Woodroffe & Ameer Ali's

Law of Evidence

FOURTEENTH EDITION
(In Four Volumes)

Edited and Revised

by

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Addl. Legal Remembrancer

AND

NARAYAN DAS

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PREFACE TO THE FOURTEENTH EDITION

We are conscious of the onerous task of revising the monumental work of Woodroffe and Ameer Ali on the Law of Evidence in India. The last edition was published in 1973-74. During the span of 5 years since then, more than 3,000 cases were decided by the various High Courts and the Supreme Court and all these had to be examined and incorporated in this edition. The fact that very few amendments were made in the Evidence Act during the course of more than hundred years, bears testimony to its perfection and simplicity based on commonsense. Whatever scope there was for judicial interpretation seems to have been exhausted. That is why we find that the majority of the new case-law relates to appreciation of evidence in the background of peculiar facts of individual cases. A good number of cases are mere repetition of some principles. already enunciated by one court or the other. We have, however noticed all of them, as we consider it our duty to make available to our readers all that has been said on the subject. At the same time, unlike digest makers, the editor of a commentary has to point out the fallacy, if any, in a judicial pronouncement. We have endeavoured to put forward our views with reasons, in such cases.

Errors of omission and commission have been corrected. Obsolescent matter, wherever necessary, has been deleted. Volumes I, II and III will have a thorough and an exhaustive Index separately. Volume IV, will, however contain a comprehensive consolidated Index of all the four volumes. This undoubtedly will facilitate easy and quick reference.

We have sincerely endeavoured to maintain the high standard of erudition, analytical approach and lucid exposition of the law set by the previous editions and as such we would feel amply rewarded if the legal sphere finds it useful.

Republic day, 1979

BRIJ RAJ PRAKASH SINGHAL NARAYAN DAS

PREFACE TO THE THIRTEENTH EDITION

The publication of the Thirteenth Edition of Woodroffe and Ameer Ali: Law of Evidence has, so to speak, coincided with the centenary of that master-piece of codification, the Indian Evidence Act, 1872 (I of 1872). The occasion also marks the completion of more than sixty years since the monumental work of Woodroffe and Ameer Ali first saw the light of day. Max Beerbohm said: "Good books and good pictures are monuments which, once made, are always there and may take fresh garlands". In that arbitrary cycle of peaks and troughs into which the reputations of all great writers are propelled immediately after their death, it is gratifying to note that the reputation of Woodroffe and Ameer Ali on the Law of Evidence has always stood at the peak. Every page of Woodroffe and Ameer Ali's work bears witness to the authors' erudition and deep study.

Lord Mansfield said long ago: "The rules of evidence are founded in the charities of religion, in the philosophy of nature, in the truths of history, and in the experience of common life." It is not surprising therefore that time has not sapped the vitality of those Rules.

The great work of Woodroffe and Ameer Ali has been ably served by a succession of learned editors who set their sights high and maintained the excellence and quality of the original. The present editor, in his turn, has tried to tread the same path.

In preparing the Thirteenth Edition, every word in the book has been read and repetitious matter, wherever it occurred, removed. The case-law has been brought up to date. No pains have been spared to correct errors of omission or commission, if any.

The exponential growth of case-law poses a threat to any one writing on a law subject. The multiplication of All India and State Journals with the rapidity of the prophet's gourd has resulted in a flood of cases amid which the writer must stay afloat as best he can. The present editor has valiantly struggled not to leave even one case untouched. A feature of the work is the inclusion of cases from State Journals. Proxility has been avoided and the attempt has been made to dehydrate a tide of cases to a drop of principle. The pages of the book are porcupine-quilled with cases. It may be observed that as in the original, so in the editions, much interesting matter is tucked away in the footnotes for the benefit of the interested and busy reader. A carefully prepared Index is provided at the end to enable the reader quickly to obtain reference on any point engaging his immediate attention. A full Table of Cases has also been appended.

28th February, 1973

E. S. SUBRAHMANYAN

PREFACE TO THE TWELFTH EDITION

Sir James Fitzjames Stephen, the distinguished author of the Indian Evidence Act I of 1872 (hereinafter called the Act), achieved the remarkable feat of condensing a great mass of the principles and rules of evidence into 167 sections. The Act will soon be a century old and during this long period it has not suffered any major legislative bombardment by way of amendment, a tribute to the excellence and thoroughness of the enactment. It is, therefore, just to regard the Act as a classic of consummate draftsmanship. When the distinguished authors, Woodroffe and Ameer Ali, blended their radiances in one beam and produced their monumental work, Law of Evidence, it was hailed by discerning readers as a classic upon a classic, just as Coke on Littleton's Tenures. The work was first published in 1898 and each new edition has endeavoured to maintain the unique qualities of the original. The edition now being issued is the Twelfth.

The general object of Sir James Fitzjames Stephen, the author of the Act, was to produce something from which a student might derive a clear, comprehensive and distinctive knowledge of the subject. Although the Act is, in the main, drawn on the lines of the English Law of Evidence, it is not intended to be a servile copy of it and does in certain respects differ from English Law. The undoubted original character of sections 5—16 dealing with the relevancy of facts goes against judicial dicta to the contrary.

The Act is a complete Code of the Law of Evidence in India. It is regarded as containing the scheme of the law, the principles and the application of these principles to the cases of frequent occurrence in India. It is acknowledged generally with some exceptions that the Act consolidates the English Law of Evidence. In the case of doubt or ambiguity over the interpretations of any of the sections of the Act, it is profitable to look to the relevant English Common Law for ascertaining the true meaning.

Each editor of Woodroffe and Ameer Ali's work has approached his task with the reverence due to a classic. The original plan of the authors is still retained in the Twelfth Edition. Great care has been taken to make it up to date both as to statutory and case-law, Indian and English. Errors of omission or commission have been corrected. Wherever necessary, obsolescent matter has been removed. New passages have been added and old ones re-written to make the work abreast of the law. A thorough and exhaustive index will enable the reader to obtain the reference he needs, quickly.

It is, therefore, hoped that the Twelfth Edition will deserve the approbation of the Beuch, the Bar and all readers of the work and maintain its reputation for profound scholarship, penetrating analysis and clear exposition of the law, making it unrivalled in its utility to the practising lawyer as well as the student of the Law of Evidence.

New Year's Day, 1968

J. P. SINGHAL

PREFACE TO THE NINTH EDITION

In the preparation of this Commentary on the Indian Evidence Act the Authors, as they stated in the First Edition of the work in 1899, have striven to meet the wants both of the profession and of students, believing that a work framed merely for the use of one of these classes will prove unsuited to the needs of the other. Much that must be set out for those who have little or no knowledge of the subject, is superfluous to the professional reader; while the close and elaborate detail which the practising lawyer requires, is not only useless, but often a source of confusion, to the beginner. The novel scheme of this work, which is designed to satisfy the wants of both classes of readers, demands a few words of explanation.

A Bibliography of works on the Law of Evidence (the only one, we believe, of its kind) revised to date, is followed by an Introduction on the Act. We have acquired the copyright of the Introduction to the Evidence Act of the late Sir James Fitzjames Stephen and have incorporated it in our own. The critical portion of the latter has been expanded chiefly in two particulars. A full statement has been given of Mr. Whitworth's criticism of Sir J. Stephen's theory of relevancy as embodied in the Act. Some apology may appear needed for the extensive citations we have made. If so, excuse will be found both in the instructive character of the criticism in Mr. Whitworth's pamphlet as also in the fact that it has been out-of-print for many years past. We have also thought it better to give, for the most part, the criticism in the Author's own words rather than, as before, a summary of such criticism of our own.

The Act is divided into three Parts and eleven Chapters. Each Part and Chapter is preceded by an Introduction dealing with its subject-matter. The Introduction prefixed to the Parts or main divisions of the Act are more general in character and broader in treatment than those which precede the chapters, while these again exhibit less detail than is found in the notes appended to the sections. Elementary notions are explained and a general, and sometimes historical, survey of the subject of the sections is given in the several Introductions which also contain references to matters akin to, but not part of, the actual material of the Act. While these Introductions will, as the Authors hope, be of aid to students, the separation of the subject-matter from the commentary to which alone the profession will, in general, refer, should spare the practitioner in search of decisions bearing directly upon the meaning of the sections unnecessary reading. A short paragraph immediately follows each section presenting with all possible brevity the principle upon which it

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is founded and has been enacted. This paragraph is succeeded by a note of cognate sections, which in turn is followed by a collection of references to standard English, American or Indian text-books dealing with the material of the section. The Authors are indebted in part for the idea of this arrangement to Mr. S. L. Phipson's work on the Law of Evidence. Next comes the Commentary proper on the section which elucidates its important words and phrases by the aid of the case-law and text-books.

The work as thus finished departs in many respects from the original and advertised plan of its Authors. At the outset they proposed to write a short Commentary for the use of the profession only and to collect therein the provisions of all other Acts on the Indian Statute-book which touch upon this branch of the law. They, however, realised in the course of their task that though a book so planned might be of assistance to members of the profession practising in the Presidency towns with large libraries available for reference, it would yet be of little use to others in the mofussil. The attempt to serve a wider circle of readers has entailed a large increase in the bulk of the work beyond the limits originally proposed, while the length of time consumed in its preparation in its modified form has prevented the inclusion of that complete collection of provisions of other Acts bearing upon this branch of the law to which allusion has been made. The more important of these provisions (taken from more than a hundred Acts and Regulations) will, however, be found in the Commentary. We have retained and revised the former Appendices relating to the places to which the Act has been applied, the Law Commissioners' Report and Proceedings in Council. But we have omitted the former Appendices on Stamps, Registrations, Oath's and Banker's Books, as separate treatises exist on, at any rate, the first three subjects and it is necessary to make room for added matter in the Ninth Edition of a book already bulky. The Proceedings in Council prior to the passing of the Bill, have, we think, been generally conside:ed useful as they and the Introduction of Sir James F. Stephen, here reprinted, form a complete explanation of the Act by its chief framer and others who approved of, and were responsible for it.

The Authors desire to acknowledge the assistance they have derived from the standard works on the Law of Evidence: published in India, in England, and in America. In special, much aid has been gained from the American text-books, amongst which are perhaps the most valuable and scientific works on this branch of the law. Amongst the text-books laid under contribution we wish particularly to indicate the work of Professor J. H. Wigmore (Treatise on Evidence: An Encyclopaedia of Statutes and cases up to March, 1904, 4 Vols., Canadian Edition, containing English cases, a valuable and exhaustive book written in an original and modern spirit and thus free of what Bentham calls

PREFACE TO THE ELEVENTH EDITION

We have been entrusted with the responsible task of editing the Eleventh Edition of this Indian Classic. In discharging our responsibilities, we have borne in mind three objectives: to preserve intact the scheme and contents which have made this Law of Evidence justly popular; to amplify and supplement those topics which have assumed importance in recent years and come up for consideration in the day-to-day work of our Courts; and to bring the case law up to date.

The illuminating XIV Report of the Law Commission of India has posed problems arising in the Law of Evidence and suggested changes. There can be no doubt that lawyers and Courts and even laymen must acquaint themselves with these highly informative discussions and coming changes. We have therefore incorporated the relevant material wherever appropriate.

Subsequent to the establishment of the Supreme Court, both the Supreme Court and the High Courts in India have expounded various aspects of the Law of Evidence which has assumed importance. Full advantage has been taken of these authoritative expositions by incorporation of these relevant materials in appropriate places. To mention one instance, the monumental judgment of the Allahabad High Court in Asharfi v. State (A. I. R. 1961 All. 153) has dealt comprehensively within a convenient compass every problem relating to the law of identification, which has come to assume such a prominent place in the criminal administration of justice. The reproduction of those materials in the very words of the judges has the added advantage of being readily citable, since our Courts insist upon an authority for every proposition advanced.

20th October, 1962

P. N. RAMASWAMI

S. RAJAGOPALAN

PREFACE TO THE TENTH EDITION

The classical work on the Law of Evidence by Woodroffe and Ameer Ali needs no introduction. Even since it was first published it has enjoyed the reputation of being the one authoritative text-book on the Law of Evidence in India. It passed through several editions, the ninth of which was published in 1930. Further editions were not brought out for over quarter of a century. There was thus a void which could not be filled in by other books on the subject. Messrs, Law Book Company naturally deserve all praise for their indefatigable enterprise in this their effort to bring out the Tenth Edition.

The Publishers have entrusted the task to us and we have taken it up in the full consciousness of the difficulties that beset us. On the one hand, in view of the fact that the Treatise had attained to the position of locus classicus, having been quoted by the highest judicial tribunals of India and England, it would with much reason, be considered vandalistic to disturb its basic plan and offer, in its name, something different; on the other hand, it was necessary to bring the book up to date in the light of the latest decisions.

We have kept both these aspects in mind and have, therefore, left the views and the expositions of the learned authors intact when they are unaffected by subsequent decisions or legislation, and have merely added the subsequent decisions as additional authorities. But portions that have been affected by later decisions or by legislation have been re-written.

Since the basic principles of the Indian Evidence Act have their root in the English Law, any book on the subject that lays claim to comprehensiveness has necessarily to refer to and discuss English decisions and we have profusely given references to up-to-date English case-law and to standard English Treatises.

The legal profession will find here noticed (and discussed, when needed) all the Indian decisions bearing on the different points of law, and in this respect we have left nothing to be desired. In order to facilitate reference by the busy lawyer, the style of the modern Law Publications has been adopted, and under every section, the topics that arise for treatment have been classified under headings and sub-headings and the same given in a Synopsis at the head of the commentary. In every citation we have taken care to give cross-references to all extant Law Reports, thereby making the book readily useful to all members of the learned profession whatever Law Reports they possess.

In bringing out this Edition we are indebted to the numerous authors that have preceded us, who have been referred to and acknowledged in the appropriate places. We think it proper to specifically refer to "The Hearsay Rule" by R. W. Baker and "Essays on the Law of Evidence" by Zelman Cowen and P. B. Carter, the two recent works from which we have derived great help.

15th March, 1957

B. MALIK

S. S. SASTRY

PREFACE TO THE NINTH EDITION

"grimgribber nonsensical reasons" for the rules of evidence. The Law of Evi dence, as it obtains in the courts of the United States, is founded upon the English law and is in nearly every respect identical with the law which prevails in England and in India; and though it is not of binding authority upon Indian Judges, yet the decisions of those Courts are, as Lord Chief Justice Cockburn said in England (Scaramanga v. Stamp, L.R. 5 C.P.D., 295, 303), and Sir Lawrence Peel observed in India (Braddon v. Abbot, Tailor and Bell's Reports, 342, 359, 360; Malcolm v. Smith, ib., 283, 288), of great value to a correct determination of questions for which our own or the English law offers no solution. Any unnecessary and therefore excessive citation of this foreign law is to be deprecated (see Missouri Steamship Co., 42 Ch. D., 321, 330, 331). The Indian case-law has been examined and incorporated in the text up to June. 1929. Some cases after that date have been noted in the Addenda. The Appendices have been revised to date and the Bibliography, which, so far as I know, is the only one of its kind, has been both revised and considerably enlarged. A recent helpful work for the practising lawyer is A.S. Osborn's "Problem of Proof." It is instructive in this connection to note how few are the cases of evidence in the English Law Reports of recent years as compared with the past. This circumstance is due to free growing sense of the inutility of many objections to evidence and to a desire to free all judicial enquiry of anything which, without sound and certain justification, may baulk or hinder it. The dictum of the Judicial Committee in Ameeroonissa Khatoon v. Abedoonissa Khatoon, 23 W.R. 208, 209, now represents also the views of other English Courts. It may, however, be necessary to add that a proper interpretation and liberal application of the law is not the same thing as the abrogation of it. In order, however, to find grist for the mills of the numerous Indian Journals a considerable number of cases are the subject of report which have not the importance which calls for it. This observation, however, applies to all branches of the law.

I wish to thank Mr. Tapanmohan Chatterji, Barrister-at-Law to help rendered in the preparation of this Ninth Edition, and for the correction of the proofs.

30th September, 1930

J. W.

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THE

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Volume I

GENERAL INTRODUCTION

CHAPTER I

PRELIMINARY

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- 4. Sufficiency of evidence distinguished from its competency.
- Weight of evidence :

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- 9. Authority of English and American decisions.
- Act, a Code,
- 11. Construction.
- 1. Evidence, a branch of adjective law. The substantive law defines the rights, duties and liabilities, the ascertainment of which is the purpose of every judicial proceeding. The Criminal branch of that law is contained in the Indian Penal Code, as also in various special and local laws dealing with the subject. The substantive Civil law of India has not yet been fully codified.1 Generally speaking, it is to be found in various Acts of the Indian Legislature, in the decisions of the Courts applying principles of English law, and in the personal law of the Hindus and Mussalmans. In cases for which no special provision exists, the Courts are enjoined to act according to rules of equity, justice and good conscience. Adjective law defines the pleading and procedure by which the substantive law is applied in practice. It is the machinery by which that law is set and kept in motion. The rules relating

^{1.} It has in recent years been almost fully codified,

L. E. 1

to pleading and procedure are contained in the Civil and Criminal Procedure Codes. The remaining branch of adjective law, logically defined, is the sufficient reason for assenting to a proposition as true.2 Practically considered, it is the establishment of facts in issue (ascertained in each particular case by the pleadings and settlement of issues) by proper legal means to the satisfaction of the Court.⁸ This is done by the production of evidence, the law relating to which is to all legal practice what logic is to all reasoning, whatever subject it may be concerned about. Accurately speaking, the terms "proof" and "evidence" are distinguished in this: that proof is the effect or result of evidence, while evidence is the medium of proof. The facts out of which the rights and liabilities arise must be determined correctly. Facts which come in question in Courts of Justice are enquired into and determined in precisely the same way as doubtful or disputed facts are enquired into and determined by men in general, except so far as positive law has interposed with rules to secure impartiality and accuracy of decision or to exclude collateral mischief likely to result from the investigation.5 Some portions of the Law of Evidence, such as those which deal with the relevancy of facts, are intimately connected with the whole theory of human knowledge and with logic, as applied to human conduct.6 Other rules are of a technical character designed to secure the objects mentioned, or are based on principles of general policy.

2. Meaning of the term "Evidence". The ambiguity of the word "evidence" has given rise to varying definitions. Bentham used it in its broadest sense, when he defined it as "any matter of fact, the effect, tendency, or design of which is to produce in the mind a persuasion, affirmative or disaffirmative, of the existence of some other matter of fact." It is, however, clear that the term as used in municipal law must have very much more limited meaning. It is manifest that every fact, some having, it may be, but the very slightest bearing on the issue, cannot be adduced. Courts are so organized that there must be some limit to the facts which may be given in evidence, as there must be an end of litigation.8 The great bulk, therefore, of the English Law of Evidence consists of negative rules declaring what as the expression runs, "is not evidence." In its legal and most general acceptation, "evidence" has been defined to include all the means, exclusive of mere argument, by which any alleged matter of fact, the truth of which is submitted to investigation, tends, to be or would be established or disproved to the satisfaction of the Court.10 According to Wigmore, the term "evidence" represents "any know-

Wharton, Ev., s. 1, Cr. Ev., s. 2.
 Best, Ev., s. 10.
 Best, Ev. s. 10.
 Ib., s. 2; Whether all these rules are effective for the purpose for which they were enacted or are necessary is, of course, another question.

Steph Introd., 1, 2. The same learned author (Dig. xi) stated that Chief Baron Gilbert's work on the Law of Evidence (1756), the first of the recognised English text-books on the subject, is founded on Locke's Essay, much as his own founded on Mill's Logic.

7. Benth., Jud. Ev., 17.

8. Bur. Jones, Ev., s. 1.

^{9.} Steph. Introd.; these rules are closely connected with the institution of trial by Jury; see Thayer's Cases on Evidence, 4; and Thayer's Preliminary Treatise on Evidence at the Common Law: Part I, Development of Trial by Jury, and per Lord Mansfield in the Berkley

Peerage case, 4 Camp., 1414.

10. Greenleaf, Ev., s. 1, Best, Ev., s. 11, p. 19; Steph. Introd., 7; as to the definition of the word as used in the Act, see Notes to s. 3, post. See also Steph. Dig., Art. 1; Taylor, Ev., s. 1 and the definition given by Prof. Thayer in his Cases on Evidence, p. 2.

able fact or group of facts, not a legal or logical principle, considered with a view to its being offered before a legal tribunal for the purpose of producing a persuation, positive or negative, on the part of the tribunal, as to the truth of a proposition, not of law, or of logic, on which the determination of the tribunal is to be asked."11 According to the concise definition of the California Code "Judicial evidence is the means sanctioned by law, of ascertaining in a judicial proceeding the truth respecting a question of fact."12

Judicial evidence is thus a species of the genus "evidence", and is for the most part nothing more than natural evidence, restrained or modified by rules of positive law.18 "A law of evidence, properly constructed would be nothing less than an application of the practical experience acquired in Courts of law to the problem of enquiring into the truth as to controverted questions of fact."14

3. What the Law of Evidence determines. The law of evidence, which is contained mainly18 in Act I of 1872, determines how the parties are to convince the Court of the existence of that state of facts which, according to the provisions of the substantive law, would establish the existence of the right or liability which they allege to exist.16 This law, in so far as it is concerned with what is receivable or not, is founded, in the words of Rolfe, B.17 "on a compound consideration of what, abstractedly considered, is calculated to throw light on the subject in dispute, and of what is practicable. Perhaps, if we lived to the age of a thousand years, instead of sixty or seventy, it might throw light on any subject that came into dispute, if all matters, which could by possibility affect it, were severally gone into: and enquiries carried on, from month to month, as to the truth of everything connected with it. I do not say how that would be; but such a course is found to be impossible at present."18 Rules respecting judicial evidence may be generally divided into those relating to the quid probandum, or thing to be proved, and those relating to the modus probandi, or mode of proving.19 It has been said that there is but one general rule of evidence, the best that the nature of the case will admit.20 This rule does not require the production of the greatest possible

11. Wigmore, 3rd Ed., Vol. I, p. 3.

12. California Code, s. 1823. See observations on the definitions given in the California Code (which are said to express and typify the judicial sentiment of the American Judiciary) in Rice's General Principles of the Law of Evidence, p. 9.

13. Best, Ev., ss. 34, 79.

Speech in Council of the Hon. Mr. Stephen, Gazette of India, 18th April, 1871, p. 42 (Extra-Supple-

Other Acts also contain provisions relating to evidence: as to this see s. 2 post.

Steph. Introd., 10.

In the Attorney-General v. I Cock, (1847) 1 Exch. 91, 105.

See also R. v. Prabhudas, (1874) 11 B. H. C. R. 91, per West, J.: "One of the objects of a law of evidence, is to restrict the investigations made by Courts within the bounds pre cribed by general convenience." As to the utility of the rules, see Best, Ev., s. 35, et. seq.: Field, Ev., 13 et seq.; sanctions, Best, Ev., 16, et seq.; securities for insuring veracity and completeness of evidence ib, s. 54, et seq. 100

seq., 100.

19. Best, Ev., s. 111; Mr. Stephen said (18th April, 1871) in his abovementioned speech: "The main feature of the Bill consists in distinction drawn by it, between the relevancy of facts and the mode of

proving relevant facts."

20. Per Lord Hardwicke, in Omychund v. Barker, 1 Atk., 21, 49. Sec Ramalakshmi v. Shivanantha, (1872) 14 M. I. A., 570, 588; 1A Sup. 1: 12 B. L. R. (P.C.) 396; 17 W. R. (P.C.) 552; 2 Suth. 603; Bodhnarain v. Omrao, (1870) 13 M. I. A. quantity of evidence, but is framed to prevent the introduction of any evidence which raises the supposition that there is better evidence behind, in the possession, or under the control, of the party by which he might prove the same fact. The two chief applications of this principle are as follows:

- (a) With regard to the quid probandum, the law requires as a condition to the admissibility of evidence (either direct or circumstantial) an open and visible connection between the principal and evidentiary facts.²¹ If the belief in the principal fact which is to be ascertained is to be, after all, an inference from other facts, those facts must, at all events, be closely connected with the principal fact in some of certain specific modes.22 This connection must be reasonable and proximate, not conjectural and remote. This, which is the theory of relevancy, is dealt with in the first Part of the Evidence Act.23 The first question, therefore, which the law of evidence should decide is: what facts are relevant and may be proved?
- (b) With regard to the modus probandi, the law rejects derivative evidence, such as the so-called "hearsay evidence"24 and exacts original evidence, prescribing that no evidence shall be received which shows, on its face, that it only derives its force from some other which is withheld,25 In other words, the best evidence must be given. If a fact is proved by oral evidence, it must be direct, that is to say, things seen must be deposed to by someone who says he saw them with his own eyes: things heard by someone who says he heard them with his own ears,1 and original documents must be produced or accounted for before any other evidence can be given of their contents.2 In addition to the abovementioned rules, English text-writers treat, as a portion of the law of evidence, the rules that the evidence must correspond with the allegations, but it will be sufficient if the substance of the issues be proved. rights of parties litigating must be determined secundum allegata et probata, (according to what is averred and proved). This rule has not been incorporated in the Act, as it is one, strictly speaking, rather of the law of procedure proper than of evidence.3

The law of evidence thus determines:

- (a) The relevancy of facts,4 or what sort of facts may be proved in order to establish the existence of the right, duty, or liability defined by substantive law.
- (b) The proof of facts,5 that is, what sort of proof is to be given of those facts.

519, 527: 6 B. L. R. 509 (P.C.): 6 W. R. (P.C.) 1: 2 Sar. 607: 2 Suther 371; Gunga Prasad v. Inder-jit, (1875) 23 W. R. 390 (P.C.); Moheema v. Poorno, (1869) 11 W. R. 165, 167; Dinomoyi Devi Luchmiput, (1879) 7 I. A. 8: 4 Sar. 112: 6 C. L. R. 101 (P.C.). As to the meaning of the rule, see North, Ev., 69: Best, Ev., pp. 70-73, 87, 88, 91-93, 96, 215, 216, 89. 431, 434, 416, 489, 251, 252; Steph. Introd., 3, 7.

21. Best, Ev., ss. 90, 38.

22. Gazette of India, 18th April, 1871,

23. v. post, Introduction to Chap. II.

24. See Steph. Introd., 4, 6; Best Ev.,

ss. 495, 112.

- Best, Ev., s. 9: Doe d. Welsh v. Langfield, (1847) 16 M. & W. 497; Doe d. Gilbert v. Ross, (1840) 7 M. & W. 102, 106; Macdonnel v. Evans, 11 C. B. 930, 942.

 1. v. ss. 59, 60, post.

 2. ss. 59, 61, 64, post.

 3. See tases cited in Field Ev., 357—

- 4. Evidence Act, Part I: v. post, s. 3, and Introduction to Chap, II.
- Evidence Act, Part II: v. post and Introduction to Part II.

- (c) The production of proof of relevant facts,6 that is, who is to give it and how it is to be given; and the effect of improper admission or rejection of evidence.7
- 4. Sufficiency of evidence distinguished from its competency. The sufficiency of evidence must be distinguished from its competency. By competent evidence is meant that which the very nature of thing to be proved requires as the fit and appropriate proof in the particular case, such as the production of a writing where its contents are the subject of enquiry. satisfactory, or, as it is also called sufficient, evidence is intended that amount of proof which ordinarily satisfies an unprejudiced mind beyond reasonable doubt. The circumstances which will amount to this degree of proof can never be previously defined; the only legal test of which they are susceptible is their sufficiency to satisfy the mind of an ordinary man, and so to convince him that he would venture to act upon that conviction in matters of the highest concern and importance to his own interests.8 The effect of evidence considered from the point of view of the weight which should be attached to it, cannot be regulated by precise rules, as the admissibility of evidence may be.9

For these reasons considerations upon the sufficiency of evidence have no place in the Act.

5. Weight of evidence. (a) General. The weight of evidence cannot be regulated by precise rules, as the admissibility of evidence may be,10 it depends on rules of commonsence,11 and the weight of the aggregate of many such pieces of evidence, taken together, is very much greater than the sum of the weight of each such piece of evidence, taken separately.12 The Draft Bill contained the following section, which though it was not thought necessary to retain it in the Act, must still be borne in mind: "when any fact is hereinafter declared to be relevant it is not intended to indicate in any way the weight, if any which the Court shall attach to it, this being a matter solely for the discretion of the Court." So also, the Law Commissioners in the second paragraph of their Draft Bill, said: "Whenever any evidence is said to be admissible, it is not meant that it is to be regarded as conclusive, but only that

(1874) 4 App. Cas. 770, 792.

^{6.} Evidence Act, Part III; see Introduction to this Part, post.

Steph. Introd. 1I (see post).

Greenleaf, Ev., s. 2

See Farquharson v. Dwarkanath,
(1871) 8 B. L. R. 504, 508; 16 W.

R. (P.C.) 29; 14 M. I. A. 259: Lord Advocate v. Blantyre, (1874) L. R. 4 App. Cas. 770, 792; R. v. Madhub Giri, (1874) 21 W. R. Cr. 13, 19: Townsend v. S. angroom, 6 Ves. 333, 334; O'Rorke v. Bolingbroke, I., R. 2 H. L. 857; Best, Ev. s. 81.

Farquharson v. Dwarkanath, (1871)
 B. L. R. 564, 508, Best, Ev., s. 81.

^{11.} Lord Advocate v. Blantyre, (1874) L. R., 4 App. Cas. 770, 792, per Lord Blac burn: "For weighing evidence and drawing inferences from it there can be no canon.

Each case presents its own peculi-arities, and commonsense and shre-wdness must be brought to bear upon the facts elicited in every case which a Judge of fact in this country, discharging the functions of a Jury in England, has to weigh and decide upon." R. v. Madhub Giri, (1874) 21 W. R. Cr. 13, 19.
"This convenience", says Lord Eldon in Townsend v. Strangroom (6 Ves., 353, 534) "belongs to the administration of justice, that the minds of different men will differ upon the result of the evidence which may lead to different decisions upon the same case." See also re-marks of Lord Blackburn in O'Rorke v. Bolingbroke, (1877) L. R. 2 App. Cas. 814.
12. Lord Advocate v. Blantyre, L. R.

the weight, if any, which the deciding authority may consider due, shall be allowed to it." In this connection a few dicta of general application may be here cited. When one witness deposes to a certain fact having occurred and another witness, stating that he was present at the same time, denies that any such fact took place, greater weight, other things being equal, is to be attached to the witness alleging the affirmative.13'

(b) Affirmative and negative evidence. "Upon general principles affirmative is better than negative evidence. A person deposing to a fact which he states he saw, must either speak truly, or must have invented his story, or it must be sheer delusion. Not so with respect to negative evidence: a fact may have taken place in the very sight of a person who may not have observed it: and if he did observe may have forgotten it."14

As a general rule, witnesses should be weighed, not numbered. 15 More weight should be attached to the evidence given of men's acts than of their alleged words which are so easily mistaken or misrepresented.16 A judge, however, cannot properly weigh evidence, who starts with an assumption of the general bad character of the prisoners.17

- 6. Judicial discretion. The Act, in many of its sections, leaves matter dealt with thereby to the discretion of the Court.18 "Discretion, when applied to a Court of law, means discretion guided by law. It must be governed by rule and not by humour. It must not be arbitrary, vague and fanciful but legal and regular."19 In using a judicial discretion, the Courts have to bear in mind not only the Statutes, but also the great rules and maxims of the law, such, for example, as those of logic or evidence or public policy. The right discretion is not scire quid sit justum but scire per legem; as Cook insisted.20
- 7. The English system. The English system of judicial evidence is comparatively of very modern date.21 Its progress is marked by the discarding of those restrictions of scholastic jurisprudence which firstly compelled much that was material to be excluded from the issue and then, when the issue was thus arbitrarily narrowed, shut out much evidence that was relevant, and attached to the evidence received certain arbitrary valuations which the Courts were required to apply.22 The progress has, as in all cases of legal reform,

 Doby Prasad v. Dowlut Singh, (1844) 3 M. I. A. 347, 357; Wills, Circ. Ev., 290,

The passage between inverted commas is per Sir H. Jenner in Chambers v. The Queen's Proctor, (1840) 2 Curt, 415, 434; see also Williams v. Hail, (1837) 1 Curt,

15. See notes to Sec. 134, post.

Meer Usud-oollah v. Beeby Imaman, 5 W. R. (P.C.) 26: 1 M. I. A. 19: 1 Suther 46: 1 Sar. 89. R. v. Kalu Mal, (1867) 7 W. R.

Cr. 103; see further notes to s. 165, post.

See ss. 32, 33, 39, 58, 60, 66, 73, 86—88, 90, 114, 118, 135, 136, 142, 148, 150, 151, 154, 156, 159, 162, 164—166.

Per Lord Mansfield in Wilke's case, 4 Burrough's Rep. 2539, cited in Harbuns v. Bhairo, (1874)

20. R. v. Chagan Daya Ram, (1890) 14 B. 331, 334, 352, per Jardine, J.: Best, Ev., s. 86.

21. Best, Ev., ss. 109, 110, See Philli-more's History and Principles of the Law of Evidence (1850), pp. 122, et seq.

22. Wharton, Ev., s. 5.

been a slow one.23 But it has been said in England, where the traditional theories still possess some strength, that artificial rules upon matters of evidence are better avoided as much as possible24 and that the law now is that, with a few exceptions on the ground of public policy, all which can throw light on the disputed transaction is admissible.25 The Evidence Act may be regarded as being itself an application of these principles. "Under the Evidence Act admissibility is the rule and exclusion the exception, and circumstances, which under other systems might operate to exclude, are, under the Act, to be taken into consideration only in judging of the value to be allowed to evidence when admitted.1 Accordingly, where a Judge is in doubt as to the admissibility of a particular piece of evidence, he should declare in favour of admissibility rather than of non-admissibility.2 The principle of exclusion enacted by the fifth section of this Act should not be so applied as to shut out matters which may be essential for the ascertainment of truth.3 The Privy Council in Ameeroonissa Khatoon v. Abedoonissa Khatoon,4 said: "Objections made with the view of excluding evidence are not received with much favour at this Board." But it must not be assumed either that all technical rules are unnecessary or that all the rules of evidence are technical. It may be safely asserted that the enforcement of most of such technical rules as are contained in this Act is necessary, and that many other rules possess no element of technicality whatever. Thus, as the Judicial Committee has also observed: "It is a cardinal rule of evidence, not one of technicality but of substance, that where written documents exist, they shall be produced as being the best evidence of their own contents."5 And other instances might be adduced than those covered by what is technically known as "the best evidence" rule. The Act would have been better had it not attempted to define what is Evidence and had limited itself to a declaration of what is not admissible. In that case all that was probative would go in without discussion, unless the objector could show that it was forbidden by the provisions of the Act.

8. History of the Law of Evidence in this country. The history of the law of evidence in this country in ancient Hindu India and Muslim India may now be briefly set out as History is philosophy, teaching by example.

plaintiff's claim."

Per Wills, J., in Hennessy v.

Wright, (1888) L. R. 21 Q. B. D.

25. Per Lord Coleridge, C. J., in Blake v. Albion Life Insurance Co., (1878) L. R. 4 C. P. D. 109 adding: "Not of course matters of mere prejudice nor anything open to real moral or sensible objection but all things which fairly throw light on the case,"

1. R. v. Mona, (1892) 16 B. 661, 667, per Jardine, J., citing Romesh Chunder Mitter and Field, JJ., and see cases cited post. 2. The Collector of Gorakhpur v. Palakhari Singh, (1889) 12 A. 1,

26 (F,B.).

3. R. v. Abdullah, (1885) 7 A. 385, 401; (1885) 5 A. W. N. 78. Sec observations of the Hon. Mr. Maine in moving the reference of the Evidence Bill to Committee; "Anything like a capricious administration of the law of evidence was an evil, but it would be an equal, or perhaps even a greater evil, that such strict rules of evi-dence should be enforced as practically to leave the Court without the materials for decision. 4. (1875) 23 W. R. 208, 209 (P.C.).

5. Dinomoyi Devi v. Luchmiput, (1879) 7 I. A. 8, 15: 6 C. L. R. 101 (P.C.); 4 Sar. 112.

^{23.} See remarks of Lord Coleridge, C. J., in Blake v. Albion Life Insurance Co., (1878) L. R. 4 C. P. D. 109: 'In any but an English Court and to the mind of any but an English lawyer the controversy whether this evidence is or is not evidence which a Court of Justice should receive would seem, I think, supremely ridiculous because everyone would say that the evidence was most cogent and material to the

(a) In Hindu India. The source of information for the law of evidence prevailing in Hindu India is the Dharma Shastras, and in this account we shall confine ourselves to the Law of Evidence as it became fully developed in later years. Those desirous of studying fully the subject may usefully consult Radhakumud Mukherjee's "Endowment Lectures on Hindu Judicial System" delivered by Sir S. Varadachariar and published by the Lucknow University, the Tagore Law Lectures, 1950, on Evolution of Ancient Hindu Law, delivered by Dr. N. C. Sen Gupta, and the monumental work of Dr. P. V. Kane's History of Dharma Shastras, Vol. III.

It has always been recognised by the Dharma Shastras that the purpose of a trial is the desire to ascertain the truth. They emphasise that a judge by his skill should extricate from a case the deceit, as a physician takes out from the body the iron dart by means of surgical instruments. A text of Yagnavalkya declares, "discarding what is fraudulent the king should give decision in accordance with true facts." The early law-givers recognised from the beginning that a proceeding in a court of law often involved suppression of facts and suggestion of falsehoods. Therefore, Hindu Evidence Law procedure took every possible precaution, consistently with the conditions or knowledge of the time, to secure the discovery of truth.

The Sastrakartas often enjoined that even after coming into court the parties may be prevailed on to admit the truth; the court was accordingly asked to make such an attempt, because, according to Mitakshara, a decision on evidence may sometimes be wrong. It was only when no agreement was possible that a trial had to proceed. Manu says, the king presiding over the tribunal shall ascertain the truth and determine the correctness of the allegations regarding the subject of the suit, the correctness of the testimonies of the witnesses, the description, time and place of the transaction or incident giving rise to the case as well as the usages of the country and pronounce a true judgment.

Four kinds of proof were generally recognised, namely, (a) Documents (Lekhya), (b) Witnesses (Sakshi), (c) Possession (Bhukti) and (d) Ordeals (Divya).

(i) Documents (Lekhya). Documentary evidence was classified under three heads; namely, (1) documents which were executed in the king's court by the king's clerk and attested by the hand of the presiding officer (Rajasaksika); (2) purely private ones written by anyone but attested in their own hands by witnesses (Sasaksika), and (3) documents which were admissible being written entirely in the hands of the party itself (Asaksika).

In the Hindu Law of Evidence, in the beginning, documentary evidence was preferred to oral evidence as in the present day, but the Hindu law-givers were alive to the weaknesses of the documentary evidence and were fully aware that already forgerers were at work. The portions dealing with documentary evidence in Dharma Shastras in later times came to contain elaborate rules, classifying them into public and private, ancient and modern, indicating the relative strength of various kinds of documents and the methods of proving them. The attestation of a document was considered vitiated, if the attestation was by a witness who was guilty of having done evil things, or it was written by a scribe of bad character. So too were documents made by women, children, dependants, lunatics, inebriates, or persons under fear, as well as

documents which were against the usage of the country. A document was said to be admissible, if it was clear and in accordance with law and contained no erasures of letters. The provision made in the Dharma Shastras about examination and proof of questioned or suspected document is strikingly modern. There were rules for testing the genuineness of document by comparison of handwriting, in question, particularly in cases of writers who were dead. The law-givers emphasised the necessity of attestation by witnesses. Some texts according to Sir S. Varadachariar seem to refer to some kind of notarial system apparently to safeguard the genuineness of documents. Benami deeds were not unknown.

(ii) Witnesses (Sakshi). The adduction of oral evidence was an important feature of the Hindu Law of Evidence. The Dharma Sastras go into great details as to the time at which and the ways in which witnesses are to be examined and how they are to be tested. The law-givers lay down that, in disputed case, the truth shall be established by means of witnesses. But there was a sharp distinction between the adduction of oral evidence, in civil matters and criminal offences. "Ancient Hindu Law" as pointed out by the late Mr. B. Gururaja Rao in his little book-let "Ancient Hindu Judicature" insisted on high moral qualifications in a witness in civil matters and did not permit any one being picked up from streets or from the court premises and made to depose, as is very often done in the modern Indian courts. One common qualification mentioned is that the witnesses should be as many as possible, "faultless as regards performance of their duties, worthy to be trusted by the court, and free from affection for or hatred against either party". It was carried to such an extreme limit that witnesses whose credibility alone would, according to modern law, be questioned, were, barred as legally incompetent witnesses. The tendency of ancient legislation in all countries was to regulate the competency of witnesses by artificial rules of exclusion, while the trend of modern jurisprudence is to widen the scope of oral testimony, leaving the determination of the credibility to the discretion of the tribunals. The ancient law-givers wisely relaxed these restrictions in the case of witnesses of criminal offences: because they recognised crimes might happen in forests and secluded places and could only be spoken to by witnesses who happened to be there irrespective of their qualifications. The corresponding Latin maxim is, that "if a murder happens in a brothel only strumpets can be witnesses." The law-givers therefore state, witnesses should not be so tested in Sahasa, Serisamgrahana and Parusyas. In order to create an atmosphere for speaking the truth, the whole truth and nothing but the truth by the witnesses, our ancients invested great solemnity to the holding of courts and enjoined that the courts should be decorated with flowers, statues, paintings, idols of Gods. Judges were distinctive robes and sat on high cane-seats. The courts were held in the mornings and did not work on full moon and new moon days. Before giving evidence, the witnesses had to perform ablutions, make a brief sankalpa, face an auspicious direction and then witnesses were exhorted to speak the truth in most solemn appeals to their strongest religious motives. They were ordered to speak the truth on pain of incurring the sin of all degrad-

The method of examining witnesses set out in Manu is insistence on examination in court and in the presence of parties. There are indications, however, that witnesses were also examined on commission. According to

Hindu practice, it was the Judges who put questions to witnesses. They were directed to watch the behaviour of the witnesses and decide upon their reliability. Vishnu states, "a false witness may be known by his altered looks, by his countenance, changing colour and by his talk wandering from the subject." Yagnavalkya states, "he who shifts from place to place, licks his lips, whose forehead perspires, whose countenance changes colour, who with a dry tongue and stumbling speech talks much and incoherently, who does not heed the speech or sight of another, who bites his lips, who by mental, vocal and bodily acts falls into a sickly state, is considered a tainted person, whether he be a complainant or a witness." But, as Mitakshara shrewdly comments, this is laid down to show the possibility of falsity but not its certainty. The same tests obtain now. But these artificial rules of evidence are substantially governed by Yagnavalkya's general rule: "Having discarded that which has only an appearance of reality, the king should decide in conformity with the nature of things, for even an honest claim, if not properly pleaded, is liable to be defeated by the adverse party merely satisfying the legal formalities" or in other words, as Lord Justice Duparcy says, "we must not overvalue the forms of procedure at the expense of the substance of the right."

Certain rules relating to the examination of witnesses may be referred to. It was open to the opponent to bring to the notice of the court circumstances disqualifying or discrediting a witness. But this was to be done when the witness was giving evidence. Then the Judge would elicit witness's answer to the objections. It has been pointed out by Mr. Kane that witnesses were not permitted to be examined to discredit another witness. In examining witnesses, it was enjoined that the presiding officer of the court should treat them gently and persuasively. It is shrewdly remarked that if the witness is harshly treated, he might take fright and thus lose the thread of his narrative and become unable to remember material details and unfold the entire narrative in its logical sequence. Therefore severe penalty was enacted for a Judge, in the Arthasastra, who threatens, brow-beats or unjustly silences witnesses, or abuses or defames or asks questions which ought not to be asked, or makes unnecessary delay and thus tires parties or helps witnesses by giving them clues. The respectable treatment, says Mr. B. Gururaja Rao,6 which seems to have been accorded to witnesses in ancient times, must have been sufficient inducement to call forth disinterested witnesses. It is well admitted by everybody acquainted with the working of the present Indian courts that respectable witnesses try to avoid the witness-box, because courts do not pay heed to Sections 146 and 151 of the Indian Evidence Act, which embodies the Hindu principles for examination of witnesses.

(iii) Possession (Bhukthi). The law regarding possession was well recognised, and in fact disputes regarding possession must have constituted the bulk of litigation in an agricultural economy, like that in ancient Hindu India. It was recognised under two aspects, namely, evidentiary and prescriptive, possession as evidence of right and title as one mode of proof along with documents and witnesses. (Vasistha) (Likitham, saksino bhukthi pramanam trividham smritam—Ch. XVI). Dr. Sen Gupta summarises the evolution of ancient Hindu Law, regarding possession in ancient India, at an age beyond the Dharma Shastras, as that just possession constituted the sole title and that the rule of prescription was a subsequent development.

^{6.} Ancient Hindu Judicature.

(iv) Ordeals (Divya). The history of ordeals (Divya) as a mode of proof in India has been summarised by Dr. Sen Gupta as follows: "As documentary and oral evidence rose in importance, and practical rules for testing such evidence were evolved, the use of divine testimony receded to the background; from being an ordinary method of proof at option, it became more and more exceptional, in addition to becoming more humane and practicable. In other words, Divya tended to be limited to more or less exceptional cases of a serious nature, where the other normal modes of evidence would not be forthcoming, and instead of ordeals by fire or lethal poison or by drowning, forms of tests which could successfully be undergone without a miracle, like the ordeal Khosa, came to be substituted.

It is not possible to say anything definite as to the existence of a legal profession in ancient India.⁷ But though there were no professional lawyers who took up cases on behalf of clients in the manner of professional lawyers today in India, or even in classical Rome, or the vakils of Muslim India, men who had made a study of the law existed in India from the earliest times, and assisted with their opinions in the king's Sabha. We cannot say anything positive, because we have no authentic descriptions of trials except in dramas like Mrichhakatika and a mythical trial preserved in a literary work written in the time of Kulotunga II, viz. Sekkilar's Purana.

(v) Conclusion. To conclude, the Hindu Law of Evidence attained by the time of the later Dharma Shastras, a considerable degree of perfection and embodied many modern concepts. The importance of pre-appointed or documentary evidence was fully recognised, and documents had come to be classified elaborately into public and private, ancient and modern, and attestation was insisted upon. These law-givers were not unaware of the weaknesses of documentary evidence, and laid down several rules for evaluating the genuineness of documents. In this connection an interesting rule may be referred to, namely, that when a pre-appointed witness to transaction was about to die, or who was going abroad, he might inform another person of all that he knew about the transaction and authorise him to testify to the same as and when occasion arose. But the principal form of evidence remained oral, and our ancients have enacted many wise rules relating thereto., In civil matters impartial witnesses were insisted upon, and after coming to court they were respectably treated and an atmosphere was created for eliciting truthful and coherent testimony. The law-givers enjoined, like modern courts, that suspicions did not constitute truth and that there must be conclusive evidence for guilt. The burden of proof laid down by the Sastrakarthas wore a remarkable resemblance to many of our modern concepts. In the case of accused persons, conclusive proof of guilt was demanded, and the initial burden of proving the offence was cast upon the prosecuting party, though in certain cases the burden of exculpating himself lay upon the accused. Both witnesses and the accused were protected to this extent by the rules, that a witness should not be compelled to make a statement which might incriminate him, and that in the investigation of criminal cases there was no use of rod or staff to obtain proofs. The modern conception that a negative cannot be expected to be proved found a place in the Hindu Law of Evidence. Similarly, as the term "Sakshi" itself connotes, witnesses could only speak to what they had themselves seen or had heard. In their endeavour to find out the truth, which was the object of all

^{7.} See discussion in 19 M. L. J., p. 153, et seq.

trials, circumstantial evidence, though admitted, is cautioned against by the wise injunction that appearances might be deceptive. Referring to injury appearing on the body of complainant, Yagnavalkya warns that they might be sometimes self-inflicted. Similarly, Narada laying down rules based on the principle of res ipsa loquitur, where no evidence is necessary, concludes by saying that someone might make a mark upon his person through hatred or to injure an enemy. In such cases, it is necessary to resort to inductive reasoning to ascertain the fact of the matter and stratagems. In short, the law-givers enjoin that evidence must principally be weighed and not counted.

This brief account is, however, not meant to imply that there were no weak points in Hindu evidentiary procedure, judged by modern standards. After solemn exhortations to witnesses to speak the truth, it is somewhat disconcerting to find that perjury from a pious motive is extenuated in certain cases. Wherever a death sentence of one of the four classes would result by a declaration of the truth, a falsehood may be spoken, for such falsehood is stated to be preferable to truth. Such witnesses might expiate the guilt by certain penances. This seems to be based upon the extraordinary sanctity attached to human life by the Hindus from the earliest times with the result that even now it is difficult to make respectable witnesses stick to truthful inculpatory evidence in cases involving capital punishment.

The key to the many riddles, which puzzle a reader of ancient Hindu Law constituting imperfections and unreasonableness from our modern standards, is that the social order of the Hindus was founded not upon the comparatively modern democratic principle of equality, but upon the conception of a social hierarchy based upon caste and sanctioned by religion. Though the Hindus attached the greatest importance to the virtues of justice and impartiality, their conceptions were deeply permeated by the notion of inequality among the castes and sexes. The only way in which the social fabric might be maintained was by making every individual know his place in the social order and keep it. The prestige and ascendancy of the higher classes could only be maintained by a differential treatment to the fourth class. Thus, we find distinctions were made both in civil and criminal law between castes and sexes, and the general principle adopted was that rights, duties and liabilities varied with caste or sex, and naturally evidentiary procedure reflected these discriminations.

(b) Rules of Evidence in Muslim India. (i) General. Rules of evidence in Muslim India may next be dealt with. Often there is no true conception especially in the South of the highly developed Muslim rules of evidence, and prejudice prevails. To promote understanding and cultivate a balanced outlook, these rules of evidence may now be briefly referred to. These can be gathered from the classics on the subject, viz., Sir Abdur Rahim's Muslim Jurisprudence, Wahed Husain's Administration of Justice during the Muslim Rule in India (University of Calcutta Publication) and M. B. Ahmad, I.C.S. on Administration of Justice in Medieval India (Aligarh Historical Research Institute Publication). The Al-quram lays great stress on justice. It holds that the creation is founded on justice and that one of the excellent attributes of God is "just". Consequently, the conception of justice in Islam is that the administration of justice is a divine dispensation. Therefore, the rules of evidence are advanced and modern.

The Muhammadan law-givers deal with evidence under the heads of oral and documentary, the former being sub-divided into direct and hearsay. There

was a further classification of evidence in the following order of merit, viz., full corroboration, testimony of a single individual and admission including confession.

Though documents duly executed and books kept in the course of business were accepted as evidence, oral evidence appears to have been preferred to documentary. When documents were produced, courts insisted upon examining the party which produced them.

In regard to oral evidence, the Quran enjoins truthfulness. It says:

- "O true believers, observe justice when you appear as witnesses before God, and let not hatred towards any induce you to do wrong: but act justly: this will approach nearer unto piety, and fear God, for God is fully acquainted with what you do." (Quran 5: 8).
- "O you who believe, be maintainers of justice when you bear witness for God's sake, although it be against yourselves, or your parents, or your near relations; whether the party be rich or poor, for God is most competent to deal with them both, therefore do not follow your low desire in bearing testimony, so that you may swerve from justice, and if you swerve or turn aside, then surely God is aware of what you do." (Quran 4: 135).

Great attention was paid to the demeanour of the parties, and a case is mentioned where a Hindu scribe sued a Moghal soldier for enticing away his wife. The wife denied that the complainant was her husband, but Emperor Shah Jehan, who was hearing the case, observing the demeanour of the wife in the witness-box was not satisfied with her statement. Therefore, he suddenly ordered her to fill the court inkpot with ink. The woman did the work most dexterously, and the Emperor concluded that she was the wife of the Hindu scribe and granted him a decree.

Witnesses were examined and cross-examined separately out of the hearing of the other witnesses. Leading questions were not allowed on the ground that this would lead to the suspicion that the court was trying to help one party to the prejudice of the other; but if a witness was frightened or got confused, the judge could put such questions so as to remove the confusion, though they may be leading questions. It was enjoined that these questions should be put in such a manner as not to make the judge liable to the charge of partiality and that he was putting questions in order to get answers to facts which should be proved by the witness. Certain classes of witnesses were held to be incompetent witnesses, viz., very close relatives in favour of their own kith and kin, or of a partner in favour of another partner. Certain classes of men, such as professional singers and mourners, drunkards, gamblers, infants or idiots, or blind persons in matters to be proved by ocular testimony were regarded as unfit for giving evidence.

(ii) Circumstantial evidence. Circumstantial evidence was freely admitted and inferences were allowed to be drawn, if the facts and circumstances led to the proof of a conclusive nature. One of the illustrations given is, that if a person was seen coming out from an unoccupied house in fear and anxiety

with a knife covered with blood in his hand and in the house a dead body was found with its throat cut, these facts could be regarded as proof that the person coming out of the house murdered the person found dead. Muslim jurists preferred evidence described as "full corroboration". They insisted on corroboration of evidence, in criminal cases by the evidence of two men, but in the case of adultery of four men. But the court could accept the evidence of one witness, provided it was convincing and irreproachable.

- (iii) Admissions and confessions. Decrees could be given on admission, provided it was unconditional and not made in jest or under coercion. In criminal cases a confession was admissible in evidence, but there are indications that the confession of one co-accused was held to be inconclusive against the other co-accused, though it was admissible. Courts were not bound to accept confessions, and indeed they were enjoined to look for further evidence. In one case Emperor Aurangzeb remanding a complaint directed that the Qazi and the Amin should make a thorough enquiry and not decide the case on a mere admission or denial. If an accused confessed his guilt and then retracted and the case was proved, the sentence was to be less severe.
- (iv) Supplementary details. This brief account may be concluded with a few supplementary details. Courts had to see that the identification of property and of the accused by witnesses was exact and explicit. Where witnesses differed, the accused was given the benefit of doubt. Evidence could be taken on commission; oaths were administered to witnesses; the Muslims said "By God"; the Hindus swore on the cow; and the Christians on the Bible.
- (c) History of the Law of Evidence in India. A brief history of the law of evidence in India before the passing of the Evidence Act will show the object and necessity for the enactment of a codified law of evidence in this country. Before the introduction of the Indian Evidence Act, there was no systematic enactment on this subject. The English Rules of Evidence were always followed in the courts established by Royal Charter in the Presidency towns of Calcutta, Madras and Bombay. Such of those rules, as were contained in the Common Law and Statute law which prevailed in England before 1726, were introduced in the Presidency towns by the Charter.8 Outside the Presidency towns there were no fixed rules of evidence. The law was vague and indefinite and had no greater authority than the use of custom. The mofussil courts used to be guided by occasional directions and a few rules regarding evidence and procedure contained in the old regulations made between 1793 and 1834. In a Full Bench decision of the Calcutta High Court, R. v. Khyroollaho decided in 1866, Peacock, C. J. held that the English Law of Evidence was not the law of the mofussil and that the rules of evidence contained in the Hindu and Muhammadan Laws were also not applicable to those courts. The same was held in Bombay in 1869 in R. v. Ramaswami, 10 Thus, there being no definite and fixed rules of evidence, the administration of the law of evidence in mofussil was far from satisfactory.

The earliest Act of the Governor-General in Council which dealt with evidence strictly so-called was Act X of 1835 which applied to all courts in

^{8.} Bunwaree v. Het Narain, 7 M. I. 9. 6 W. R. (Cr.) 21. A. 148. 10. 6 B. H. C. R. 47-49.

British India which dealt with the proof under the Acts of the Governor-General in Council.11 Between 1835 and 1853 a series of Acts were passed by the Indian Legislature introducing some reforms for the improvement of the law of evidence. These Acts embodied with some additions many of the reforms which were advocated by Bentham and introduced in England by Lords Brougham and Denman. A few of those English Acts may be noted here12, which swept away the restrictions as to interested witnesses; Lord Denman's Act13 which declared that no witness should be excluded from giving evidence either in person or by deposition by reason 'of incapacity for crime interest',14 which declared the parties to the proceedings, their wives and all other persons competent as witnesses in the county courts; Lord Brougham's Act of 1851,15 which declared the parties and the person on whose behalf any suit, action or proceedings may be brought or defended, competent and compellable to give evidence in any court of justice; Lord Brougham's Act of 185316 which made the husbands and wives of parties to the record competent and compellable witnesses. Similar reforms were effected by the Acts passed by the Indian Legis ature, e.g., Act XIX of 1837 abolished incompetency by reason of a conviction for criminal offences; Section 1 of Act IX of 1840 extended the provisions of 3 and 4 Will, IV c. 92; Act VII of 1844 introduced provisions similar to that of 6 and 7 Vic. c. 85 Presidency towns; Act XV of 1852 contained provisions similar to that of 9 and 10 Vic. c. 95 and 4 and 15 Vic. c. 95. By Act XIX of 1853 many of these reforms were extended to Civil Courts of the East India Co. in the Bengal Presidency.

In 1855, Act II of 1855 was passed for further improvement of the law of evidence. This contained many valuable provisions. It was made applicable to all the courts in British India. As to this Act, see R. v. Gopal Doss.17 It did not contain a complete body of rules. The Act reproduced with some additions all the reforms advocated by Bentham and carried out in England by Lords Denman and Brougham. But nearly all these provisions presupposed the existence of that body of law upon which these reforms were engrafted. Still it was authoritatively laid down that the English Law of Evidence was not the law in mofussil.

The following Acts were subsequently passed: Act X of 1855 (attendance of witnesses); Act VIII of 1859 (Civil Procedure containing the present Code, provisions as to witnesses) and Act XXV of 1861 (Criminal Procedure containing provisions as to witnesses, confession, police diaries, examination of accused and civil surgeons, reports of chemical officers and dying declarations, which had been re-enacted in the present Act and in the present Code) and Act XV of 1869 (evidence of prisoners) .18

From what has been said above, two conclusions follow, first that the courts of the Presidency towns usually followed English rules of evidence notwithstanding the fact that the entire English Law on the subject was never

^{11.} Whitley Stoke's Anglo-Indian Codes,

Vol. II, p. 830.

12. 3 and 4 Will. IV c. 92.

13. 6 and 7 Vic. c. 85 of 1843.

14. 9 and 10 Vic. c. 95.

15. 14 and 15 Vic. c. 95.

16. 16 and 17 Vic. c. 83.

17. 3 M. 271 at 282.

^{18.} Se: .Gajju Lal v. Fateh Lal, 6 Cal. 171, Unide v. Pemmasamy, 7 M. I. A. 128 at 136; Ajoodya v. Omiao, (1870) 13 M. I. A. 519: 15 W. R. 1 (P.C.): 6 B. L. R. 509: 2 Sar. 607; Hurrehur v. Majhce, (1874) 22 W. R. 355 and 356.

declared to be applicable to India by any statute. Only portions of it were, from time to time, introduced by the Acts mentioned above; Act II of 1855 being the most important, and embodying many of the reforms introduced in England. Secondly, there were no complete rules of evidence in the mofus-sil courts except the Acts XIX of 1853 and II of 1855. Some customary laws prevailed in different parts of the country. They were mostly vague and indefinite. The English Law was not the law in mofussil courts except those portions that were introduced by the Acts referred to above. But they were not debarred from following the English Law, where they regarded it as the most equitable. This led to laxity of evidentiary procedure in the mofussil.

This unsatisfactory state of the law was commented upon by the judges in the judgments.¹⁹ The whole of the Indian Law of Evidence, says Field, might then be divided into three portions, viz., (1) one portion settled by the express enactments of the Legislature; (2) a second portion settled by judicial decisions; and (3) a third unsettled portion and this—by far the largest of the three—remains to be incorporated with either of the preceding portion.

Thus, the need was felt for codification of the Law of Evidence in this country. What was needed was the introduction in this country of the English Law of Evidence, which was the outcome and experience and wisdom of ages with such modifications as were rendered necessary by the peculiar circumstances of India.

In 1868, the Indian Law Commissioners prepared a draft Bill which was circulated to local governments for opinion. Mr. Maine, afterwards Sir Henry Sumner Maine, in introducing the draft Bill said:

"No doubt much evidence is received by the mofussil courts, which the English courts would not strictly regard as admissible. But I would appeal to the members of the Council, who have had more experience of the mofussil than myself, whether the judges of those courts do not as a matter of fact believe that it is their duty to administer the English Law of Evidence as modified by the Evidence Acts. In particular, I am informed that when a case is argued by a barrister before the mosussil judge and when English rules of evidence are pressed on the attention, he does practically accept those rules and admits or rejects evidence according to his construction of them. I cannot help regarding this state of things as eminently unsatisfactory. I entirely agree with the Commissioners that there are parts of the English Law of Evidence which are wholly unsuited to this country. We have heard much of the laxity with which evidence is admitted in the mofussil courts, but the truth is that this laxity is to a considerable extent justifiable. The evil, it appears to me, lies in admit ting evidence which under strict rules of admissibility would be rejected than admitting or rejecting evidence without fixed rules to govern admission and rejection. Anything like a capricious administration of law of evidence was an evil, but it would be an equal evil, or perhaps even a greater evil, when such strict rules of evidence should be in force as practi cally to leave the court without materials for a decision."

^{19.} See Whitley Stokes, p. 817.

The Bill did not proceed beyond the first reading. It was pronounced by every legal authority consulted as unsuitable for the wants of the country. Sir james Fitzjames Stephen criticised the Bill as not sufficiently elementary and being incomplete in every respect and that if it became law it would not supersede the necessity under which judicial officers in this country were then placed of acquainting themselves by means of English Handbooks with the English Law upon the subject. There was every room for apprehension that Taylor on Evidence might come to be regarded as a special depository of the Law of India. In his speech on presenting the report of the Select Committee in March, 1872, Sir James emphasised that the Commissioners' draft would be hardly intelligible to a person who did not enter upon the study of it with considerable knowledge of English Law.

Two years later it fell to Sir James Stephen to prepare a new Bill, which was finally passed into law as Act I of 1872. The general object kept in view, says the author of the Act, in framing it, was to produce something from which a student might derive a clear, comprehensive and distinct knowledge of the subject. The second section which made away with all rules not imposed by positive enactment, was the pivotal feature of the Act. It overcame finally the objections of officers of experience like Sir George Campbell, who were inclined to deprecate systematic rules of evidence as theoretical and to coquette with the notion that the best Evidence Act would consist of a sentence abolishing all rules of evidence. The exclusion of evidence not authorised by the Act was insisted upon by the Privy Council in Lehraj Kuar v. Mehpal Singh²⁰ and when Mahmud, J. in R. v. Abdullah²¹ sought to introduce a refinement that while the principle of the exclusion adopted by the Act was the safest guide yet it should not be so applied as to exclude matters which may be essential for the ascertainment of truth, this dictum was disapproved by the Privy Council in Maharaja Sris Chandri Nandy v. R. Thakur.22 By Act I of 1938, a statute law revision measure, Section 2 of the Indian Evidence Act has been repealed. But it is not thought that this has revived or re-introduced any new principle of evidence.28

Act 1 of 1872 has been amended by Acts XVIII of 1872, III of 1887, III of 1891, V of 1899, XVIII of 1919, XXXI of 1926, X of 1927, XXXV of 1934, XL of 1949 and III of 1951. It was repealed in part by Acts 44 and 45 Vic. c. 58, X of 1897, XII of 1927 and I of 1938, and repealed in part and amended by Act X of 1914.

The cognate Acts and provisions are reproduced in the Appendices to the Fourth Volume.

The Central Acts from 1841 to 1961 in which provisions relating to evidence are chronologically arranged and the relevant sections themselves will be found set out as an Appendix to the Fourth Volume.

R. 68 I. A. 34: 193 I. C.

^{20. 1879} L. R. 7 I. A. 63, 70: 5 C. 744: 6 C. L. R. 593: 4 Sar. 93. 21. (1885) I. L. R. 7 All. 385: (1885) 5 A. W. N. 78. 22. A. I. R. 1941 P. C. 16: 1941 J.

although their Lordships did not expressly refer to this case.

23. Rt. Hon'ble Sir George Rankin

[&]quot;Background to Indian Law, p. 115,

L. E. 2

It has been said that, with some few exceptions, the Indian Evidence Act was intended to, and did, in fact, consolidate the English law of evidence,24 that the Act itself is little more than an attempt to reduce the English law of evidence to the form of express propositions arranged in their natural order, with some modifications rendered necessary by the peculiar circumstances of India,25 and that it was drawn up chiefly from 'Taylor on Evidence.' It is true that although the Code is, in the main, drawn on the lines of English law of evidence, there is no reason to suppose that it was intended to be a servile copy of it2 and indeed, as already stated, it does, in certain respects, differ from English law. Moreover, these dicta do not recognise the undoubted original character of Sections (5-16) dealing with the relevancy of facts.

9. Authority of English and American decisions. Although as all rules of evidence which were in force at the passing of the Act are repealed, the English decisions cannot be regarded as binding authorities, they may still serve as valuable guides; though, of course. English authorities upon the meaning of particular words are of little or no assistance when those words are very different from the one to be considered.8

Even where a matter has been expressly provided for by the Act, recourse may be had to English or American decisions, if, as is not infrequently the case, the particular provision be of doubtful import owing to the obscurity or incompleteness of the language in which it has been enacted. Authority abounds for the use of the extraneous sources to which reference has been made in cases such as these.4 As was observed by Edge, C. J., in The Collector of Gorakhpur v. Palakdhari Singh,5 "No doubt, cases frequently occur in

24. Gujju Lal v. Fatteh Lal (1880) 6 C.

171, 188, Per Garth, C. J.
25. Smith v. Ludha, (1892) 17 B. 129, 141: Per Bayley, C. J., adopting the words of Sir James Stephen, Introd., Ev. Act 2.

Ranchoddas v. Bapu, (1886) 10 B. 439, 442, per Sargent, C. J.; see the Collector of Gorakhpur v. Palak-dhari Singh, (1889) 12 A., 1, 37 (F.B.); R. v. Abdullah, (1885) 7 A. 385, 401: (1885) 5 A. W. N. 78.

3. R. v. Pyari, 4 C. L. R. 504, 509; R. v. Ghulet, (1884) 7 A. 44; English cases irrelevant when Indian Legislature has not followed English

lature has not followed English law.

4. See R. v. Vajiram, (1892) 16 B. 414, 433; and the cases cited, post.

^{1.} Munchershaw v. New Dhurmsey, (1880) 4 B. 576, 581, Per West, J.: see remarks of Jackson, J. in R. v. Ashootosh, (1878) 4 C. 483, 491; Taylor on Ev. referred to in R. v. Pyari, 4 C. L. R. 508, 509: Gujju Lal v. Fatteh Lal, (1880) 6 C. 171, 179; R. v. Rama Birapa, (1878) 3 B. 12, 17; R. v. Fakirappa, (1890) 15 B. 491, 502; Framji v. Mohansingh, (1893) 18 B. 279 and numerous other cases, Mr. Norton however, at p. iv. of the Reserver. ton, however, at p. iv of the Preface to his Edition of the Act, says that in his opinion it is a mere figure of speech to assert that the 167 sections of the Act contain all that is applicable in India of the two volumes of "Taylor on Evidence" and that a great mass of the principles and rules which Mr. Taylor's work contains will have to be written back between the lines of the Code.

^{(1889) 12} A. 1 at 12 (F.B.) and see also remarks of Straight, J., at pp. 19 20 ibid: Framii v. Mohan, 19, 20 ibid.; Framji v. Mohan, (1893) 18 B. 263, 280 (reference to American case-law); R. v. Elahi, (1866) B. L. R. Sup. Vol. F. B. 459 (English, American and Scotch Law); R. v. Chutterdhari Singh 5, W. R. (Cr.) 59; (Best, Ev., Gilbert on Ev., Chitty's Criminal Law); Kanhya Lall v. Radha Charan, 7 W. R. 358 (F.B.) (Civil Law: Austin, Jur. Goodeve, Ev.); R. v. Kalla Chand, 11 W. R. (Cr.) 21 (Roscoe, Ev.); R. v. Hedger, (1852) P. 132 (Starkie on Ev.) and 144 (Paley); R. v. Budhu, 1 B. 475; 11 B. H. C. 93 (Russell on Crimes); R. v. Chagan Daya Ram (1890) 14 B. 331, 335 (Phillip's Ev.); 581 (Gres-Law); R. v. Chutterdhari Singh 5, 331, 335 (Phillip's Ev.); 581 (Gres-

India in which considerable assistance is derived from the consideration of the law of England and of other countries. In such cases we have to see how far such law was founded on commonsense and on the principles of justice between man and man and may safely afford guidance to us here." In a Full Bench case of the Allahabad High Court, Parbhoo v. Emperor,⁶ a majority of four Judges against three held that, even though a matter has been expressly provided for by the Evidence Act, recourse may be had to English decisions in order to interpret the particular provisions of the Act when they are of doubtful import owing to the obscurity of the language in which they have been enacted. But, since the Indian Evidence Act, 1872, is not an exact reproduction of the English law and the latter has never been codified and judicial decisions may well have developed or expanded some of its principles since 1872, the Federal Court held that caution was necessary in the application of English authorities on the subject in an Indian Court.⁷

- 10. Act, a Code. It must not, however, be forgotten that the Indian Evidence Act is a Code which not only defines and amends but also consolidates the Law of Evidence, repealing all rules other than those saved by the last portion of its second section.8
- 11. Construction. The method of construction to be adopted in the case of a Code has been expounded by Lord Herschell,⁹ in terms which have been adopted by the Privy Council,¹⁰ and cited and applied in other cases in this country.¹¹

A similar rule had been previously laid down in this country with reference to the construction of this Act. In the case of R. v. Ashootosh Chucker-butty, 12 it was said that instead of assuming the English Law of Evidence, and then inquiring what changes the Evidence Act has made in it, the Act should be regarded as containing the scheme of the law the principles and the application of these principles to the cases of most frequent occurrence; but in respect of matters expressly provided for in the Act one must start from the Act and not deal with it as a mere modification of the Law of Evidence prevailing in England. But in the case of In re Budgett, 13 Chitty, J., distinguished the rule indicated by Lord Herschell and observed:

"I have here not to deal with an Act of Parliament codifying the Law, but with an Act,14 to amend and consolidate the law and therefore I say, those

ley on Ev.): B. L. R. F.B. Sup. Vol. p. 422; Norton on Ev.; and other cases too numerous to mention. Concerning the weight to be given to American decisions see remarks of Cockburn, L. C. J., in Scaramanga v. Stamp, 5 G. P. D., 295, 303.

6. 1941 All. 402: I. L. R. 1941 All. 843; 197 I. C. 525: 1941 A. L. J.

Niharendu Dutt Majumdar v. Emperor, 1942 F. C. 22; 200 I. C. 289: 44 Bom. L. R. 782: 46 C. W. N. 9.

 The Collector of Gorakhpur v. Palakdhari Singh, (1889) 12 A. 1, 35 and see notes under s. 2 post. Bank of England v. Vagliano Brothers, L. R. (1891) App. Cas. 107 (at pp. 144, 145).

Norendra v. Kamalbasini, (1896) 23
 I. A. 18, 26; 23 Cal. 563, 565;
 Gokul Mandar v. Pudmanand Singh, (1902) 29 I. A. 196 at 202; 29 Cal. 707 (P.C.).

(1902) 29 1. A. 196 at 202; 25 Cat. 707 (P.C.).

11. Dagdu v. Pancham, (1892) 17 B. 375, 382; Damodar v. The Secretary of State, (1894) 18 M. 88, 91: 4 M. L. J. 205; Kondayya v. Narasimhulu, (1869) 20 M. 97, 103; Suraj Prasad v. Golab, (1901) 28 C. 517.

12. (1878) 4 C. 483. per Jackson, J.

 (1894) 2 Ch. 557, at pp. 561, 562.
 Bankruptcy Act, (1883) 46-47 Vict., c. 52. observations of Lord Herschell, L. C., in Bank of England v. Vagliano Bros. 15 do not apply, and I think it is legitimate in the interpretation of the sections in this amending and consolidating Act to refer to the previous state of the law for the purpose of ascertaining the intention of the Legislature."

Similarly, in Secretary of State v. Mask and Co., 16 where the question arose as to the construction of Section 188 of the Sea Customs Act, 1878 (now Section 128 of the Customs Act, 1962), which was passed "to consolidate and amend" the law relating to the levy of Sea Customs duties, their Lordships of the Privy Council observed:

"If there were any doubt as to the proper construction of Section 188 of the 1878 Act, it would be legitimate to consider the previous law which it was consolidating and amending."

Questions, however, may arise as regards matters not expressly provided for in the Act. It has been held that the second section¹⁷ in effect prohibits the employment of any kind of evidence not specifically authorised by the Act itself,18 and that a person tendering evidence must show that it is admissible under someone or other of the provisions of this Act.¹⁹ It is to be regretted that the Act was not so framed as to admit other rules of evidence on points not specifically dealt with by it, as was in effect done by the Commissioners in the second section of their Draft. In that case whenever omissions occur (and some do in fact occur) in the Act, recourse might be had to the present or previous law on the point existing in England or the previous rules, if any, in this country.

^{15.} L. R. (1891) App. Cas. 107, 144.
16. 1940 P. C. 105; 67 I. A. 222: I. L. R. 1940 Mad. 599: 1940 A. W. R. 132: 42 Bom. L. R. 767: 44 C. W. N. 709. (1940) 2 M. L. J. 140: 1940 O. W. N. 679.
17. Repealed by the Repealing Act, 1938 (1 of 1938) section 2 and Sch.

^{1938 (1} of 1938), section 2 and Sch. R. v. Abdullah, (1885) I. L. R. 7 A. 385, 399; Muhammad Allahadad Khan v. Muhammad Ismail Khan, (1886) 10 A. 289, 325; R. v. Pitamber Jina. (1876) 2 B. 61, 64 and in next note.

^{19.} Lekraj v. Mahpal, (1879) S. C. 744 (P.C.) 7 I. A. 70; Collector of

Gorakhpur v. Palakdhari Singh, (1889) 12 A. 1, 12, 19, 20, 34, 35, 43; Maharaja Sris Chandra Nandy v. 45; Maharaja Sris Chandra Nandy v. Rakhalananda, 1941 P. C. 16; 1941 L. R. 68 I. A. 34: 193 I. C. 220; B. N. Kashyap v. Emperor, 1945 Lah. 23: I. L. R. 1944 L. 408; 217 I. C. 284: 46 C. L. J. 296 (F.B.) Though in R. v. Ashootosh, (1878) 4 C. 483 (F.B.) 491, it was said that where a case arises for which no positive so. case arises for which no positive solution can be found in the Act itself recourse may be had to the English rules, if any, on the point,

CHAPTER II20

GENERAL DISTRIBUTION OF THE SUBJECT

SYNOPSIS

- 1. Technical and general elements of
- 2. Relation of Evidence Act to English Law of Evidence.
- 3. English Law of Evidence. 4. Its want of arrangement.
 5. Difficulties of amending it.
- 6. Fundamental rules of English Law of Evidence.
- 7. Ambiguity of the rule as to confining evidence to issue.
- 8. Ambiguity of the rule excluding hearsay.

- 9. Rules as to best evidence,
- 10. Ambiguity of the word 'evidence'.
- 11.
- Effects of this ambiguity.

 Merits of English Law of Evidence.

 Natural distribution of the subject
- Illustration.
- Relevancy of facts: (1) Facts in issue.
 - (2) Relevant facts,
- Proof of relevant facts.
- 17. Judicial notice. Oral evidence, Documentary evidence,
- 18. Production of proof.
- 1. Technical and general elements of law. Almost every branch of law is composed of rules of which some are grounded upon practical convenience and the experience of actual litigation, whilst others are closely connected with the constitution of human nature and society. Thus, the criminal law contains many provisions of no general interest, such as those which relate to the various forms in which dishonest persons tamper with or imitate coin; but it also contains provisions, such as those which relate to the effect of madness on responsibility, which depend on several of the most interesting branches of moral and physical learning. This is perhaps more conspicuously true of the law of evidence than of any other branch of the law. Many of its provisions, however useful and necessary, are technical; and the enactments in which they are contained can claim no other merit than those of completeness and perspicuity. The whole subject of documentary evidence is of this nature. Other branches of the subject, such as the relevancy of facts, are intimately connected with the whole theory of human knowledge and with logic, as applied to human conduct. The object of this production is to illustrate these parts of the subject, by stating the theory on which they depend and on which the provisions of the Act proceed. As to more technical matters, the Act speaks for itself.
- 2. Relation of Evidence Act to English Law of Evidence. The Indian Evidence Act is a little more than an attempt to reduce the English Law of Evidence to the form of express propositions arranged in their natural order, with some modifications rendered necessary by the peculiar circumstances of India.
- 3. English Law of Evidence. Like almost every other part of English law, the English Law of Evidence was formed by degrees. No part of the law

^{20.} Chapter I to Chapter IV afe Sir James Fitzjames Stephen's Introduc-

has been left so entirely to the discretion of successive generations of judges. The Legislature till very recently interfered but little with the matter, and since it began to interfere, it has done so principally by repealing particular rules, such as that which related to the disqualification of witnesses by interest, and that which excluded the testimony of the parties; but it has not attempted to deal with the main principle of the subject.

- 4. Its want of arrangement. It is natural that a body of law thus formed by degrees and with reference to particular cases should be destitute of arrangement, and in particular that its leading terms should never have been defined by authority; that general rules should have been laid down with reference rather to particular circumstances than to general principles, and it should have been found necessary to qualify them by exceptions inconsistent with the principles on which they proceed.
- 5. Difficulties of amending it. When this confusion had once been introduced into the subject it was hardly capable of being remedied either by Courts of Law, or by writers of text-books. The Courts of Law could only decide the cases which came before them according to the rules in force. The writers of text-books could only collect the results of such decisions. The Legislature might, no doubt, have remedied the evil, but comprehensive legislation upon abstract questions of law has never yet been attempted by Parliament in any one instance, though it has in several well-known cases been attended to with signal success in India.
- 6. Fundamental rules of English Law of Evidence. That part of the English Law of Evidence which professes to be founded upon anything in the nature of a theory on the subject may be reduced to the following rules:
 - (1) Evidence must be confined to the matters in issue.
 - (2) Hearsay evidence is not to be admitted.
 - (3) In all cases the best evidence must be given.

Each of these rules is very loosely expressed. The word 'evidence', which is the leading term of each, is undefined and ambiguous.

It sometimes means the words uttered and things exhibited by witnesses before a court of justice. At other times, it means the fact proved to exist by those words or things, and regarded as the ground-work of inferences as to other facts not so proved. Again, it is sometimes used as meaning to assert that a particular fact is relevant to the matter under inquiry.

The word 'issue' is ambiguous. In many cases, it is used with reference to the strict rules of English special pleading, the main object of which is to define, with great accuracy, the precise matter which is affirmed by the one party to a suit, and denied by the other. In other cases it is used as embracing generally the whole subject under inquiry.

Again, the word 'hearsay' is used in various senses. Sometimes it means whatever a person is heard to say; sometimes it means whatever a person

declares on information given by someone else; sometimes it is treated as being nearly synonymous with 'irrelevant'.

7. Ambiguity of the rule as to confining evidence to issue. If the rule that evidence must be confined to the matters in issue were construed strictly, it would run thus: 'No witness shall ever depose to any fact, except those facts which by the form of pleadings are affirmed on the one side and denied on the other. So understood, the rule would obviously put a stop to the whole administration of justice, as it would exclude evidence of decisive facts. To quote an example. A sues B on a promissory-note. B denies that he made the note. A has a letter from B in which he admits that he made the note, and promises to pay it. The admission could not be proved if the rule referred to were construed strictly, because the issue is, whether B made the note and not whether he admitted having made it.

This absurd result is avoided by using the word 'evidence' as meaning not testimony but any fact from which any other fact may be inferred. Thus interpreted, the rule that evidence must be confined to matters in issue will run thus: 'No facts may be proved to exist, except facts in issue or facts from which the existence of the facts in issue can be inferred; but if the rules are thus interpreted, it becomes so vague as to be of little use; for the question naturally arises, from what sort of facts may the existence of other facts be inferred? To this question the law of England gives no explicit answer at all though partial and confused answer to parts of it may be inferred from some of the exceptions to the rules which exclude hearsay.

For instance, there are cases from which it may be inferred that evidence may sometimes be given of a fact from which another fact may be inferred, although the fact upon which the inference to be founded is a crime, and although the fact to be inferred is also a crime for which the person against whom the evidence is to be given is on his trial.

The full answer to the question, 'what facts are relevant', which is the most important of all the questions that can be asked about the law of evidence, has thus to be learnt partly by experience, and partly by collecting together such crooked and narrow illustrations of it as the one just given.

8. Ambiguity of the rule excluding hearsay. The rule that 'hearsay is no evidence' is vague to the last degree, as each of the meanings of which the word 'hearsay' is susceptible is sometimes treated as the true one. As the rule is nowhere laid down in an authoritative manner, its meaning has to be collected from the exceptions to it, and these exceptions, of which there are as many as twelve or thirteen, imply at least three different meanings of the word 'hearsay'.

Thus, it is a rule that evidence may be given of statements which accompany and explain relevant actions. As no rule determines what actions are relevant, this is in itself unsatisfactory; but as the rule is treated as an exception to the rules excluding hearsay, it implies that 'hearsay' means that which a man is heard to say. If this is the meaning of hearsay, the rule which excludes it would run thus: 'No witness shall ever be allowed to depose anything which he has heard said by any one else.' The result of this would be

that no verbal contract could ever be proved, and that no one could ever be convicted of using threats with intent to extort money, or of defamation by words spoken, except in virtue of exceptions which stultify the rule.

Most of the exceptions indicate that the meaning of the word 'hearsay' is that which a person reports on the information of someone else, and not upon the evidence of his own senses. This, with certain exceptions, is no doubt a valuable rule, but it is not the natural meaning of the words 'hearsay is no evidence' and it is in practice almost impossible to divest words of their natural meaning.

The rule that documents which support ancient possession may be admitted as between persons who are not parties to them, is treated as an exception to the rule excluding hearsay. This implies that the word 'hearsay' is nearly, if not quite, equivalent to the word 'irrelevant.' But the English law contains nothing which approaches to a definition of relevancy.

- 9. Rules as to best evidence. The rule which requires that the best evidence of which a fact is susceptible should be given, is the most distinct of the three rules referred to above, and it is certainly one of the most useful. It is simply an amplification of the obvious maxim that if a man wishes to know all that he can know about a matter his own senses are to him the highest possible authority. If a hundred witnesses of unimpeachable character were all to swear to the contents of a sealed letter, and if the person who heard them swear opened the letter and found that its contents were different, he would conclude, without the intervention of any conscious process of reasoning at all, that they had sworn what was not true.
- 10. Ambiguity of the word 'evidence'. The ambiguity of the word 'evidence' is the cause of a great deal of obscurity apart from that which it gives to the rules above mentioned. In scientific inquiries, and for popular and general purposes, it is no doubt convenient to have one word which includes—
 - (1) the testimony on which a given fact is believed.
 - (2) the facts so believed, and

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(3) the arguments founded upon them.

For instance, in the title of "Paley's Evidences of Christianity," the word is used in this sense. The nature of the work was not such as to give much importance to the distinction which the word overlooks. So, in scientific inquiries, it is seldom necessary to lay stress upon the difference between the testimony on which a fact is believed, and the fact itself. In judicial inquiries, however, the distinction between the relevancy of facts and the mode of proving relevant facts is most important, and the neglect to observe it has thrown the whole subject into confusion by causing English lawyers to overlook the leading distinction which ought to form the principle on which the whole law should be classified.

11. Effects of this ambiguity. The use of the one name 'evidence' for the fact to be proved, and the means by which it is to be proved, 'has given a double meaning to every phrase in which the word occurs,' Thus,

for instance, the phrase 'primary evidence' sometimes means a relevant fact, and sometimes the original of a document as opposed to a copy. 'Circumstantial evidence' is opposed to 'direct evidence.' But 'circumstantial evidence' usually means a fact, from which some other fact is inferred, whereas 'direct evidence' means testimony given by a man as to what he has himself perceived by his own senses. It would thus be correct to say that circumstantial evidence must be proved by direct evidence—a clumsy mode of expression which is in itself a mark of confusion of thought. The evil, however, goes beyond mere clumsiness of expression. People have naturally enough supposed that circumstantial and direct evidence admit of being contrasted in respect of their cogency, and that different canons can be laid down, as to the conditions which they ought to satisfy before the Court is convinced by them. This confuses the theory of proof, and is an error due entirely to the ambiguity of the word 'evidence'.

- 12. Merits of English Law of Evidence. It would be a mistake to infer from the unsystematic character and absence of arrangement which belongs to the English Law of Evidence that the substance of the law itself is bad. On the contrary, it possesses, in the highest degree, the characteristic merits of English case-law. English case-law, as it is, is what it ought to be, and might be, if it were properly arranged, what the ordinary conversation of very clever man on all sorts of subjects written down as he uttered it, and as passing circumstances furnished him with a text would be to the matured and systematic statement of his deliberate opinions. It is full of the most vigorous sense, and is the result of great sagacity applied to past and varied experience.
- 13. Natural distribution of the subject. The manner in which the law of evidence is related to the general theories, which give it its interest, can be understood only by reference to the natural distribution of the subject, which appears to be as follows:
 - (1) All rights and liabilities are dependent upon and arise out of facts.
 - (2) Every judicial proceeding whatever has, for its purpose, to ascertain some right or liability. If the proceeding is criminal, the object is to ascertain the liability to punishment of the person accused. If the proceeding is civil, the object is to ascertain some right of property or of status, or the right of one party, and the liability of the other, to some form of relief.

In order to effect this result, provision must be made by law for the following objects: First, the legal effect of particular classes of facts in establishing rights and liabilities must be determined. This is the province of what has been called substantive law. Secondly, a course of procedure must be laid down by which persons interested may apply the substantive law to particular cases.

The law of procedure includes, amongst others, two main branches:

- (1) the law of pleading which determines what in particular cases are the questions in dispute between the parties, and
- (2) the law of evidence, which determines how the parties are to convince the Court of the existence of that state of facts which, according

to the provisions of substantive law, would establish the existence of the right or liability which they allege to exist.

14. Illustration. The following is a simple illustration: A sues B on a bond for Rs. 1,000, B says that the execution of the bond was procured by coercion.

The substantive law is that a bond executed under coercion cannot be enforced.

The law of procedure lays down the method according to which A is to establish his right to the payment of the sum secured by the bond. One of its provisions determines the manner in which the question between the parties is to be stated. The question stated under that provision is whether the execution of the bond was procured by coercion.

The law of evidence determines-

- (1) What sort of facts may be proved in order to establish the existence of that which is defined by the substantive law as coercion?
- (2) What sort of proof is to be given of those facts?
- (3) Who is to give it?
- (4) How it is to be given?

Thus, before the law of evidence can be understood or applied to any particular case, it is necessary to know so much of the substantive law as determines what, under given state of facts, would be the rights of the parties, and so much of the law of procedure as is sufficient to determine what question it is open to them to raise in the particular proceeding.

Thus, in general terms, the law of evidence consists of provision upon the following subjects:

- (1) The relevancy of facts.
- (2) The proof of facts.
- (3) The production of proof of relevant facts.

The foregoing observations show that this account of the matter is exhaustive. For, if we assume that a fact is known to be relevant, and that its existence is duly proved, the Court is in a position to go to say how it affects the existence, nature, or extent of the right or liability, the ascertainment of which is the ultimate object of the enquiry, and this is all that Court has to do.

The matter must, however, be carried further. The three general heads may be distributed more particularly.

- 15. Relevancy of facts. Facts may be related to rights and liabilities in one of two ways:
- (1) Facts in issue. They may by themselves, or in connection with other facts, constitute such a state of things that the existence of the disputed right or liability would be a legal inference from them. From the fact that A is the eldest son of B, there arises, of necessity, the inference that A is,

by the Law of England, the heir-at-law of B, and that he has such rights as that status involves. From the fact that A caused the death of B under certain circumstances, and with a certain intention or knowledge, there arises, of necessity the inference that A murdered B and is liable to the punishment provided by law for murder.

Facts thus related to a proceeding may be called facts in issue, unless their existence is undisputed.

(2) Relevant facts. Facts, which are not themselves in issue in the sense above explained, may affect the probability of the existence of facts in issue, and be used as the foundation of inferences respecting them; such facts are described in the Evidence Act as relevant facts.

All the facts with which it can, in any event, be necessary for Courts of Justice to concern themselves are included in these two classes.

The first great question, therefore, which the law of evidence should decide is, what facts are relevant. The answer to this question is to be learnt from the general theory of judicial evidence.

What facts are in issue in particular cases is a question to be determined by the substantive law, or in some instances by that branch of the law of procedure which regulates the forms of pleading, civil or criminal.

- 16. Proof of relevant facts. Whether an alleged fact is a fact in issue or a relevant fact, the Court can draw no inference from its existence till it believes it to exist; and it is obvious that the belief of the Court in existence of a given fact ought to proceed upon grounds, altogether independent of the relation of the fact to the object and nature of the proceeding in which its existence is to be determined. Thus, for instance, the question is whether A wrote a letter. The letter may have contained the terms of a contract. It may have been a libel. It may have constituted the motive for the commission of a crime by B. It may supply proof of an alibi in favour of A. It may be an admission or a confession of crime; but whatever may be the relation of the fact to the proceeding, the Court cannot act upon it unless it believes that A did write the letter, and that belief must obviously be produced, in each of the cases mentioned, by the same or similar means. If the Court requires the production of the original when the writing of the letter is a crime, there can be no reason why it should be satisfied with a copy when the writing of the letter is a motive for a crime. In short, the way in which a fact should be proved depends on the nature of the fact, and not on the relation of the fact to the proceeding.
- 17. Judicial notice. Oral evidence. Documentary evidence. Some facts are too notorious to require any proof at all, and of these the Court will take judicial notice; but, if a fact does require proof, the instrument by which the Court must be convinced of it is evidence; which means the actual words uttered, or documents, or other things actually produced in Court, and not the facts which the Court considers to be proved by those words and documents. Evidence, in this sense of the word, must be either (1) oral or (2) documentary. A third class might be formed of things produced in Court, not being documents, such as the instruments with which a crime was committed or the property to which damage had been done, but this division would introduce needless intricacy into the matter. The reason for distinguishing between oral and documentary evidence is that, in many cases, the existence of the latter

excludes the employment of the former; but the condition of material things, other than documents, is usually proved by oral evidence, so that there is no occasion to distinguish between oral and material evidence.

. It may be said that in strictness all evidence is oral, as documents or other material things must be identified by oral evidence before the Court can take notice of them. It is unnecessary to discuss the justice of this criticism, as the phrase 'documentary evidence' is not ambiguous, and is convenient and in common use. The only reason for avoiding the use of word 'evidence' in the general sense in which most writers use it, is that it leads, in practice, to confusion, as has been already pointed out.

18. Production of proof. This includes the subject of the burden of proof: the rules upon which to answer the question, by whom is proof to be given; the subject of witnesses: the rules upon which to answer the question who is to give evidence and under what conditions; the subject of the examination of witnesses: the rules upon which to answer the question: how are the witnesses to be examined, and how is their evidence to be tested: and lastly, the effect upon the subsequent proceedings of mistakes in the reception and rejection of evidence, may be included under this head.

The following tabular scheme of the subject may be of assistance to the reader. The figures refer to the sections of the Act which treat of the matter referred to:

The object of legal proceedings is the determination of rights and liabilities which depend on facts (s. 3).

Relevant to the issue In issue, s. 3 (s. 3) which may be They may be Judicially proved by oral proved by documentary evidence noticed (ch. iii). (ch. iv). evidence (ch. vi), which is-

-admissions, ss. 17-31. -statements by persons who cannot be called as witnesses, ss. 32-33. -statements under special dircumstances, ss. 34-39.
-judgments in other cases, ss. 40-44.

issue, ss. 5-16.

- -opinion, ss. 45-51.
- -character, ss. 52-53.

-connected with the

-attested or unattested, ss. 67-73. -public or private, ss. 74-78.
-sometimes presumed to be genuine, ss. 70-90. -exclusive or not of oral evidence, (ch. vi).

-primary or secondary, ss. 61-66.

This proof must be produced by the party on whom the burden of proof rests (ch. vii), unless he is estopped (ch. viii).

If given by witnesses (ch. ix) they must testify, subject to rules as to examination (ch. x). Consequence of mistakes defined (ch. xi).

CHAPTER III

A Statement of the Principles of Induction and Deduction, and a Comparison of their Application to Scientific and Judicial Inquiries.

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62. Illustrations.

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- 1. General. The general analysis given in the last chapter of the subjects to which the law of evidence must relate, sufficiently explains the general arrangement of the Indian Evidence Act. To understand the substance of the Act, it is necessary to have some acquaintance with the general theory of judicial evidence. The object of the present chapter is to explain this theory and to compare its application to physical science with its application to judicial inquires.
- 2. Mr. Huxley on physical science and judicial inquiries. Mr. Huxley remarks in one of his latest works "The vast results obtained by science are won by no physical faculties, by no mental processes, other than those which are practised by everyone of us in the humblest and meanest affairs of life. A detective policeman discovers a burglar from the marks made by his shoe, by a mental process identical with that by which Cuvier restored the extinct animals of Montmartee from fragments of their bones; nor does that process of induction and deduction, by which a lady finding a stain of a particular kind upon her dress, concludes that somebody has upset the inkstand thereon, differ in any way from that by which Adams and Leverrier discovered a new planet. The man of science, in fact, simply uses, with scrupulous exactness, the methods which we all habitually and at every moment use carelessly."21
- 2A. Application of his remarks to Law of Evidence. These observations are capable of an inverse application. If we wish to apply the methods in question to the investigation of matters of every day occurrence, with a greater degree of exactness than is commonly needed, it is necessary to know something of the theory on which they rest. This is specially important when, as in judicial proceedings, it is necessary to impose conditions by positive law upon such investigations. On the other hand, when such conditions have been imposed, it is difficult to understand their importance or their true significance, unless the theory on which they are based is understood. It appears necessary for these reasons to enter, to a certain extent, upon the general subject of the investigation of the truth as to matters of fact, before attempting to explain and discuss that particular branch of it which relates to judicial proceedings.
- 3. General object of evidence. First, then, what is the general problem of science? It is to discover, collect and arrange true propositions about facts. Simple as the phrase appears, it is necessary to enter upon some illustration of its terms, namely.
 - (1) facts,
 - (2) propositions,
 - (3) the truth of propositions.
- 4. Facts. First, then, what are facts? During the whole of our waking life we are in a state of perception. Indeed, consciousness and perception are two names for one thing, according as we regard it from the passive

or active point of view. We are conscious of everything that we perceive, and we perceive whatever we are conscious of. Moreover, our perceptions are distinct from each other, some both in space and time, as is the case with all our perceptions of the external world; others, in time only, as is the case with our perceptions of the thoughts and feelings of our own minds.

- 5. External facts. Whatever may be the objects of our preceptions, they make up collectively the whole sum of our thoughts and feelings. They constitute, in short, the world with which we are acquainted, for without entering upon the question of the existence of the external world, it may be asserted with confidence that our knowledge of it is composed, first, of our perceptions; and, secondly, of the inferences which we draw from them as to what we should perceive if we were favourably situated for that purpose. The human body supplies an illustration of this. No one doubts that his own body is composed not only of the external organs which he perceives by his senses, but of numerous internal organs, most of which it is highly improbable that either he or any one else will ever see or touch, and some of which he never can, from the nature of things, see or touch as long as he lives. When he affirms the existence of these organs, say the brain or the heart, what he means is that he is led to believe from what he has been told by other persons about human bodies, or observed himself in other human bodies, that if his skull and chest were laid open, those organs would be perceived by the senses of persons who might direct their senses towards them.
- 6. Internal facts. There is another class of perceptions, transient in their duration, and not perceived by the five best marked senses, which are nevertheless distinctly perceptible and of the utmost importance. These are thoughts and feelings; love, hatred, anger, intention, will, wish, knowledge, opinion, are all perceived by the person who feels them. When it is affirmed that a man is angry, that he intends to sell an estate, that he knows the meaning of a word, that he struck a blow voluntarily and not by accident, each proposition relates to a matter capable of being as directly perceived as a noise or flash of light. The only difference between the two classes of propositions is this: When it is affirmed that a man has a given intention, the matter affirmed is one which he, and he only, can perceive; when it is affirmed that a man is sitting or standing the matter affirmed is one which may be perceived not only by the man himself, but by any other person able to see, and favourably situated for the purpose. But the circumstances that either event is regarded as being, or as having been capable of being, perceived by someone or other, is what we mean, and all that we mean, when, we say that it exists or existed, or when we denote the same thing by calling it a fact. The word 'fact' is sometimes opposed to theory, sometimes to opinion, sometimes to feeling, but all these modes of using it are more or less rhetorical. When it is used with any degree of accuracy, it implies something which exists, and it is as difficult to attach any meaning to the assertion that a thing exists which neither is, nor under any conceivable circumstances could be, perceived by any sentient being as to attach any meaning to the assertion that anything which can be so perceived does not, or at the time of perception did not, exist.
- 7. Definition of facts in Evidence Act. It is with reference to this that the word 'fact' is defined in the Evidence Act (Section 3) as meaning and including—
 - (1) Anything, state of things, or relation of things capable of being perceived by the senses; and
 - (2) Any mental condition of which any person is conscious.

It is important to remember with respect to facts, that as all thought and language contain a certain element of generality, it is always possible to describe the same facts with greater or less minuteness, and to decompose every fact with which we are concerned into a number of subordinate facts. Thus we might speak of the presence of several persons in a room at one time as a fact, but if the fact were doubted or if other circumstances rendered it desirable, their respective positions, their occupations, the position of the furniture and many other particulars might have to be specified.

8. Propositions. Such being the nature of facts, what is the meaning of a proposition? A proposition is a collection of words so related as to raise in the minds of those who understand them a corresponding group of images or thoughts.

The characteristic by which words are distinguished from other sounds is their power of producing corresponding thoughts or images: I say thoughts or images, because though most words raise what may be intelligibly called images in the mind, this is true principally of those which relate to visible objects. Such words as 'hard', 'soft', 'taste', 'smell', call up sufficiently definite thoughts, but they can hardly be described as images, and the same is still more true of words which qualify others, like 'although,' 'whereas' and other adverbs, prepositions and conjunctions.

- 9. Illustrations. The statement that a proposition, in order to be entitled to the name, must raise in the mind a distinct group of thoughts or images, may be explained by two illustrations. The words 'that horse is niger' form a proposition to every one who knows that niger means black, but to no one else. The words 'I see a sound' form a proposition to no one unless some signification is attached to the word 'sound' (for instance, an arm of the sea), which would make the words intelligible.
- 10. True propositions. Such being a proposition, what is true proposition? A true proposition is one which excites in the mind, thoughts or images, corresponding to those which would be excited in the mind of a person so situated as to be able to perceive the facts to which the proposition relates. The words 'a man is riding down the road on a white horse' form a proposition because they raise in the mind a distinct group of images. The proposition is true, if all persons favourably situated for purposes of observation did actually perceive a corresponding group of facts.
- 11. How true propositions are to be framed. The next question is: How are we to proceed in order to ascertain whether any given proposition about facts is true, and in order to frame true propositions about facts? This, as already observed, is the general problem of science which is only another name for knowledge so arranged as to be easily understood and remembered.
- 12. Facts must be correctly observed and properly recorded. The facts, in the first place, must be correctly observed. The observations made must, in the next place, be recorded in apt language, and each of these operations is one of far greater delicacy and difficulty than is usually supposed; for it is almost impossible to discriminate between observation and inference, or to make language a bare record of our perceptions instead of being a running commentary upon them. To go into these and some kindred points would

extend this inquiry beyond all reasonable bounds, and I accordingly pass them over with this slight reference to their existence. Assuming, then, the existence of observation and language sufficiently correct for common purposes, how are they to be applied to inquiries into matters of fact.

- 13. Mr. Mill's theory of logic: a fixed order prevails in the world. An answer to these questions, sufficient for the present purpose, will be supplied by giving a short account of what is said on the subject by Mr. Mill in his treatise on logic. The substance of that part of it which bears upon the present subject is as follows: The first great lesson learnt from the observation of the world in which we live, is that a fixed order prevails amongst the various facts of which it is composed. Under given conditions, fire always burns wood, lead always sinks in water, day always follows night and night day, and so on. By degrees we are able to learn what the conditions are under which these and other such events happen. We learnt, for instance, that the presence of a certain quantity of air is a condition of combustion; that the presence of the force of gravitation, the absence of any equal or great force acting in an opposite direction, and the maintenance by the water of its properties as a fluid are conditions necessary to the sinking of lead in water; that the maintenance by the heavenly bodies of their respective positions and the persistency of the various forces by which their paths are determined, are the conditions under which day and night succeed each other.
- 14. Induction and deduction. The great problem is to find out what particular antecedents and consequents are thus connected together, and what are the conditions of their connection? For this purpose two processes are employed, namely, induction and deduction. Deduction assumes and rests upon previous inductions, and derives a great part at least of its value from the means which affords of carrying on the process of thought from the point at which induction stops. The questions-What is the ultimate foundation of induction? Why are we justified in believing that all men will die because we have reason to believe that all men hitherto have died? Or that every particle of matter whatever will continue to attract every other particle of matter with a force bearing a certain fixed proportion to its mass and its distance, because other particles of matter have hitherto been observed to do so are questions which lie beyond the limits of the present inquiry. For practical purposes, it is enough to assume that such inferences are valid, and will be found by experience to yield true results in the shape of general propositions, from which we can argue downwards to particular cases according to the rules of verbal logic.
- 15. Mere observation of facts insufficient. The general propositions, however, cannot be executed directly from the observation of nature or of human conduct, as every fact which we can observe, however apparently simple, is in reality so intricate that it would give us little or no information unless it were connected with and checked by other facts. What, for instance, can appear more natural and simple than the following facts? A tree is cut down. It falls to the ground. Several birds which were perched upon it fly away. Its fall raises a cloud of dust which is dispersed by the wind and splashes up some of the water in a pond. Natural and simple as this seems, it raises the following questions at least: Why did the tree fall at all? The tree falling, why did not the birds fall too, and how came they to fly away? What became of the L. E. 3

dust, and why did it disappear in the air, whereas the water fell back into the pond from which it was splashed? To see in all these facts so many illustrations of the rules by which we can calculate the force of gravity, and the action of fluids on bodies immersed in them, is the problem of science in general, and of induction and deduction in particular.

16. Proceeding of induction. Generally speaking, this problem is solved by comparing together different groups of facts resembling each other in some particulars, and differing in others and the different inductive methods described by Mr. Mill are in reality no more than rules for arranging these comparisons. The methods which he enumerates are five,22 but the last three are little more than special applications of the other two-the method of agreement and the method of difference. Indeed the method of agreement is inconclusive, unless it is applied upon such a scale as to make it equivalent to the method of difference.

The nature of these methods is as follows:

All events may be regarded as effects of antecedent causes.

17. Methods of agreement and difference. Every effect is preceded by a group of events, one or more of which are its true cause or causes, and all of which are possible causes.

The problem is to discriminate between the possible and the true causes.

If whenever the effect occurs one possible cause occurs, the other possible causes varying, the possible cause which is constant is probably the true cause and the strength of this probability is measured by the persistency with which the one possible cause recurs, and the extent to which the other possible causes vary. Arguments founded on such a state of things are arguments on the method of agreement.

If the effect occurs when a particular set off possible causes precedes its occurrence, and does not occur when the same set off possible causes co-exist, one only being absent, the possible cause which was present when the effect was produced, and was absent when it was not produced, is the true cause of the effect. Arguments founded on such a state of things are arguments on the method of difference.

The following illustration makes the matter plain: Various materials are mixed together on several occasions. In each case soap is produced and in each case oil and alkali are two of the materials so mixed. It is probable from this that oil and alkali are the causes of the soap, and the degree of the probability is measured by the number of the experiments, and the variety of the ingredients other than oil and alkali. This is the method of agreement.

^{22. (1)} The method of agreement.

⁽²⁾ The method of difference, (3) The joint method of agreement and difference.

⁽⁴⁾ The method of residues.(5) The method of concemitant variations.

Various materials, of which oil and alkali are two, are mixed and soap is produced. The same materials, with exception of the oil and alkali, are mixed and soap is not produced. The mixture of the oil and alkali is the cause of the soap. This is the method of difference. The case would obviously be the same if oil and alkali only were mixed. Soap was unknown, and upon the mixture being made, other things being unchanged, soap came into existence.

- 18. Difficulties—Several causes producing the same effects—results as to method of agreement. These are the most important of the rules of induction; but induction is only one step towards the solution of the problems which nature presents. In the statement of the rules of induction, it is assumed for the sake of simplicity that all the causes and all the effects under examination are separate and independent facts, and that each cause is connected with some one single effect. This, however, is not the case. A given effect may be produced by any one of several causes. Various causes may contribute to the production of a single effect. This is peculiarly important in reference to the method of agreement. If that method is applied to a small number of instances its value is small. For instance, other substances might produce soap by their combination besides oil and alkali, say, for instance, that the combination of A and B, and that of C and D would do so. Then, if there were two experiments as follows:
 - (1) oil and alkali, A and B, produce soap;
 - (2) oil and alkali, C and D, produce soap;

soap would be produced in each case, but whether by the combination of oil and alkali, or by the combination of A and B, or by that of C and D or by the combination of oil and alkali, with A, B, C, or D, would be altogether uncertain.

A watch is stolen from a place to which A, B and C only had access. Another watch is stolen from another place to which A, D and E only had access.

In each instance, A is one of the three persons, one of whom must have stolen the watch, but this is consistent with its having been stolen by any of the other persons mentioned.

19. Weakness of the method of agreement—how cured. This weakness of the method of agreement can be cured only by so great a multiplication of instances as to make it highly improbable that any other antecedent than the one present in every instance could have caused the effect present in every instance.

For the statement of the theory of chances and its bearing on the probability of events, those who wish to pursue the subject must refer to the many works which have been written upon it, but its general validity will be inferred by every one from the common observation of the life. If it was certain that either A or B, A or C, A or D, and so forth, up to A or Z, had committed one of a large number of successive thefts of the same kind, no one could doubt that A was the thief.

It is extremely difficult, in practice, to apply such a test as this, and the test when applied is peculiarly liable to error, as each separate alternative requires distinct proof. In the case supposed, for instance, it would be necessary to ascertain separately in each of the cases relied upon, first, that a theft had been committed; then that one of two persons must have committed it; and lastly, that in each case the evidence bore with equal weight upon each of them.

20. Intermixture of effects and interference of causes with each other. The intermixture of effects and the interference of causes with each other is a matter of much greater intricacy and difficulty.

It may take place in one of two ways, viz .-

- (1) "In the one, which is exemplified by the joint operation of different forces in mechanics, the separate effects of all the causes continue to be produced, but are compounded together, and disappear in one total."
- (2) "In the other, illustrated by the case of chemical action, the separate effects cease entirely and are succeeded by phenomena altogether different and governed by different laws."

In the second case, the inductive methods already stated may be applied, though it has difficulties of its own.

In the first case, i.e., where an effect is not the result of any one cause, but the result of several causes modifying each other's operation, the results cease to be separately discernible. Some cancel each other. Others merge in one sum, and in this case there is often an insurmountable difficulty in tracing by observation any fixed relation whatever between the causes and the effects. A body, for instance, is at rest. This may be the effect of the action of two opposite forces exactly counteracting each other, but how are such causes to be inferred from such an effect?

A balloon ascends into the air. This appears, if it is treated as an isolated phenomenon, to form an exception to the theory of gravitation. It is in reality an illustration of that theory, though several concomitant facts and independent theories must be understood and combined together before this can be ascertained.

The difficulty of applying the inductive methods to such cases arises from the fact that they assume the absence of the state of things supposed. The subsequent and antecedent phenomena must be assumed to be capable of specific and separate observation before it can be asserted that a given fact invariably follows another given fact, or that two sets of possible causes resemble each other in every particular with a single exception.

21. Deductive method. It is necessary for this reason to resort to the deductive method, the nature of which is as follows: A general proposition established by induction is used as a premiss from which consequences are drawn according to the rules of logic, as to what must follow under particular circumstances. The inference so drawn is compared with the facts

observed, and if the result observed agrees with the deduction from the inductive premiss, the inference is that the phenomenon is explained. The complete method, inductive and deductive, thus involves three steps,—

- (1) Establishing the premiss by induction, or what, in practice, comes to the same thing, by a previous deduction resting ultimately upon induction;
- (2) Reasoning according to the rules of logic to a conclusion;
- (3) Verification of the conclusion by observation.
- 22. Illustration. The whole process is illustrated by the discovery and proof of the identity of the central force of the solar system with the force of gravity as known on the earth's surface. The steps in it were as follows:
- (1) It was proved by deductions resting ultimately upon inductions that the earth attracts the moon with a force varying inversely as the square of the distance.

This is the first step, the establishment of the premiss by a process resting ultimately upon induction.

(2) The moon's distance from the earth, and the actual amount of her deflexion from the tangent being known, it was ascertained with what rapidity the earth's attraction would cause the moon to fall if she were no further off and no more acted upon by extraneous forces than terrestrial bodies are.

This is the second step, the reasoning regulated by the rules of logic.

(8) Finally, this calculated velocity being compared with the observed velocity with which all heavy bodies fall by mere gravity towards the surface of the earth (sixteen feet in the first second, forty-eight in the second, and so forth in the ratio of the odd numbers), the two quantities are found to agree.

This is the verification. The facts observed agree with the facts calculated; therefore the true principle of calculation has been taken.

This paraphrase, for it is no more, of Mr. Mill, is sufficient to show, in general, the nature of scientific investigation and the manner in which it aims at framing true propositions about matters of fact. It would be foreign to the present purpose to follow the subject further. Enough has been said to illustrate the general meaning of such words as "proof" and "evidence" in their application to scientific inquiry. Before inquiring into the application of these principles to judicial investigations, it will be convenient to compare the conditions under which judicial and scientific investigations are carried on.

23. Judicial and scientific inquiries compared—resemblances. In some essential points they resemble each other. Inquiries into matters of fact, of whatever kind and with whatever object, are, in all cases whatever, inquiries from the known to the unknown, from our present perceptions or our present recollection (which is in itself a present perception), of past perceptions, to

what we might perceive, or might have perceived, if we now were, or formerly had been, or hereafter should be favourably situated, for that purpose. They proceed upon the supposition that there is a general uniformity both in natural events and in human conduct; that all events are connected together as cause and effect; and that the process of applying this principle to particular cases and of specifying the manner in which it works, though a difficult and delicate operation, can be performed.

- 24. Differences. There are, however, several great differences between inquiries which are commonly called scientific inquiries, that is into the order and course of nature, and inquiries into isolated matters of fact, whether for judicial or historical purpose, or for the purposes of every-day life. These differences must be carefully observed before we can undertake with much advantage the task of applying to the one subject the principles which appear to be true.
- 25. First Difference as to amount of evidence. The first difference is, that, in reference to isolated events, we can never, or very seldom, perform experiments but are tied down to a fixed number of relevant facts which can never be increased.
- 26. In scientific inquiries unlimited. The great object of physical science is to invent general formulas (perhaps unfortunately called laws) which, when ascertained, sum up and enable us to understand the present, and predict the future course of nature. These laws are ultimately deduced by the method already described from individual facts; but any one fact of an infinite number will serve the purpose of a scientific inquirer as well as any other, and in many, perhaps in most, cases it is possible to arrange facts for the purpose. In order, for instance, to ascertain the force of terrestrial gravity, it was necessary to measure the time occupied by different bodies in falling through given spaces, and every such observation was an isolated fact. It, however, one experiment failed, or was interfered with, if an observation was inaccurate, or if a disturbing cause, as for instance, the resistance of the atmosphere had not been allowed for, nothing could be easier than to repeat the process; and inferences drawn from any one set off experiments were obviously as much to be trusted as inferences drawn from any other set. Thus, with regard to inquiries into physical nature, relevant facts can be multiplied to a practically unlimited extent, and it may, by the way, be observed that the case with which this has been assumed in all ages is a strong argument that the course of nature does impress mankind as being uniform under superficial variations. For many centuries before the modern discoveries in astronomy were made, the motions of the heavenly bodies were carefully observed and inferences as to their future course were founded upon those observations. Such observations would have been useless and unmeaning, but for the tacit assumption that what they had done in times past, they would continue to do for the future.
 - 27. In judicial inquiries limited. In inquiries into isolated events, this great resource is not available. Where the object is to decide what happened on a particular occasion, we can hardly ever draw inferences of any value from what happened, on similar occasions, because the groups of events which form the subject of historical or judicial inquiry are so intricate that it can scarcely ever be assumed that they will repeat, or that they have repeated,

themselves. If we wish to know what happened two thousand years ago, when specific quantities of oxygen and hydrogen were combined, under given circumstances, we can obtain complete certainty by repeating the experiment; but the whole course of human history must recur before we could witness a second assassination of Julius Caesar.

- 28. It cannot be increased. With reference to such events, we are tied down inexorably to certain limited amount of evidence. We know so much of the assassination of Caesar as has been told us by the historians, who are to us ultimate authorities, and we know no more. Their testimony must be taken subject to all the deductions which experience shows to be necessary in receiving as true, statement made by historical writers on subjects which interest their feelings, and upon the authority of materials which are no longer extant and therefore cannot be weighed or criticised. Unless, by some unforeseen accident, new materials on the subject should come to light, a few pages of general history will for ever comprise the whole amount of human knowledge upon this subject, and any doubts about it, whether they rise from inherent improbabilities in the story itself, from differences of detail in the different narratives, or from general considerations as to the untrustworthy character of historians writing on hearsay, and at a considerable distance of time from the events which they relate, are and must remain for ever, unsolved and insoluble.
 - 29. Object of scientific inquiries. Besides this difference as to the quantity of evidence accessible in scientific and historical inquiries, there is a great difference as to the objects to which the inquiries are directed. The object of inquiries into the course of nature is twofold,-the satisfaction of a form of curiosity, which to those who feel it at all, is one of the most powerful. and which happens also to be one of the most generally useful elements of human nature; and the attainment of practical results of very various kinds. Neither of these ends can be attained unless and until the problems stated by nature have been solved; partially, it may be but at all events truly, as far as the solution goes. On the other hand, there is no pressing or immediate necessity for their solution. Every scientific question is always open, and the answer to it may be discovered after vain attempts to discover it have been made for thousands of years, or an answer long accepted may be rejected and replaced by a better answer after an equally long period. In short, in scientific inquiries, absolute truth, or as near an approach to it as can be made is the one thing needful, and is the constant object of pursuit. So long as any part of his proof remains incomplete, so long as any one ascertained fact does not fit into and exemplify his theory, the scientific inquirer neither is. nor ought to be, satisfied. Until he has succeeded in excluding the possibility of error, he is bound, to the extent, at least of that possibility, to suspend his judgment.
 - 30. Object of judicial inquiries. In judicial inquiries the case is different. It is necessary for urgent practical purposes to arrive at a decision which, after a definite process has been gone through, becomes final and irreversible. It is obvious that, under these circumstances, the patient suspension of judgment, and the high standard of certainty required by scientific inquiries, cannot be expected. Judicial decisions must proceed upon imperfect materials and must be made at the risk of error.

- 31. Evidence in scientific inquiries trustworthy. Finally, inquiries into physical science have an additional advantage over those who conduct judicial inquiries, in the fact that the evidence before them, in so far as they have to depend upon oral evidence, is infinitely more trustworthy than that which is brought forward in Courts of Justice. The reasons of this are manifold. In the first place, the facts which a scientific observer has to report do not affect his passions. In the second place, his evidence about them is not taken at all unless his powers of observation have been more or less trained and can be depended upon. In the third place, he can hardly know what will be the inference from the fact which he observes until his observations have been combined with those of other persons, so that if he were otherwise disposed to misstate them, he would not know what misstatement would serve his purpose. In the fourth place, he knows that his observations will be confronted with others, so that if he is careless or inaccurate, and a fortiori, if he should be dishonest, he would be found out. In the fifth place, the class of facts which he observes are, generally speaking, simple, and he is usually provided with means specially arranged for the purpose of securing accurate observations, and a careful record of its results.
- 32. Evidence in judicial inquiries less trustworthy. The very opposite of all this is true as regards witnesses in a Court of Justice. The facts to which they testify are, as a rule, facts in which they are more or less interested, and which in many cases excite their strongest passions to the highest degree. The witnesses are very seldom trained to observe any facts or to express themselves with accuracy upon any subject. They know what the point at issue is, and how their evidence bears upon it, so that they can shape it according to the effect which they wish to produce. They are generally so situated that a large part, at least, of what they say is secure from contradiction, and the facts which they have to observe being in most instances portions of human conduct, are so intricate that even with the best intention on the part of the witness to speak the truth, he will generally be inaccurate and almost always incomplete, in his account of what occurred.
- 33. Advantages of judicial over scientific inquiries. So far it appears that our opportunities for investigating and proving the existence of isolated facts are much inferior to our opportunities for investigating and proving the formulas which are commonly called the laws of nature. There is, however, something to be said on the other side. Though the evidence available in judicial and historical inquiries is often scanty, and is always fixed in amount, and though the facts which form the subject of such inquiries are far more intricate than those which attract the inquirer into physical nature; though the judge and the historian can derive no light from experiments; though in a word, their apparatus for ascertaining the truth is far inferior to that of which physical inquirers dispose of the task which they have to perform is proportionally easier and less ambitious. It is attended, moreover, by some special facilities which are great helps in performing it satisfactorily.
- 34. Maxims more easily appreciated. The question whether it is in the nature of things possible that general formulas should ever be devised by the aid of which human conduct can be explained and predicted in the short specific manner in which physical phenomena are explained and predicted has been the subject of great discussion, and is not yet decided; but no one

doubts that approximate rules have been framed which are sufficiently precise to be of great service in estimating the probability of particular events. Whether or not any proposition as to human conduct can ever be enunciated, approaching in generality and accuracy to the proposition that the force of gravity varies inversely as the square of the distance, and one would feel disposed to deny that a recent possessor of stolen property who does not explain his possession is probably either the thief or a receiver; or that if a man refuses to produce a document in his possession, the contents of the document are probably unfavourable to him. In inquiries into isolated facts for practical purposes, such rules as these are nearly as useful as rules of greater generality and exactness, though they are of little service when the object is to interpret a series of facts either for practical or theoretical purposes. If, for instance, the question is whether a particular person committed a crime in the course of which he made use of water, knowledge of the facts that there was a pump in his garden, and that water can be drawn from a well by working the pump handle, is as useful as the most perfect knowledge of hydrostatics. But if the question were as to the means by which water could be supplied for a house and field during the year, considerable knowledge of the theory and practice of hydrostatics and of various other subjects might be necessary, and the more extensive the undertaking might be, the wider would be the knowledge required.

35. Their limitations easily perceived. To this it must be added that the approximate rules which relate to human conduct are warranted principally by each man's own experience of what passes in his own mind, corroborated by his observation of the conduct of other persons which every one is obliged to interpret upon the hypothesis that their mental processes are substantially similar to his own. Experience appears to show that the results given by this process are correct within narrower limits of error than might have been supposed, though the limits are wide enough to leave room for the exercise of a great amount of individual skill and judgment.

This circumstance invests the rules relating to human conduct with a very peculiar character. They are usually expressed with little precision, and stand in need of many exemptions and qualifications, but they are of greater practical use than rough generalisations of the same kind about physical nature, because the personal experience of those by whom they are used readily supplies the qualifications and exceptions which they require. Compare two such rules as these: 'heavy bodies fall to the ground.' 'the recent possessor of stolen goods is the thief'. The rise of a balloon into the air would constitute an unexplained exception to the first of these rules, which might throw doubt upon its truth, but no one would be led to doubt the second by the fact that a shop eeper doing a large trade had in his till stolen coins shortly after they had been stolen without having stolen them. Every one would see at once that such a case formed one of the many unstated exceptions to the rule. The reason is, that we know external nature only by observation of a neutral unsympathetic kind, whereas every man knows more of human nature than any general rule on the subject can ever tell him.

36. Judicial problems are simpler than scientific problems. To these considerations it must be added that to inquire whether an isolated fact exists,

- is a far simpler problem than to ascertain and prove the rule according to which facts of a given class happen. The enquiry falls within a smaller compass. The process is generally deductive. The deductions depend upon previous inductions, of which the truth is generally recognised, and which (at least in judicial inquiries) generally share in the advantage just noticed of appealing directly to the personal experience and sympathy of the Judge. The deductions, too, are, as a rule, of various kinds and so cross and check each other, and thus supply each other's deficiencies.
 - 37. Illustrations. For instance, from one series of facts it may be inferred that A had a strong motive to commit a crime, say the murder of B. From an independent set of facts, it may be inferred that B died of poison, and from another independent set of facts that A administered the poison of which B died. The question is whether A falls within the small class of murderers by poison. If he does, various propositions about him must be true, no two of which have any necessary connection, except upon the hypothesis that he is a murderer. In this case three such propositions are supposed to be true viz. (1) the death of B by poison, (2) the administration of it by A, and (3) the motive for its administration. Each separate proposition, as it is established, narrows the number of possible hypotheses upon the subject. When it is established that B died of poison, innumerable hypotheses which would explain the fact of his death consistently with A's innocence are excluded, when it is proved that A administered the poison of which B died, every supposition, consistent with A's innocence, except those of accident, justification, and the like, are excluded: when it is shown that A had a motive for administering the poison, the difficulty of establishing any one of these hypotheses, e.g., accident, largely increases, and the number of suppositions consistent with innocence is narrowed in a corresponding degree.
 - 38. In judicial inquiries parties interested have opportunities to be heard. This suggests another remark of the highest importance in estimating real weight of judicial inquiries. It is that such inquiries in all civilised countries are, or at least ought to be, conducted in such a manner as to give every person interested in the result the fullest possible opportunity of establishing the conclusion which he wishes to establish. In the illustration just given A would have at once the strongest motive to explain the fact that he had administered the poison to B and every opportunity to do so. Hence, if he failed to do it, he would either be a murderer or else a member of that infinitesimally small class of persons who, having a motive to commit murder, and having administered poison to the person whom they have a motive to murder, are unable to suggest any probable reason for supposing that they did administer it innocently.
 - 39. Summary of results. The results of the foregoing inquiry may be shortly summed up as follows:
 - I. The problem of discovering the truth in relation to matters which are judicially investigated is a part of the general problem of science—the discovery of true propositions as to matters of fact.
 - II. The general solution of this problem is contained in the rule of induction and deduction stated by Mr. Mill, and generally employed for

the purpose of conducting and testing the results of inquiries into physical nature.

- III. By the due application of these rules, facts may be exhibited as standing towards each other in the relation of cause and effect, and we are able to argue from the cause to the effect and from the effect to the cause with a degree of certainty and precision proportionate to the completeness with which the relevant facts have been observed or are accessible.
- IV. The leading differences between judicial investigation and inquiries into physical nature are as follows:
- In physical inquiries the number of relevant facts is generally unlimited, and is capable of indefinite increase by experiments.

In judicial investigations the number of relevant facts is limited by circumstances, and is incapable of being increased.

2. Physical inquiries can be prolonged for any time that may be required in order to obtain full proof of the conclusion reached, and when a conclusion has been reached, it is always liable to review if fresh facts are discovered, or if any objection is made to the process by which it was arrived at.

In judicial investigation it is necessary to arrive at a definite result in limited time and when that result is arrived at it is final and irreversible with exceptions too rare to require notice.

3. In physical inquiries the relevant facts are usually established by testimony open to no doubt, because they relate to simple facts which do not affect the persons, which are observed by trained observers who are exposed to detection if they make mistakes, and who could not tell the effect of misrepresentation, if they were disposed to be fraudulent.

In judicial inquiries the relevant facts are generally complex. They affect the passions in the highest degree. They are testified to by untrained observers who are generally not open to contradiction, and are aware of the bearing of the facts which they allege upon the conclusion to be established.

- 4. On the other hand, approximate generalizations are more useful in judicial than they are in scientific inquiries, because in the case of judicial inquiries every man's individual experience supplies the qualifications and exceptions necessary to adjust general rules to particular facts, which is not the case in regard to scientific inquiries.
- 5. Judicial inquiries being limited in extent, the process of reaching as good a conclusion as is to be got of the materials is far easier than the process of establishing a scientific conclusion with complete certainty, though the conclusion arrived at is less satisfactory.
- 40. Judicial inquiries usually produce only a very high degree of probability. It follows from what precedes that the utmost result that can, in any case, be produced by judicial evidence is a very high degree of probabil-

ity. Whether upon any subject whatever more than this is possible-whether the highest form of scientific proof amounts to more than an assertion that a certain order in nature has hitherto been observed to take place, and that if that order continues to take place such and such events will happen, are questions which have been much discussed, but which lie beyond the sphere of the present inquiry. However this may be, the reasons given above show why Courts of Justice have to be contented with a lower degree of probability than is rightly demanded in scientific investigation. The highest probability at which a Court of Justice can under ordinary circumstances arrive is the probability that a witness or a set of witnesses affirming the existence of a fact which they say they perceived by their own senses, and upon which they could not be mistaken, tell the truth. It is difficult to measure the value of such a probability against those which the theories of physical inquirers produce, nor would it serve any practical purpose to attempt to do so. It is enough to say that the process by which a comparatively low degree of probability is shown to exist in the one case is identical in principle with that by which a much higher degree of probability is shown to exist in the other case.

- 41. Degrees of probability-moral certainty. The degrees of probability attainable in scientific and in judicial inquiries are infinite, and do not admit of exact measurement or description. Cases might easily be mentioned in which the degree of probability obtained in either is so high, that if there is any degree of knowledge higher in kind than the knowledge of probabilities, it is impossible for any practical purpose to distinguish between the two. Whether any higher degree of assurance is conceivable than that which may easily be obtained of the facts that the earth revolves round the sun, and that Delhi was besieged and taken by the English in 1857, is a question which does not belong to this inquiry. For all practical purposes, such conclusions as these may be described as absolutely certain. From these down to the faintest guess about the inhabitants of the stars, and the faintest suspicion that a particular person has committed a crime, there is a descending scale of probabilities which does not admit of any but a very rough measurement for practical purposes. The only point in it worth noticing is what is commonly called moral rertainty, and this means simply such a degree of probability as a prudent man would act upon under the circumstances in which he happens to be placed in reference to the matter of which he is said to be morally certain.
- 42. Moral certainty is a question of prudence. What constitutes moral certainty is thus a question of prudence, and not a question of calculation. It is commonly said in reference to judicial inquiries that in criminal cases guilt ought to be proved "beyond all reasonable doubt," and that in civil cases the decision ought to be in favour of the side which is most probably right. To the latter part of this rule there is no objection, though it should be added that it cannot be applied absolutely without reserve. For instance, a civil case in which character is at stake partakes more or less of the nature of a criminal proceeding; but the first part of the rule means nothing more than that in most cases the punishment of an innocent man is a great evil and ought to be carefully avoided; but that, on the other hand, it is often impossible to eliminate an appreciable though undefinable degree of uncertainty from the decision that a man is guilty. The danger of punishing the innocent is marked by the use of the expression "no doubt", the necessity of running some degree of risk of doing so in certain cases is intimated by the word "rea-

sonable". The question, what sort of doubt is "reasonable" in Criminal cases is a question of prudence. Hardly any case ever occurs in which it is not possible for an ingenious person to suggest hypotheses consistent with the prisoner's innocence. The hypotheses of falsehood on the part of the witnesses can never be said to be more than highly improbable.

- 43. Principle of estimating probabilities is that of Mr. Mill's methods of difference. Though it is impossible to invent any rule by which different probabilities can be precisely valued, it is always possible to say whether or not they fulfil the conditions of what Mr. Mill describes as the method of difference; and if not, how nearly they approach to fulfilling it. The principle is precisely the same in all cases, however complicated or however simple, and whether the nature of the enquiry is scientific or judicial. In all cases the known facts must be arranged and classified with reference to the different hypotheses, or unknown or suspected facts, by which the existence of the known facts can be accounted for. If every hypothesis except one is inconsistent with one or more of the known facts, that one hypothesis is proved. If more than one hypothesis is consistent with the known facts, but one only is reasonably probable-that is to say, if one only is in accordance with the common course of events, that one in judicial inquiries may be said to be proved "beyond all reasonable doubt," The word "reasonable" in this sentence denotes a fluctuating and uncertain quantity of probability (if the expression may be allowed), and shows that the ultimate question in judicial proceedings is and must be in most cases a question of prudence.
- 44. Illustration. Let the question be whether A did a certain act; the circumstances are such that the act must have been done by somebody, but it can have been done only by A or by B. If A and B are equally likely to have done the act, the matter cannot be carried further, and the question—Who did it?—must remain undecided. But if the act must have been done by one person, if it required great physical strength, and if A is an exceedingly powerful man and B a child, it may be said to be proved that A did it. If A is stronger than B, but the disproportion between their strength is less, it is probable that A did it, but not impossible that B may have done it, and so on. In such a case as this a nearer approach than usual to a distinct measurement of the probability is possible, but no complete and definite statement on the subject can be made.
- 45. Judicial inquiries involve two classes of inferences. Such being the general nature of the object towards which judicial inquiries are directed, and the general nature of the process by which they are carried on, it will be well to examine the chief forms of that process somewhat more particularly.

It will be found upon examination that the inferences employed in judicial inquiries tall under two heads:

- (1) Inferences from an assertion, whether oral or documentary, to the truth of the matter asserted.
- (2) Inferences from facts which, upon the strength of such assertions, are believed to exist to facts of which the existence has not been so asserted.

For the sake of simplicity, I do not here distinguish various subordinate classes of inferences, such as inferences from the manner in which assertions are made, from silence, from the absence of assertion, and from the conduct of the parties. They may be regarded as so many forms of assertion, and may therefore be classed under the general head of inferences from an assertion to the truth of the matter asserted.

46. Direct and circumstantial evidence. This is the distinction usually expressed by saying that all evidence is either direct or circumstantial. I avoid the use of this expression, partly because, as I have already observed, direct evidence means direct assertion, whereas circumstantial evidence means a fact on which an inference is to be founded, and partly for the more important reason that the use of the expression favours an unfounded notion that the principles on which the two classes of inference depend are different, and that they have different degrees of cogency, which admit of comparison. The truth is that each inference depends upon precisely the same general theory, though somewhat different considerations apply to the investigation of cases in which the facts testified to are few.

The general theory has been already stated. In every case the question is, are the known facts inconsistent with any other than the conclusion suggested? The known facts in every case whatever are the evidence in the narrower sense of the word. The Judge hears with his own ears the statements of the witnesses and sees with his own eyes the documents produced in Court. His task is to infer, from what he thus sees and hears, the existence of facts which he neither sees nor hears.

- 47. Illustration. Let the question be whether a will was executed. Three witnesses, entirely above suspicion, come and testify that they witnessed its execution. These assertions are facts which the judge hears for himself. Now there are three possible suppositions, and no more, which the Judge has to consider in proceeding from the known fact, the assertion of the witnesses that they saw the will executed, to the fact to be proved—the actual execution of the will:
 - (1) The witnesses may be speaking the truth.
 - (2) The witnesses may be mistaken.
 - (3) The witnesses may be telling a falsehood.

The circumstances may be such as to render suppositions (2) and (3) improbable in the highest degree, and generally speaking they would be so. In such a case the first hypothesis, i.e. that the will really was executed as illeged would be proved. The facts before the Judge would be inconsistent with any other reasonable hypothesis except that of the execution of the will. This would be commonly called a case of direct evidence.

48. Identity of this process with Mr. Mill's theory. Let this question be whether A committed a crime. The facts which the Judge actually knows

are that certain witnesses made before him a variety of statements which he believes to be true. The result of these statements is to establish certain facts which show that either A or B or C must have committed the crime, and that neither B nor C did commit it. In this case the facts before the Judge would be inconsistent with any other reasonable hypothesis except that A committed the crime. This would be commonly called a case of circumstantial evidence; yet it is obvious that the principle on which the investigation proceeds as in the last case is identically the same. The only difference is in the number of inferences, but no new principle is introduced.

It is also clear that each case is identical in principle with the method of difference as explained by Mr. Mill.

Mr. Mill's illustration of the application of that method to the motions of the planets is as follows: The planets with a central force give areas proportional to the times. The planets without a central force give a different set of motions: but areas proportional to the times are observed. Therefore there is a central force.

Similarly in the cases suggested, the assertions of the witnesses give the execution of a will, i.e., no other cause can account for those assertions having been made. If the will had not been executed these assertions would not have been made. But the assertions were made, Therefore the will was executed.

Though inferences from an assertion to its truth, and inferences from facts taken as true to other facts not asserted to be true rest upon the same principle, each inference has its peculiarities.

49. Inference from assertion to matter asserted. The inference from the assertion to the truth of the matter asserted is usually regarded as an easy matter calling for little remark.

Though in particular cases it is really easy, and though in a certain sense it is always easy, to deal with, it rightly is by far the most difficult task which falls to the lot of a Judge and miscarriages of justice are almost invariably caused by dealing with it wrongly. This requires full explanation.

To infer from an assertion the truth of the matter asserted is in one sense the easiest thing in the world. The intellectual process consists of only one step, and that is a step which gives no trouble, and is taken in most cases unconsciously. But to draw the inference in those cases only in which it is true is a matter of the utmost difficulty. If we were able to affirm the proposition, "All men upon all occasions speak the truth" the remaining proposition,—"This man says so and so," "Therefore it is true," would present no difficulty. The major premiss, however, is subject to wide exceptions, which are not forced upon the Judge's attention. Moreover, if they were, the Judge has often no means of ascertaining whether or not and to what extent, they apply to any particular case.

50. Its difficulties. How is it possible to tell how far the powers of observation and memory of a man seen once for a few minutes enable him.

and how far the innumerable motives by any one or more of which he may be actuated dispose him, to tell the truth upon the matter on which he testifies? Cross-examination supplies a test to a certain extent, but those who have seen most of its application will be disposed to trust it least as a proof that a man not shaken by it ought to be believed. A cool, steady liar who happens not to be open to contradiction will baffle the most skilful cross-examiner in the absence of accidents which are not so common in practice as persons who take their notions on the subject from anecdotes or fiction would suppose.

- 51. Cannot be affected by rules of evidence. No rules of evidence which the legislator can enact can perceptibly affect this difficulty. Judges must deal with it as well as they can by the use of their natural faculties and acquired experience, and the miscarriages of justice in which they will be involved by reason of it must be set down to the imperfection of our means of arriving at truth. The natural and acquired shrewdness and experience by which an observant man forms an opinion as to whether a witness is or is not lying, is by far the most important of all a Judge's qualifications, infinitely more important than any acquaintance with law or with rules of evidence. No trial ever occurs in which the exercise of this faculty is not required; but it is only in exceptional cases that questions arise which present any legal difficulty or in which it is necessary to exercise any particular ingenuity in putting together the different facts which the evidence tends to establish. This preeminently important power for a Judge is not to be learnt out of books. In so far as it can be acquired at all, it is to be acquired only by experience, for the acquisition of which the position of a Judge is by no means peculiarly favourable. People come before him with their cases ready prepared, and give the evidence which they have determined to give. Unless he knows them in their unrestrained and familiar moments he will have great difficulty in finding any good reason for believing one man rather than another. The rules of evidence may provide tests, the value of which have been proved by long experience, by which Judges may be satisfied that the quality of the materials upon which their judgments are to proceed is not open to certain obvious objections: but they do not profess to enable the Judges to know whether or not a particular witness tells the truth or what inference is to be drawn from a particular act. The correctness with which this is done must depend upon the natural sagacity, the logical power and the practical experience of the Judge, not upon his acquaintance with the law of evidence.
- 52. Grounds for believing and disbelieving a witness. The grounds for believing or disbelieving particular statements made by particular people under particular circumstances, may be brought under three heads,—those which affect the power of the witness to speak the truth; those which affect his will to do so; and those which arise from the nature of the statement itself and from surrounding circumstances.
- (a) Power. A man's power to speak the truth depends upon his know-ledge and his power of expression. This knowledge depends partly on his accuracy in observation, partly on his memory, partly on his presence of mind; his power of expression depends upon an infinite number of circumstances and varies in relation to the subject of which he has to speak.
- (b) Will. A man's will to speak the truth depends upon his education, his character, his courage, his sense of duty, his relation to the particular facts

as to which he is to testify, his humour for the moment, and a thousand other circumstances as to the presence or absence of which in any particular case it is often difficult to form a true opinion.

(c) Probability of statement. The third set of reasons are those which depend upon the probability of the statement.

Many discussions have taken place on the effect of the improbability of a statement upon its credibility in cases which can never fall under judicial consideration. It is unnecessary to enter upon that subject here. Looking at the matter merely in relation to judicial inquiries, it is sufficient to observe that whilst the improbability of a statement is always a reason, and may be, in practice, a conclusive reason, for disbelieving it, its probability is a poor reason for believing if it rests upon uncorroborated testimony. Probable falsehoods are those which an artful liar naturally tells; and the fact that a good opportunity for telling such a falsehood occurs is the commonest of all reasons for its being told.

- 53. Experience is the only guide on the subject. Upon the whole it must be admitted that little, that is really serviceable, can be said upon the inference from an assertion to the truth of the matter asserted. The observations of which the matter admits are either generalities too vague to be of much practical use, or they are so narrow and special that they can be learnt only by personal observations and practical experience. Such observations are seldom, if ever, thrown by those who make them into the form of express proposition. Indeed, for obvious reasons, it would be impossible to do so. The most acute observer would never be able to catalogue the tones of voice, the passing shades of expression or the unconscious gestures which he had learnt to associate with falsehood and if he did, his observations would probably be of little use to others. Everyone must learn matter of this sort for himself, and though no sort of knowledge is so important to a Judge, no rules can be laid for its acquisition.²⁸
 - 23. I may give a few anecdotes which have no particular value in themselves, but which show what I mean. "I always used to look at the witnesses' toes when I was cross-examining them," said a friend of mine who had practised at the bar in Ceylon. "As soon as they began to lie they always fidgeted about with them," I know a Judge who formed the opinion that a letter had been forged because the expression "that woman" which it contained appeared to him to be one which a woman and not a man would use, and the question was whether the letter in question had been forged by a woman. In the life of Lord Keeper Guilford it is said that he always acted on the principle that a man was to be believed in what he said when he was in a passion. The common places

about the evidence of police-men, children, women, and the natives of particular countries belongs to this subject. The only remark I feel inclined to add to what is commonly said on it is that according to my observation, the power to tell the truth, which implies accurate observation, knowledge of the relative importance of facts and power of description, properly proportioned to each other, is much less common than people usually suppose it to be It is extremely difficult for an untrained person not to mix up inference and assertion. It is also difficult for such a person to distinguish between what they themselves saw and heard, and what they were told by others, unless their attention is specially directed to the distinction.

54. Illustration. If the opinion here advanced appears strange, I would invite attention to the following illustration: Is there any class of cases in which it is in practice, so difficult to come to a satisfactory decision as those which depend upon the explicit, direct testimony of a single witness uncorroborated, and, by the nature of the case, incapable of corroboration? For instance, a man and a woman are travelling alone in a railway carriage. The train stops at a station and the woman charges the man with indecent conduct which he denies. Nothing particular is known about the character of previous history of either. The woman is not betrayed on cross-examination into any inconsistency. There are no cases in which the difficulty of arriving at a satisfactory decision is anything like so great. It is easy to decide them as it is easy to make a bet, but it is easier to deal satisfactorily with the most complicated and lengthy chain of inference.

The uncertainty of inferences from an assertion to the truth of the matter asserted may be shown by stating them logically. They may be considered as being the conclusion of syllogisms in this form:

All men situated in such and such a manner speak the truth or speak falsely (as the case may be).

A B, situated in such and such a manner, says so and so

Therefore, in saying so and so, he speaks truly or falsely (as the case may be).

This is a deduction resting on a previous induction, and it is obvious that the induction which furnishes the major premiss must always be exceedingly imperfect, and that the truth of the minor premiss, which is essential to the deduction, is always more or less conjectural.

- 55. Inference from facts proved to facts not otherwise proved. In many cases the defects of inferences of the first kind may be incidentally remedied by inferences of the second kind, namely, inferences from facts which are asserted, and, on the ground of such assertion, believed by the Court to exist, to facts not asserted to exist.
- 56. Inference from assertion to truth sometimes really easy. The inference from an assertion to the truth of the matter asserted often is as easy as it always appears to be. In very many instances, which it is much easier to recognise when they occur than to reduce to rule, a direct assertion, even by a single witness of whom little is known, is entitled to great weight. Suppose for instance, that the matter asserted is of a character indifferent in itself and upon which the witness is, or for aught he can tell may be, open to contradiction. A single assertion of this sort may outweigh a mass of artfully combined falsehood. Suppose for instance, that a number of witnesses have been called to prove an alibi and that they allege that on a given day they were all present together with the person on behalf of whom the alibi is to be proved at a fair held at a certain place. If the Magistrate of the district, whose duty it was to superintend the fair, were to depose that it did not begin to be held till a day subsequent to the one in question, no one would doubt that the witnesses had conspired together to give false evidence by the familiar

trick of changing the day. In this case one direct assertion would outweigh many direct assertions. Why? Because the Magistrate of the district would be a man of character and position: because he would (we must assume) be quite indifferent to the particular case in issue; because he would be deposing to a fact of which it would be his official duty to be cognizant and on which he could hardly be mistaken; and lastly, because the fact would be known to a vast number of people and he would be open to contradiction, detection, and ruin if he spoke falsely. Change in these circumstances and the equally explicit testimony of very same man might be worthless. Suppose, for instance, that he was asked whether he had committed adultery? His denial would carry hardly any weight in any conceivable case, inasmuch as the charge is one which a guilty man would always deny, and an innocent man could do no more. In other words, since the course of conduct supposed is one which a man would certainly take whether he were innocent or not, the fact of his taking it would afford no criterion as to his guilt or innocence.

Now in almost all judicial proceedings a certain number of facts are established by direct assertions made under such circumstances that no one would seriously doubt their truth. Others are rendered probable in various degrees and thus the judge is furnished with facts which he may use as a basis for his inference as to the existence of other facts which are either not asserted to exist, or are asserted to exist by unsatisfactory witnesses.

- 57. Such inference comparatively easy. These inferences are generally considered to be more difficult to draw than the inference from an assertion to the matter asserted. In fact it is far easier to combine materials supposed to be sound than to ascertain that they are sound. In the one case no rules for the Judge's guidance can be laid down. No process is gone through, the correctness of which can afterwards be independently tested. The Judge has nothing to trust to but his own natural and acquired sagacity. In the other case, all that is required is to go through a process with which, as Mr. Huxley remarks, everyone has a general superficial acquaintance tested by every day practice, and the theory of which it is easy to understand and interesting to follow out and apply.
- 58. Facts must fulfil test of Method of Difference. The facts supposed to be proved must ultimately fulfil the condition of the Method of Difference, but they may be combined by any of the recognised logical methods or by a combination of them all. The object, indeed, at which they are all directed is the same, though they reach it by different roads. A few illustrations will make this plain. The question is whether A has embezzled a small sum of money, say a particular rupee which he received on account of his employer and did not enter in a book in which he ought to have entered it? His defence is that the omission to make the entry was accidental. The account book is examined and it is found that in a long series of instances omissions of small sums have been made, each of which omissions is in A's favour. This, in the absence of explanation, would leave no reasonable doubt of A's guilt in each and every case. It would be practically impossible to account for such facts except upon the assumption of systematic fraud. Logically, this is an instance of the Method of Agreement applied to so great a number of instances as to exclude the operation of chance. When, however, this is done, the Method of Agreement becomes a case of the Method of Difference.

59. Converging probabilities. The well-known cases in which guilt is inferred from a number of separate, independent, and, so to speak, converging probabilities, may be regarded as an illustration of the same principle. Their general type is as follows:

B was murdered by someone.

Whoever murdered B had a motive for his murder.

A had a motive for murdering B.

Whoever murdered B had an opportunity for murdering B.

A had an opportunity for murdering B.

Whoever murdered B made preparations for the murder of B.

A acted in a manner which might amount to a preparation for murdering B.

In each of these instances, which might of course be indefinitely multiplied, one item of agreement is established between the ascertained fact that B was murdered and the hypothesis that A murdered him, and it does sometimes happen that this coincidence may be multiplied to such an extent and may be of such a character as to exclude the supposition of chance, and justify the inference that A was guilty.²⁴ The case, however is a rare one, and there is always a great risk of injustice unless the facts proved go beyond the mere multiplication of circumstances separately indicating guilt, and amount to a substantial exclusion of every reasonable possibility of innocence.

- 60. Illustration. The celebrated passage in Lord Macaulay's Essays in which he seeks to prove that Sir Phillips Francis was the author of Junius's letters, is an instance, of an argument of this kind. The letters, he says, show that five facts can be predicated of Junius, whoever he may have been. But these five facts may also be predicated of Sir Phillips Francis and no other. Whether any part of this argument can in fact be sustained, is a question to which it would be impertinent to refer here, but that the method on which it proceeds is legitimate there can be no doubt.
- 61. Rules as to corpus delicti. The cases in which it is most probable that injustice will be done by the application of the method of agreement to judicial inquiries are those in which the existence of the principal fact has to be inferred from circumstances pointing to it. This is the foundation of the well-known rule that the corpus delicti should not in general, in criminal cases be inferred from other facts, but should be proved independently. It has been sometimes narrowed to the proposition that no one should be convicted of murder unless the body of the murdered person has been discovered. Neither of these rules is more than a rough and partial application of the

See Richardson's case, p. 64 of Sir James Fizjames Stephen's Introduc-

general principle stated above. If the circumstances are such as to make it morally certain (within the definition given above) that a crime has been committed, the inference that it was so committed is as safe as any other such inference.

62. Illustrations. The captain of a ship, a thousand miles from any land, and with no other vessel in sight, is seen to run into his cabin, pursued by several mutinous sailors. The noise of a struggle and a splash are heard. The sailors soon afterwards come out of the cabin and take the command of the vessel. The cabin windows are opened. The cabin is in confusion, and the captain is never seen or heard of again.

A person looks at his watch and returns it to his pocket. Immediately afterwards a man comes past, and makes a snatch at the watch, which disappears. The man being pursued, runs away and swims across a river; he is arrested on the other side. He has no watch in his possession and the watch is never found.

In these cases, it is morally certain that murder and theft respectively were committed, though in the first case the body, and in the second the watch is not producible.

63. Existence of corpus delicti sometimes wrongly inferred. Cases, however, do undoubtedly occur in which the inference that a crime has been committed at all, is incorrect. They may often be resolved into a case of begging the question. The process is this: suspicion that a crime has been committed is excited, upon inquiry a number of circumstances are discovered, which if it is assumed that a crime has been committed, are suspicious, but which are not suspicious unless the assumption is made.

A ship is cast away under such circumstances that her loss may be accounted for either by fraud or by accident. The captain is tried for making away with her. A variety of circumstances exist which would indicate preparation and expectation on his part if the ship really was made away with, but which would justify no suspicion at all if she was not. It is manifestly illogical first to regard the antecedent circumstances as suspicious because the loss of the ship is assumed to be fraudulent, and next to inter that the ship was fraudulent destroyed from the suspicious character of the antecedent circumstances. This, however, is a fallacy of very common occurrence both in judicial proceedings and common life.²⁵

The modes in which facts may be so combined as to exclude every hypothesis other than the one which it is intended to establish are very numerous, and are, I think, better learnt from specific illustrations and from actual practice than from abstract theories. One of the objects of the illustrations given in the next chapter is to enable students to understand this matter.

 An illustration of this form of error occurred in the case of R. v. Steward, and two others, who were convicted at Singapore in 1867 for casting away the Schooner, Erin and subsequently received a free pardon on the ground of their innocence.

- 64. Summary of conclusions. The result of the foregoing inquiries may be summed up as follows:
- I. In judicial inquiries the facts which form the materials for the decision of the court are the facts that certain persons assert certain things under certain circumstances. These facts the Judge hears with his own ears. He also sees with his own eyes documents and other things respecting which he hears certain assertions.

II. His task is to infer-

- (1) from what he himself hears and sees the existence of the facts asserted to exist;
- (2) from the facts which on the strength of such assertion he believes to exist other facts which are not so asserted to exist.
- III. Each of these inferences is an inference from the effect to the cause, and each ought to conform to the Method of Difference, that is to say, the circumstances in each case should be such that the effect is inconsistent (subject to the limitations contained in the following paragraphs) with the existence of any other cause for it than the cause of which the existence is proposed to be proved.
- IV. The highest results of judicial investigation must generally be, for the reasons already given, to show that certain conclusions are more or less probable.
- V. The question—what degree of probability is it necessary to show, in order to warrant a judicial decision in a given case is a question not of logic, but of prudence, and is identical with the question: "What risk of error is it wise to run, regard being had to the consequence of error in either direction?"
- VI. This degree of probability varies in different cases to an extent which cannot be strictly defined, but wherever it exists it may be called moral certainty.

CHAPTER IV

THE THEORY OF RELEVANCY WITH ILLUSTRATIONS

SYNOPSIS

connection of Relevancy means events as cause and effect.

Objections.

3. Answer.

4. Traceable influence of causes on effects narrow.

5. Rule as to cause and effect true, subject to caution that every step in the connection must be made

6. Illustrations.

7. Obscurity of this definition. 8. Importance of these sections.

9. Illustrations-

(a) Case of R. v. Donellan, (b) Case of R. v. Belancy. Remarks in cases of Donellan

- Belanev.
- 11. Case of R. v. Richardson.
- 12. Case of R. v. Patch.

- 13. Case of R. v. Palmer.14. Irrelevant facts:
 (a) What facts are irrelevant. (b) Facts apparently relevant.
- 15. Reason for exclusion of hearsay.

16.

- Effect of section 165. 18.
- 18. Unconnected transactions.19. Exclusion of evidence of opinion. 20. Exception to rules as to irrelevancy.

21. Admissions.

22. Confessions.

- 23. Statements by witness who cannot be called.
- 24. Statements under special circumstances.
- Judgments in other cases.

Opinions.

- 27. Character, when important.
- 1. Relevancy means connection of events as cause and effect. An intelligence of sufficient capacity might perhaps be able to conceive of all events as standing to each other in the relation of cause and effect; and though the most powerful of human minds are unequal to efforts which fall infinitely short of this, it is possible not only to trace the connection between cause and effect both in regard to human conduct and in regard to inanimate matter, to very considerable length, but to see that numerous events are connected together, although the precise nature of the links which connect them may not be open to observation. The connection may be traced in either direction, from effect to cause or from cause to effect; and if these two words were taken in their widest acceptation, it would be correct to say that when any theory has been formed which alleges the existence of any fact, all facts are relevant which, if that theory was true, would stand to the fact alleged to exist either in the relation of cause or in the relation of effect.
- 2. Objections. It may be said that this theory would extend the limits of relevancy beyond all reasonable bounds, inasmuch as all events whatever are or may be more or less remotely connected by the universal chain of cause and effect, so that the theory of gravitation would, upon this principle, be relevant, wherever one of the facts in issue involved the falling of an object to the ground.
- 3. Answer. The answer to this objection is, that while, general causes, which apply to all occurrences, are, in most cases, admitted, and do not require proof; but no doubt if their application to the matter in question were doubtful or were misunderstood, it might be necessary to investigate them. For instance, suppose that in an action for infringing a patent, the

defence set up was that the patent was invalid, because the invention had been anticipated by someone who preceded the patentee. The issue might be whether an earlier machine was substantially the same as the patentee's machine. All the facts, therefore, which went to make up each machine would be facts in issue. But each machine would be constructed with reference to the general formulae called laws of nature and thus the existence of an alleged law of nature might well become not merely relevant, but a fact in issue. If the first inventor of barometers had taken out a patent, and had to defend its validity, the variation of atmospheric pressure, according to the height of a column of air, and the fact that air has weight, might have been facts in issue.

- 4. Traceable influence of causes on effects narrow. With regard to the remark that all events are connected together more or less remotely as cause and effect it is to be observed that though this is or may be true, it is equally true that the limit within which the influence of causes upon effects can be perceived is generally very narrow. A knife is used to commit a murder, and it is notched and stained with blood in the process. The knife is carefully washed, the water is thrown away, and the notch in the blade is ground out. It is obvious that, unless each link in this chain of cause and effect could be separately proved it would be impossible to trace the connection between the knife cleaned and ground and the purpose for which it had been used. On the other hand if the first step—the fact that the knife was bloody at a given time and place—was proved, there would be no use in inquiring into the further effects produced by that fact, such as the staining of the water in which it was washed, the infinitesimal effects produced on the river into which the water was thrown and so forth.
- 5. Rule as to cause and effect true, subject to caution that every step in the connection must be made out. The rule, therefore, that facts may be regarded as relevant which can be shown to stand either in the relation of cause or in the relation of effect to the fact to which they are said to be relevant, may be accepted as true, subject to caution that when an inference is to be founded upon the existence of such a connection, every step by which the connection is made out must either be proved or be so probable under the circumstances of the case that it may be presumed without proof.
- 6. Illustrations. Footmarks are found near the scene of a crime. The circumstances are such that they may be presumed to be the foot-marks made by the criminal. These marks correspond precisely with a pair of shoes found on the feet of the accused. The presumption founded upon common experience, though its force may vary indefinitely, is that no two pairs of shoes would make precisely the same marks. It may further be presumed, though this presumption is by no means conclusive, that shoes were worn by the owner on a given occasion. Here the steps are as follows:
 - The person who committed the crime probably made those marks by pressing the shoes which he wore on the ground.
 - (2) The person who committed the crime probably wore his own shoes.
 - (3) The shoes so pressed were probably those shoes.

(4) These shoes are A B's shoes.

Therefore A B probably made those marks with those shoes.

Therefore A B probably committed the crime.

These facts may be exhibited in the relation of cause and effect thus-

- (1) A's owning the shoes was the cause of his wearing them.
- (2) His wearing them at a given place and time caused the marks.
- (3) The marks were caused by the flight of the criminal.
- (4) The flight of the criminal was caused by the commission of the crime.
- (5) Therefore the marks were caused by the flight of A, the criminal. after committing the crime.
- 7. Obscurity of this definition. Though this mode of describing relevancy might be correct it would not be readily understood. For instance, it might be asked, how is an alibi relevant under this definition. The answer is, that a man's absence from a given place at a given time is a cause of his not having done a given act at that place and time. This mode of using language would, however, be obscure, and it was for this reason that relevancy was very fully defined in the Evidence Act (Sections 6-11 both inclusive). These sections enumerate specifically the different instances of the connection between cause and effect which occur most frequently in judicial proceedings. They are designedly worded very widely, and in such a way as to overlap each other. Thus, a motive for a fact in issue (Section 8) is part of its cause (Section 7). Subsequent conduct influenced by it (Section 8) is part of its effect (Section 7). Facts relevant under Section 11 would, in most cases, be relevant under other sections. The object of drawing the Act in this manner was that the general ground on which facts are relevant might be stated in as many and as popular forms as possible, so that if a fact is relevant, its relevancy must be easily ascertained.
 - 8. Importance of these sections. These sections are by far the most important, as they are the most original part of the Evidence Act, as they affirm positively what facts may be proved whereas the English law assumes this to be known, and merely declares negatively that certain facts shall not be proved.

Important as these sections are for purposes of study, and in order to make the whole body of law to which they belong easily intelligible to students and practitioners not trained in English Courts, they are not likely to give rise

to litigation or to nice distinction. The reason is that Section 167 of the Evidence Act, which was formerly Section 57 of Act II of 1855, renders it practically a matter of little importance whether evidence of a particular fact is admitted or not. The extreme intricacy and minuteness of the law of England on this subject is principally due to the fact that the improper admission or rejection of a single question and answer would give a right to a new trial in a civil case, and would upon a criminal trial be sufficient ground for the quashing of a conviction before the court for Crown cases reserved.

The improper admission or rejection of evidence in India has no effect at all unless the Court thinks that the evidence improperly dealt with either turned or ought to have turned the scale. A Judge, moreover, if he doubts as to the relevancy of a fact suggested, can, if he thinks it will lead to anything relevant, ask about it himself under Section 165.

- 9. Illustrations. In order to exhibit fully the meaning of these sections, to show how the Act was intended to be worked and to furnish students with models by which they may be guided in the discharge of the most important of their duties, abstracts of the evidence given at the following remarkable trials are appended:
 - 1. R. v. Donellan.
 - 2. R. v. Belaney.
 - 3. R. v. Richardson.
 - 4. R. v. Patch.
 - 5. R. v. Palmer.

To every fact proved in each of these cases, the most intricate, a note is attached, showing under what section of the Evidence Act it would be relevant.

The general principles of evidence are, perhaps, more clearly displayed in trials for murder than in any other. Murders are usually concealed with as much care as possible; and, on the other hand, they must, from the nature of the case, leave traces behind them which render it possible to apply the argument from effects to causes with greater force in these than in most other cases. Moreover, as they involve capital punishment and excite peculiar attention, the evidence is generally investigated with special care. There are accordingly few cases which show so distinctly the sort of connection between fact and fact, which makes the existence of one fact a good ground for inferring the existence of another.

- (a) Case of R. v. Donellan1. John Donellan, Esq., was tried at Warwick
- 1. Wills on "Circumstantial Evidence."

Spring Assizes, 1781, before Mr. Justice Buller, for the murder of Sir Theodosius Broughton, his brother-in-law, a young man of fortune, twenty years of age2 who up to the moment of his death, had been in good health and spirits, with the exception of a trifling ailment, for which he occasionally took a laxative draught.3 Mrs. Donellan was the sister of the deceased, and together with Lady Broughton, his mother, lived with him at Lawford Hall, the family mansion.4

In the event of Sir T. Broughton's death, unmarried and without issue, the greater part of his fortune would descend to Mrs. Donellan5; but it was stated, though not proved, by the prisoner in his defence that he on his marriage entered into articles for the immediate settling of her whole fortune on herself and children, and deprived himself of the possibility of enjoying even a life-estate in case of her death, and that the settlement extended not only to the fortune but to expectancies.6

For some time before the death of Sir Theodosius, the prisoner had, on several occasions, falsely represented his health to be very bad and his life to be precarious.7 On the 29th of August, the apothecary in attendance sent him a mild and harmless draught to be taken the next morning.8 In the evening, the deceased was out fishing,9 and the prisoner told his mother that he had been out with him, and that he had imprudently got his feet wet, both of which assertions were false.10 When Sir Theodosius was called on the following morning he was in good health,11 and about seven o'clock his mother went to his chamber to give him his draught,12 of which he immediately complained,18 and she remarked that it smelt like bitter almonds.14 In about two minutes, he struggled very much as if to keep the medicine down, and Lady Broughton observed a gurgling in his stomach; 15 in ten minutes he seemed inclined to dose;16 but in five minutes afterwards she found him with his eyes fixed, his teeth clenched, and froth running out of his mouth, and within half an hour after taking the dose he died.17

Lady Broughton ran downstairs to give orders to a servant to go for the apothecary, who lived about three miles distant, 18 and in less than five minutes

Introductory fact (section 9).
 Introductory fact (section 9).
 State of things under which facts

in issue happened (section 7).

5. Motive (section 8).6. Fact rebutting an inference suggested by a relevant fact (section 9). These facts are omitted by Mr. Wills, but are mentioned in my account of the case, Gen. View, Crim.

Law, p. 338.
7. Facts showing preparation for fact in issue (section 8). The statements are also admissions as against the prisoner (section 17).

8. A fact affording an opportunity for facts in issue (section 7).

9. Introductory to what follows (section 9).

10. Preparation (section 8). Admission (section 17).

11. State of things under which facts in

issue happened (section 7).

12. It was suggested that Donellan changed the apothecary's draught for a poisoned one administered by Lady Broughton, an innocent agent. Therefore, the administration of the draught suggested to be poisoned was a fact in issue (section 5).

13. As to this, see section 14. 14. i.e. of prussic acid. Lady Broughton perceived by smell the presence of the poison. Therefore, she smelt a fact in issue (section 5).

15. Effect of facts in issue (section 7). All these facts go to make up the fact of his death which was a fact

in issue. 16. Ibid.

18. Introductory to next fact as fixing the time (section 9).

after Sir Theodosius had been taken, Donellan asked where the physic bottle was, and Lady Broughton showed him the two bottles. The prisoner then took up one of them and said, "Is this it," and being answered "Yes," he poured some water out of the water bottle which was near into the phial, shook it, and then emptied it into some dirty water which was in a wash-hand basin. Lady Broughton said, "you should not meddle with the bottle," upon which the prisoner snatched up the other bottle and poured water into that also, and shook it, and then put his finger into it and tasted it. Lady Broughton again asked what he was about, and said he ought not to meddle with the bottles; on which he replied that he did it to taste it,19 though20 he had not tasted the first bottle.21 The prisoner ordered a servant to take away the basin, the dirty things and the bottles, and put the bottles into her hand, for that purpose; she put them down again on being directed by Lady Broughton to do so, but subsequently removed them on the peremptory order of the prisoner.22 On the arrival of the apothecary, the prisoner said the deceased had been out the preceding evening fishing, and had taken cold, but he said nothing of the draught which he had taken.28 The prisoner had a still in his own room which he used for distilling rose,24 and a few days after the death of Sir Theodosius he brought it full of wet lime to one of the servants to be cleaned.25 The prisoner made several false and inconsistent statements to the servants as to the cause of the young man's death1 and on the day of his death he wrote to Sir W. Wheeler, guardian, to inform him of the event, but made no reference to its suddenness.2 The coffin was soldered up on the fourth day after the death.3 Two days afterwards Sir W. Wheeler in consequence of the rumours which had reached him of the manner of Sir Theodosius's death, and that suspicions were entertained that he had died from the effects of poison,4 wrote a letter to the prisoner requesting that an examination might take place; and mentioning the gentlemen by whom he wished it to be conducted.5 The prisoner accordingly sent for them, but did not exhibit Sir W. Wheeler's letter alluding to the suspicion that the deceased had been poisoned, nor did he mention to them that they were sent for at his request. Having been induced by the prisoner to suppose the case to be one of ordinary death,6 and finding the body in an advanced state of putrefaction, the medical gentlemen declined to make the examination on the ground that it might be attended with personal danger. On the following day, a medical man who had heard of their refusal to examine the body offered to do so, but the prisoner declined his offer on the ground that he had not been directed to send for him.7 On

19. Subsequent conduct influenced by a fact in issue and statements ex-

planatory of conduct (section 8).

20. This word is Mr. Wills' comment.

21. Subsequent conduct influenced by a fact in issue and statements expla-natory of conduct (section 8).

22. Subsequent conduct and explanatory

statements (section 8).

Opportunity to distil laurel-water, the poison said to have been used (section 7).

25. Subsequent conduct (section 8).

1. Admission, 17, 18.

3. Introductory to what follows (section 9).

4. Introductory to, and explanatory of,

what follows (section 9). It should be observed that proof of the rumours and suspicions for the pupose of showing the truth of the matters remoured and suspected would not be admissible. The fact that there were rumours and suspicions

explains Sir W. Wheeler's letter.

5. Statement to the prisoner and affecting his conduct (section 8, ex.

6. Subsequent conduct of prisoner (section 8) and Mr. Wills' comment

on the conduct.

7. Subsequent conduct (section 8). The fact that the first set of doctors refused explains the prisoner's conduct by showing that it had the effect of preventing examinations the same day, the prisoner wrote to Sir W. Wheeler a letter in which he stated that the medical men had fully satisfied the family, and endeayoured to account for the event by the ailment under which the deceased had been suffering; but he did not state that they had not made the examination.8 Three or four days after, Sir W. Wheeler having been informed that the body had not been examined,9 wrote to the prisoner insisting that it should be done¹⁰ which, however, he prevented by various disingenious contrivances,¹¹ and the body was interred without examination.12 In the meantime, the circumstances having become known to the coroner, he caused the body to be disinterred and examined on the eleventh day after death. Putrefaction was found to be far advanced, and the head was not opened, nor the bowels examined, and in other respects the examination was incomplete.18 When Lady Broughton in giving evidence before the coroner's inquest related the circumstances of the prisoner, having rinsed the bottles, he was observed to take hold of her sleeve and endeavour to check her, and he afterwards told her that she had no occasion to have mentioned that circumstance, but only to answer such questions as were put to her; and in a letter to the coroner and jury he endeavoured to impress them with the belief that the deceased had inadvertently poisoned himself with arsenic, which he had purchased to kill fish.14 Upon the trial four medical men-three physicians and an apothecary-were examined on the part of the prosecution, and expressed a very decided opinion mainly grounded upon the symptoms, the suddenness of the death, the post-mortem appearances, the smell of the draught as observed by Lady Broughton, and the similar effects produced by experiments upon animals, that the deceased had been poisoned with laurel-water, 15 one of them stating that on opening the body he had been affected with a biting acrimonious taste like that which affected him in all the subsequent experiments with laurel water.16 An eminent17 surgeon and anatomist stated a positive opinion that the symptoms did not necessarily lead to the conclusion that the deceased had been poisoned and that the appearances presented upon dissection explained nothing but putrefaction.18 The prisoner was convicted and executed.

(b) Case of R. v. Belaney.19 A surgeon named Belaney was tried at the Central Criminal Court, August, 1844, before Mr. Baron Gurney, for the murder of his wife. They left their place of residence at North Sunderland, on a journey of pleasure to London on the 1st of June (having a few days previously made mutual wills in each other's favour),20 where on the 4th of

(section 7). The ground on which they refused tends to rebut this inference (section 9), but the second doctor's offer and the prisoner's conduct thereon, tend to confirm it

(section 9).

8. Subsequent conduct (section 11), and admission (section 17).

9. Introductory (section 9). 10. Statement to the prisoner affecting his conduct (section 8, ex. 2).

11. Each contrivance and each circumstance which showed that it was disingenious would come under the head of subsequent conduct (section

The burial was part of the transaction (section 6). The absence of examination is explanatory of parts of the medical evidence. The whole is introductory to medical evidence (section 9).

13. Introductory to opinions of experts (sections 9, 45, 46).14. Subsequent conduct (section 8) and

admissions (section 17).

15. Opinion of experts (section 45).

16. This is a case of testing a fact in issue, viz., the laurel-water present in the body. See definition of fact (section 3).

17. This was the famous John Hunter.18. Opinion of experts (section 45).19. Wills on "Circumstantial Evidence," pp. 175-178.

Motive (section 8).

that month they went into lodgings.21 The deceased who was advanced in pregnancy, was slightly indisposed after the journey; but not sufficiently so to prevent her going about with her husband.22 On the 8th, being the Saturday morning after the arrival in town, the prisoner rang the bell for some hot water, a tumbler, and a spoon;23 and he and his wife were heard conversing in their chamber about seven o'clock. About a quarter before eight the prisoner called the landlady upstairs, saying that his wife was very ill; and she found her lying motionless on the bed, with her eyes shut and her teeth closed and foaming at the mouth. On being asked if she was subject to fits, the prisoner said she had fits before, but none like this, and that she would not come out of it. On being pressed to send for a doctor, the prisoner said he was a doctor himself, and should have let blood before, but there was no pulse. On being further pressed to send for a doctor and his friends he assented, adding that she would not come to; that this was an affection of the heart, and that her mother died in the same way nine months ago. The servant was accordingly sent to fetch two of the prisoner's friends, and on her return she and the prisoner put the patient's feet and hands in warm water and applied a mustard plaster to her chest. A medical man was sent for but before his arrival the patient had died.24 There was a tumbler close to the head of the bed, about one-third full of something clear, but whiter than water; and there was also an empty tumbler on the other side of the table, and a paper of Epsom salt.25 In reply to a question from a medical man whether deceased had taken any medicine that morning, the prisoner stated that she had taken nothing but a little salt.1 On the same morning the prisoner ordered a grave for interment on the following Monday.2 In the meantime, the contents of the stomach were examined and found to contain prussic acid and Epsom salts. It was deposed that the symptoms were similar to those of death by prussic acid, but might be the result of any powerful sedative poison and that the means resorted to by the prisoner were not likely to promote recovery, but that cold effusion, artificial respiration, and the application of brandy ammonia (which in the shape of smelling salts is found in every house) and other stimulants were the appropriate remedies and might probably have been effectual. No smell of prussic acid had been discovered in the room, though it had a very strong odour, but the window was open, and it was stated that the odour is soon dissipated by a current of air.3 The prisoner had purchased prussic acid, as also acetate of morphine, on the preceding day, from a vendor of medicines with whom he was intimate; but he had been in the habit of using these poisons under advice for a complaint in the stomach.4 Two days after the fatal event the prisoner stated to the medical man, who had been called in and who had assisted in the examination of the body, that on the morning in question he was about to take some prussic acid; that on

21. Introductory (section 9).

^{22.} State of things under which fact in issue happened (section 7).

^{23.} Preparation (section 8).

The death and attendant circumstances are facts in issue and part of the transaction (sections 5, 26). The other facts are conduct (section 8)

and admissions (sections 17, 18).

25. State of things at death, or cause or effect of administration of poison (section 7).

^{1.} Admissions (sections 17, 18).

^{2.} Conduct (section 8).

⁽section 7), 3. Effect of poisoning opinions of experts (sections 45, 46). The absence of the smell of prussic acid and the presence of the draughts are respectively a fact suggesting the absence of prussic acid, and a fact rebutting that inference (sec-

^{4.} Preparation (section 8) and fact rebutting inference from purchase of poison (section 9).

endeavouring to remove the stopper he had some difficulty, and used some force with the handle of a tooth brush; that in consequence of breaking the neck of the bottle by force, some of the acid was spilt; that he placed the remainder in the tumbler on the drawers at the end of the bed-room; that he went into the front room to fetch a bottle wherein to place the acid, but instead of so doing began to write to his friends in the country, when in a few minutes he heard a scream from his wife's bed-room, calling for cold water, and that the prussic acid was undoubtedly the cause of her death. Upon being asked what he had done with the bottle, the prisoner said he had destroyed it; and on being asked why he had not mentioned the circumstances before, he said he had not done so because he was so distressed and ashamed at the consequence of his negligence. To various persons in the north of England, the prisoner wrote false and suspicious accounts of his wife's illness. In one of them, dated from the Euston Hotel on the 6th of June, he stated that his wife was unwell, and that two medical men attended her, and that, in consequence, he should give up an intended visit to Holland, and intimated his apprehension of a miscarriage. For these statements there was no foundation. At that time, moreover, he had removed from the Euston Hotel into lodgings, and, on the same day, he had made arrangement for leaving his wife in London, and proceeding himself on his visit to Holland. In another letter, dated 8th of June, and posted after his wife's death, though it could not be determined whether it was written before or after, the prisoner stated that he had had his wife removed from the hotel to private lodgings, where she was dangerously ill and attended by two medical men, one of whom had pronounced her heart to be diseased; these representations were equally false. In another letter, dated the 9th of June, but not posted until the 10th he stated the fact of his wife's death, but without any allusion to the case; and in a subsequent letter he stated the reason for the suppression to be to conceal the shame and reproach of his negligence. The prisoner's statements to his landlady that his wife's mother had died from disease of the heart was also a falsehood, the prisoner having himself stated in writing' to the registrar of burials that brain fever was the cause of death.5 It was, however, proved that the prisoner was of a kind disposition, that he and his wife had lived upon affectionate terms and that he was extremely careless in his habit; and no motive for so horrible a deed was clearly made out, though it was urged that it was the desire of obtaining her property by means of her testamentary disposition.7 Upon the whole, though the case was to the last degree suspicious, it was certainly possible that an accident might have taken place in the way suggested; and the jury brought in a verdict of acquittal.

10. Remarks in cases of Donellan and Belaney. Two cases of Donellan and Belaney are not merely curious in themselves, but throw light upon one of the most important of the points connected with judicial evidence, the point, namely, as to the amount of uncertainty which constitutes what can be called reasonable doubt. This is a question not of calculation, but of prudence. The cases in question show that different tribunals, at different times, do not measure it in precisely the same way. In Donellan's case, the jury

^{5.} All these are admissions (sections 17, 18) and conduct (section 3),

Character (section 53).
 Motive (section 8).

did not think the possibility that Sir Theodosius Broughton might have died of a fit sufficiently great to constitute reasonable doubt as to his having been poisoned. In Belaney's case, the jury thought that the possibility, that the prisoner gave his wife the poison by accident, did constitute a reasonable doubt as to his guilt. If the chances of the guilt and innocence of the two men could be numerically expressed, they would be as nearly as possible equal, and it might be said that both or that neither ought to have been convicted, if it were not for the all-important principle that every case is independent of every other, and that no decision upon facts forms a precedent for any other decision. If two juries were to try the very same date, upon the same evidence and with the summing up and the same arguments by counsel, they might very probably arrive at opposite conclusions and yet it might be impossible to say that either of them was wrong. Of the moral qualifications for the office of a Judge, few are more important than the strength of mind which is capable of admitting the unpleasant truth that it is often necessary to act upon probabilities, and to run some risk of error. The cruelty of the old criminal law of Europe, and of England as well as of other countries produced many bad effects, one of which was that it intimidated those who had put it in force. The saying that it is better that ten criminals should escape than that one innocent man should be convicted expresses this sentiment, which has been carried too far, and has done much to enervate the administration of justice.

11. Case of R. v. Richardson.8 In the autumn of 1786, a young woman, who lived with her parents in a remote district in the Stewartry of Kirkcudbright, was one day left alone in the cottage, to her parents having gone out to the harvest-field.11 On their return home a little after midday12 they found their daughter murdered13 with her throat cut,14 in a most shocking manner.

The circumstances in which she was found, the character of the deceased, and the appearance of the wound, all concurred in excluding all supposition of suicide15 while the surgeons who examined the wound were satisfied that it had been inflicted by a sharp instrument, and by a person who must have held the weapon in his left hand.16 Upon opening the body, the deceased appeared to have been some months gone with child,17 and, on examining the ground about the cottage, there were discovered the footsteps of a person who had seemingly been running hastily from the cottage by an indirect road through a quagmire or bog, in which there were stepping-stones.¹⁸ It appear-

8. Wills, pp. 225-229, Mr. Wills observes; "This case is also concisely stated in the 'Memoirs of the Life of Sir Walter Scott.' IV, p. 52, and it supplied one of the most striking incidents in 'Guy Mannering'."

9. Introductory (Section 9).
10. Opportunity (section 7).
11. Explanatory (section 9).
12. Introductory (section 9).
13. Mr. Wills' comment. They found her with the throat cut, and Mr. Wills says, she was murdered but

her murder was to them an infer-

ence, not a fact (section 3).

14. Fact in issue (section 5).

15. Suicide would be a relevant fact as being inconsistent with The facts which exclude suicide are relevant as inconsistent with a relevant fact (section 11).

16. Opinion of experts (section 45).

17. State of things under which death happened (section 7).

18. Effects of facts in issue

ed, however, that the person in his haste and confuston had slipped his foot and stepped into the mire, by which he must have been wet nearly to the middle of the leg.19 The prints of the footsteps were accurately measured and an exact impression taken of them,20 and it appeared that they were those of a person, who must have worn shoes, the soles of which had been newly mended, and which, as is usual in that part of the country, had iron knobs or nails in them.21 There were discovered also along the track of the footsteps, and at certain intervals, drops of blood, and, on a stile or small gateway near the cottage and in the line of the footsteps some marks resembling those of a hand which had been bloody.22 Not the slightest suspicion at this time attached to any particular person as the murderer nor was it even suspected who might be the father of the child of which the girl was pregnant.23 At the funeral a number of persons of both sexes attended,24 and the stewarddepute thought it the fittest opportunity of endeavouring, if possible, to discover the murderer, conceiving rightly that, to avoid suspicion, whoever he was, he would not on that ocsasion be absent.25 With this view he called together after the interment, the whole of the men who were present, being about sixty in number.1 He caused the shoes of each of them to be taken off, and measured, and one of the shoes was found to resemble pretty nearly the impression of the footsteps near to the cottage. The wearer of the shoe was the schoolmaster of the parish which led to a suspicion that he must have been the father of the child, and had been guilty of the murder to save his character. On a closer examination of the shoe, it was discovered that it was pointed at the toe, whereas the impression of the footstep was round at the place.2 The measurement of the rest went on, and after going through nearly the whole number one at length was discovered which corresponded with the impression in dimensions, shape of the foot, form of the sole, and the number and position of the nails.3 William Richardson, the young man to whom the shoe belonged, on being asked where he was the day deceased was murdered, replied. seemingly without embarrassment, that he had been all that day employed at his master's work,4-a statement which his master and fellow servants who were present confirmed.5 This going so far to remove suspicions a warrant of commitment was not then granted, but some circumstances occurring a few days afterwards having a tendency to excite it anew, the young man was appre-

19. This is so stated as to mix up inference and fact. Stripped of in-ference the fact might have been stated thus. There were such marks in the bog as would have been produced if a person crossing the stepping-stones had slipped with one foot. The mud was of such a depth that a person so slipping would get wet to the middle of the leg.

20. Effects of facts in issue (section 7).

21. Ibid.

22. Ibid.23. Observation.24. Introductory (section 9).

25. Effects of fact in issue_(section 7).

1. Introductory (section 9).

2. Irrelevant.

The making of the footmark was an effect of, or conduct subsequent L. E. 5

to and effected by, a fact in issue (section 7). The measurement of the sixty shoes, of which one only corresponded exactly with the mark was a fact, or rather a set of facts, making highly probable the want fact that, that shoe made that mark (section 11). The experiment itself is an application of the method of difference. The shoe would make the mark, and no other of a very large number would.

4. This would be relevant against him, but not in his favour as an admission (sections 17, 18).

5. The fact that his master and fellowservants confirmed his statement is irrelevant. If they had testified afterwards to the fact itself, it would have been relevant.

hended and lodged in jail.6 Upon his examination,7 he acknowledged that he was left-handed,8 and some scratches being observed on his cheek, he said he had got them when pulling nuts in a wood a few days before.9 He still adhered to what he had said of his having been on the day of the murder employed constantly in his master's work¹⁰ but, in the course of the inquiry, it turned out that he had been absent from his work about half an hour, the time being distinctly ascertained, in the course of the forenoon of that day; that he called at a smith's shop under the pretence of wanting something which it did not appear that he had any occasion for; and that his smith's shop was in the way to the cottage of the deceased.11 A young girl, who was some hundred yards from the cottage, said that, about the time when the murder was committed (and which corresponded to the time when Richardson was absent from his fellow-servants), she saw a person exactly with his dress and appearance running hastily towards the cottage but did not see him return, though he might have gone round by a small eminence which would intercept him from her view, and which was the very track where the footsteps had been traced.12

His fellow-servants now recollected that on the forenoon of that day they were employed with Richardson in driving their master's cart, and that when passing by a wood which they named, he said that he must run to the smith's shop and would be back in a short time. He then left his cart under their charge, and having waited for him about half an hour, which one of the servants ascertained by having at the time looked at his watch, they remarked on his return that he had been absent a longer time than he said he would be, to which he replied that he had stopped in the wood to gather some nuts. They observed at the same time one of his stockings wet and soiled as if he had stepped in a puddle. He said he had stepped into a marsh, the name of which he mentioned, on which his fellow-servants remarked "that he must have been either mad or drunk if he stepped into that marsh, as there was a footpath which went along the side of it." It then appeared by comparing the time he was absent with the distance of the cottage from the place where he had left his fellow-servants that he might have gone there, committed the murder, and returned to them.13 A search was then made for the stockings

6. Irreievant.

7. By Scotch law, as well as by the Code of Criminal Procedure, a pri-

8. The fact that he was left-handed would be a cause of a fact in issue, viz., the peculiar way in which the fatal wound was given. The admission that he was left-handed

would be relevant as proof of the fact by sections 17, 18.

9. If it was suggested that the scratches were made in a struggle with the girl, they would be an effect of a fact in issue (section 7), and the statement would be relevant as against the prisoner as an admission (sections 17, 18).

Opportunity (section 7). Admissions (sections 17, 18). The call at

the shop was preparation by making evidence (section 8), illustration (e).

II. Ibid.

There is here a mixture of fact and inferences; the girl could not know that a murder was committed at the time when it was committed. bably she mentioned the time, and it corresponded with the time when Richardson was away. This would be preparation and opportunity (section 7). The existence of the small eminence explains her not seeing him return (section 9).

13. All these facts are either opportunity or preparation or subsequent or previous conduct or admission (sections 7, 8, 17).

he had worn that day.14 They were found concealed in the thatch of the apartment where he slept, and appeared to be much soiled, and to have some drops of blood in them.15 The fact he accounted for by saying first, that his nose had been bleeding some days before; but it being observed that he wore other stockings on that day, he said he had assisted in bleeding a horse; but it was proved that he had not assisted and had stood at such a distance that the blood could not have reached him.16 On examining the mud or sand upon the stockings, it appeared to correspond precisely with that of the more or puddle adjoining the cottage, and which was of a very particular kind, none other of the same kind being found in that neighbourhood.17 The shoemaker was then discovered who had mended his shoes a short time before and he spoke distinctly to the shoes of the prisoner which were exhibited to him as having been those he had mended.18 It then came out that Richardson had been acquainted with the deceased, who was considered in the country as of weak intellect, and had on one occasion been seen with her in a wood in circumstances that led to a suspicion that he had criminal intercourse with her, and on being taunted with having such connection with one in her situation, he seemed much ashamed and greatly hurt.19 It was proved further, by the person who sat next to him when his shoes were measured, that he trembled much and seemed a good deal agitated, and that, in the interval between that time and his being apprehended, he had been advised to fly, but his answer was, "Where can I fly to?"20

On the other hand, evidence was brought to show that about the time of the murder, a boat's crew from Ireland had landed on that part of the coast near to the dwelling of the deceased,21 and it was said that some of the crew might have committed the murder, though their motive for doing so it was difficult to explain, it not being alleged that robbery was their purpose, or that anything was missing from the cottages in the neighbourhood. The prisoner was convicted, confessed, and was hanged.

This case illustrates the application of what Mr. Mill calls the method of agreement upon a scale which excludes the supposition of chance, thus:-

(1) The murderer had a motive,-Richardson had a motive.

14. Introductory to next fact (section 91).

The concealment is subsequent conduct (section 8). The state of the stockings is the effect of a fact

in issue (section 7).

The falsehoods are subsequent conduct (section 8), or admissions sections 17 and 18). The prisoner's allegation about the borse is an allegation about the horse is an allegation of a fact explaining the relevant fact, that there was blood on the stockings (section 9): and the fact proved about his distance from the horse is a fact rebutting inference suggested thereby that the blood was the horse's (section 9).

17. Effect of a fact in issue (section 7). The similarity of the sand on the stockings to the sand in the marsh was one of the effects of the slip

which was the effect of the murder; 18. That the marks were made by the prisoner's shoe was relevant as an effect of facts in issue. That the shoes which made the marks were the prisoner's had been already proved by their being found on his feet. This further proof seems superfluous, unless it was suggested that they belonged to someone

19. The opinion about her would be irrelevant. The fact that her intellect was weak would be part of the state of things under which the murder happened, and with what follows would show motive

tions 7, 8).

20. Subaequent conduct (section 10). The weight of this is very slight.

21. Opportunity for the murder tion 7).

- (2) The murderer had an opportunity at a certain hour of a certain day in a certain place,—Richardson had an opportunity on that hour of that day at that place.
 - (3) The murderer was left-handed,-Richardson was left-handed.
- (4) The murderer wore shoes which made certain marks,—Richardson wore shoes which made exactly similar marks.
- (5) If Richardson was the murderer and wore stockings, they must have been soiled with a peculiar kind of sand—he did wear stockings which were soiled with that kind of sand.
- (6) If Richardson was the murderer, he would naturally conceal his stockings,—he did conceal his stockings.
- (7) The murderer would probably get blood on his clothes,-Richardson got blood on his clothes.
- (8) If Richardson was the murderer, he would probably tell lies about the blood,—he did tell lies about the blood.
- (9) If Richardson was the murderer, he must have been at the place at the time in question,—a man very like him was seen running towards the place at the time.
- (10) If Richardson was the murderer, he would probably tell lies about his proceedings during the time when the murderer was committed,—he told such lies.

Here are ten separate marks, five of which must have been found in the murderer, one of which must have been found on the murderer if he wore stockings, whilst others probably would be found in him.

All ten were found in Richardson. Four of them were so districtive that they could hardly have met in more than one man. It is hardly imaginable that two left-handed men, wearing precisely similar shoes and closely resembling each other, should have put the same leg into the same hole of the same marsh at the same time, that one of them should have committed a murder, and that the other should have causelessly hidden the stocking which had got soiled in the marsh. Yet this would be the only possible supposition consistent with Richardson's innocence.

12. Case of R. v. Patch.²² A man named Patch had been received by Mr. Isaac Blight, a shipbreaker, near Greenland Dock, into his service in the year 1803. Mr. Blight having become embarrassed in his circumstances in July, 1805, entered into a deed of composition with his creditors; and in consequence of the failure of this arrangement, he made a colourable transfer of his property to the prisoner.²³ It was afterwards agreed between them that

Mr. Blight was to retire nominally from the business, which the prisoner was to manage, and the former was to have two-thirds of the profits, and the prisoner the remaining third, for which he was to pay £1,250. Of this amount £250 was paid in cash, and a draft was given for the remainder upon a person named Goom, which would become payable on the 16th of September, the prisoner representing that he had received the purchase-money of an estate and lent it to Goom.24 On the 16th of September the prisoner represented to Mr. Blight's bankers that Goom could not take up the bill and withdrew it, substituting his own draft upon Goom, to fall due on the 20th September.25 On the 19th of September, the deceased went to visit his wife at Margate, and the prisoner accompanied him as far as Deptford,1 and then went to London and represented to his bankers that Goom would not be able to face his draft, but that he had obtained from him a note which satisfied him, and therefore, they were not to present it.2 The prisoner boarded in Mr. Blight's house, and the only other inmate was a female servant, whom the prisoner about eight o'clock the same evening (the 19th) sent out to procure some oysters for his supper.3 During her absence a gun or pistol ball was fired through the shutter of a parlour fronting the Thames, where the lamily, when at home, usually spent their evenings. It was low water, and the mud was so deep that any person attempting to escape in that direction must have been suffocated. A man who was standing near the gate of the wharf, which was the only other mode of escape, heard the report, but saw no person. From the manner in which the ball entered the shutter it was clear that it had been discharged by some person who was close to the shutter, and the river was so much below the level of the house that the ball, if it had been fired from thence, must have reached a much higher part than that which it struck. The prisoner declined the offer of the neighbour to remain in the house with him that night.5 On the following day, he wrote to inform the deceased of the transaction, stating his hope that his shot had been accidental; that he knew no person who had any animosity against him, that he wished to know for whom it was intended, and that he should be happy to hear from him, but much more so to see him.6 Mr. Blight returned home on the 23rd September, having previously been to London to see his bankers on the subject of the £1,000 draft.7 Upon getting home the draft became the subject of conversation, and the deceased desired the prisoner to go to London, and not to return without the money.8 Upon his return the prisoner and the deceased spent the evening in the back parlour, a different one from that in which the family usually sat.9 About eight o'clock the prisoner went from the parlour into the kitchen,

24. Motive (section 8).

25. Preparation (section 8).

 Preparation (section 8).
 Explains what follows (section 8).
 The suggestion was that Patch fired the shot himself in order to make evidence in his own favour. This would be preparation (section 8). Hence his firing the shot would be a relevant fact. The facts in the text are facts which, taken together, make it highly probable that he did so, as they show that he and no one else had the opportunity and that it was, done by

someone (section 11). The last fact illustrates the remarks made at pages 58, 59. The inference from the facts stated, assuming them to be true, is necessary; but suppose that the "man standing near the gate" saw someone running, and for reasons of his own denied it, how could he be contradicted?

5. Conduct (section 8). 6. Preparation (section 8).

Hardly relevant, except as introductory to what follows (section 9).
 Motive (section 8).
 State of things under which facts in

issue happened (section 7).

^{1.} Introductory (section 9) but unimportant.

and asked the servant for a candle,10 complaining that he was disordered.11 The prisoner's way from the kitchen was through an outer door which was fastened by a spring lock, and across a paved court in front of the house which was enclosed by palisades, and through a gate over a wharf in front of that court on which there was the kind of soil peculiar to premises for breaking up ships, and then, through a counting-house. All of these doors, as well as the door of the parlour, the prisoner left open, notwithstanding the state of alarm excited by the former shot. The servant heard the privy door slam, and almost at the same moment saw the flash of a pistol at the door of the parlour where the deceased was sitting upon which she ran and shut the outer door and gate. The prisoner immediately afterwards rapped loudly at the door for admittance with his clothes in disorder. He evinced great apparent concern for Mr. Blight, who was mortally wounded and died on the following day. From the state of the tide and from the testimony of various persons who were on the outside of the premises, no person could have escaped from them.12

In consequence of this event Mrs. Blight returned home,18 and the prisoner in answer to an inquiry about the draft which had made her husband so uneasy, told her that it was paid, and claimed the whole of the property as his own.14 Suspicion soon fixed upon the prisoner,15 and in his sleeping room was found a pair of stockings rolled up like clean stockings, but with the feet plastered over with the sort of soil found on the wharf, and a ramrod was found in the privy.16 The prisoner usually wore boots; but on the evening of the murder he wore shoes and stockings.17 It was supposed that to prevent alarm to the deceased or the female servant, the murderer must have approached without his shoes, and afterwards gone on the wharf to throw away the pistol into the river.18 All the prisoner's statements as to his pecuniary transactions with Goom and his right to draw upon him, and the payment of the bill, turned out to be false.19 He attempted to tamper with the servant girl as to her evidence before the coroner, and urged her to keep to one account,20 and before that officer he made several inconsistent statements as to his pecuniary transactions with the deceased and equivocated much as to whether he wore boots or shoes on the evening of the murder, as well as to the ownership of the soiled stockings,21 which, however, were clearly proved to his and for the soiled state of which he made no attempt to account.22 The prisoner suggested the existence of malicious feelings in two persons with whom the deceased had

10. Preparation (section 8).

11. Ibid.

12. These facts collectively are inconsistent with the firing of shot by anyone except Patch (section 11). They would also be relevant as being either facts in issue, or the state of things under which facts in issue happened (section 7), or as preparation, or opportunity sections 7 and 8 illustration h).

 Introductory (section 9).
 Subsequent conduct influenced by a fact in issue (section 8).

Irrelevant.

16. Effect of fact in issue (section 7). 17. State of things under which facts in 18. Fact and inference are mixed up in this statement; the facts are (1) that the state of things was such that the deceased and his servant would have heard the steps of a man with shoes on under the window; and (2) that a person who wished to throw anything into the Thames would have to go on

issue happened (section 7).

to the wharf. 19. Preparation (section 8).

20. Subsequent conduct (section 8), and admission (sections 17 and 18).

21. Effect of fact in issue (section 7).

22. Ibid.

been on ill-terms,²³ but they had no motive²⁴ for doing him any injury; and it was clearly proved that upon both occasions of attack they were at a distance.²⁵

Patch's case illustrates the method of difference¹ and the whole of it may be regarded as a very complete illustration of Section 11. The general effect of the evidence is, that Patch had motive and opportunity for the murder, and that no one else, except himself, could have fired either the shot which caused the murdered man's death, or the shot which was intended to show that the murdered man had enemies who wished to murder him. The relevancy of the first shot arose from the suggestion that it was an act of preparation. The proof that it was fired by Patch consisted of independent facts, showing that it was fired, and that he, and no one else, could have fired it. The firing of the second shot by which the murder was committed was a fact in issue. The proof of it by a strange combination of circumstances was precisely similar in principle to the proof as to the first shot.

The case is also very remarkable as, showing the way in which the chain of cause and effect links together facts of the most dissimilar kind; and this proves that it is impossible to draw a line between relevant and irrelevant facts otherwise than by enumerating as completely as possible the more common forms in which the relation of cause and effect displays itself. In Patch's case the firing of the first shot was an act of preparation by way of what is called "making evidence," but the fact that Patch fired it appeared from a combination of circumstances which showed that he might, and that no one else could, have done so. It is easy to conceive that some one of the facts necessary to complete this might have had to be proved in the same way. For instance, part of the proof that Patch fired the shot consisted in the fact that no one left certain premises by certain gate, which was one of the suppositions necessary to be negatived in order to show that no one but Patch caused have fired the shot. The proof given of this was the evidence of a man standing near who said that at the time in question no one did pass through the gate in his presence, or could have done so unnoticed by him. Suppose that the proof had been that the gate had not been used for a long time; that spiders' webs had been spun all over the opening of the gate; that they were unbroken at night and remained unbroken in the morning after the shot; and that it was impossible that they should have been spun after the shot was fired and before the gate was examined. In that case the proof would have stood thus:

Patch's preparations for the murder were relevant to the question whether he committed it. Patch's firing the first shot was one of his preparations for the murder. The facts inconsistent with his not having fired the shot were relevant to the question whether he fired it. The fact that a certain door was not opened between certain hours was one of the facts which, taken together, were inconsistent with his not having fired the shot. The fact that a spider's web was whole overnight and also in the morning was inconsistent with the door having been opened.

Motive (section 8).
 i.e., no special motive beyond general ill-will.

Facts inconsistent with relevant fact (section 11).
 P. 33.

Inversely, the integrity of the spider's web was relevant to the opening of the door; the opening of the door was relevant to the firing of the first shot; the firing of the shot was relevant to the firing of the second shot; and the firing of the second shot was a fact in issue; therefore, the integrity of the spider's web was relevant to a fact in issue.

13. Case of R. v. Palmer.² On the 14th day of May, 1856, William Palmer was tried at the Old Bailey under powers conferred on the Court of Queen's Bench by 19 Vic., c. 16, for the murder of John Parsons Cook at Rugeley, in Staffordshire. The trial lasted twelve days, and ended on the 27th May, when the prisoner was convicted, and received sentence of death, on which he was afterwards executed at Stafford.

Palmer was a general medical practitioner at Rugeley, much engaged in sporting transactions. Cook, his intimate friend, was also a sporting man; and, alter attending Shrewsbury races with him on the 13th November, 1855, returned in his company to Rugeley and died at the Talbot Arms Hotel, at that place, soon after midnight, on the 21st November, 1855, under circumstances which raised a suspicion that he had been poisoned by Palmer. The tase against Palmer was that he had a strong motive to murder his friend, and that his conduct before, at the time of, and after his death, coupled with the circumstances of death itself, left no reasonable doubt that he did murder him by poisoning him with antimony and strychnine administered on various occasions—the antimony probably being used as a preparation for the strychnine.

The evidence stood as follows:-At the time of Cook's death, Palmer was involved in bill transactions which appeared to have begun in the year 1853. His wife died in September, 1854, and on her death he received £13,000 on policies on her life, nearly the whole of which was applied to the discharge of his liabilities.3 In the course of the year 1855, he raised other large sums, amounting in all to £13,500, on what purported to be acceptances of his mother's. The bills were renewed from time to time at enormous interest (usually sixty per cent per annum) by a money-lender named Pratt, who at the time of Cook's death, held eight bills-four on his own account and four on account of his client, two already overdue and six others falling due-some in November and others in January. About £1,000 had been paid off in the course of the year, so that the total amount then due or shortly to fall due to Pratt, was £12,000. The only means which Palmer had by which these bills could be provided for was a policy on the life of his brother, Walter Palmer, for £13,000. Walter Palmer died in August, 18554 and William Palmer had instructed Pratt to recover the amount from the insurance office, but the office refused to pay. In consequence of this difficulty, Pratt earnestly pressed Palmer to pay something in order to keep down the interest or diminish the principal due on the bills. He issued writs against him and his mother on the 6th November and informed him in substance that they would be served at once unless he would pay something on account. Shortly before the Shrewsbury races, he

Reprinted from "General View of the Criminal Law of England." p. 357

^{3.} A bill was found against him for

her murder.
4. A bill was found against Palmer for his murder.

had accordingly paid three sums, amounting in all to £800, of which £600 went in reduction of the principal, and £200 was deducted for interest. It was understood that more money was to be raised as early as possible.

Besides the money due to Pratt, Mr. Wright of Birmingham held bills for £10,400. Part of these, amounting to £6,500, purporting to be accepted by Mrs. Palmer, were collaterally secured by a bill of sale of the whole of William Palmer's property. These bills would fall due on the first or second week of November. Mr. Padwick also held a bill of the same kind for £2,000 on which £1,000 remained unpaid, and which was twelve months overdue on the 16th of October, 1855. Palmer, on the 12th November, had given Espin a cheque ante-dated on the 28th November, for the other £1,000. Mrs. Sarah Palmer's acceptance was on nearly all these bills, and in every instance was forged.

The result was that about the time of the Shresbury races, Palmer was being pressed for payment on forged acceptances to the amount of nearly £20,000 and that his only resources were a certain amount of personal property, over which Wright held a bill of sale, and a policy for £13,000, the payment of which was refused by the office. Should he succeed in obtaining payment he might no doubt struggle through his difficulties, but there still remained the £1,000 ante-dated cheque given to Espin, which it was necessary to provide for at once by some means or other. That he had no funds of his own was proved by the fact that his balance at the bank on the 19th November was £9.6s. and that he had to borrow £25 of a farmer named Walbank, to go to Shrewsbury races. It follows that he was under the most pressing necessity to obtain a considerable sum of money as even a short delay in obtaining it might involve him not only in insolvency, but in a prosecution for uttering forged acceptances.

Besides the embrrassment arising from the bills in the hands of Pratt, Wright and Padwick, Palmer was involved in a transaction with Cook, which had a bearing on the rest of the case. Cook and he were parties to a bill for £500 which Pratt had discounted, giving £365 in cash, and a wine warrant for £65, and charging £60 for discount and expenses. He also required an assignment of two race-horses of Cook's-Pole-Star and Sirius-as a collateral security. By Palmer's request the £365, in the shape of a cheque payable to Cook's order and the wine warrant, were sent by post to Palmer at Doncaster. Palmer wrote Cook's endorsement on the cheque, and paid the amount to his own credit at the Bank at Rugeley. On the part of the prosecution it was said that this transaction afforded a reason why Palmer should desire to be rid of Cook, inasmuch as it amounted to a forgery by which Cook was defrauded of £375. It appeared, however, on the other side, that there were £300 worth of notes relating to some other transaction, in the letter which enclosed the cheque; as it did not appear that Cook had complained of getting no consideration for his acceptance, it was suggested that he had authorized Palmer to write his name on the back of the cheque, and had taken the notes himself. This arrangement seems not improbable as it would otherwise be hard to explain why Cook acquiesced in receiving nothing for his acceptance, and there was evidence that he meant to provide for the bill when it became due. It also appeared later in the case that there was another bill for £500, in which Cook and Palmer were jointly interested.⁵

Such was Palmer's position when he went to Shrewsbury races, on Monday, the 12th November, 1855. Cook was there also; and on Tuesday, the 13th his mare Pole-Star won the Shrewsbury Handicap, by which he became entitled to the stakes, worth about £380, and bets to the amount of nearly £2,000. For these bets he received £700 or £800 on the course at Shrewsbury. The rest was to be paid at Tattersall's on the following Monday, the 19th November. After the race Cook invited some of his friends to dinner at the Raven Hotel, and on the occasion and on the following day he was both sober and well.6 On the Wednesday night a man named Ishmael Fisher came into the sitting room, which Palmer shared with Cook, and found them in company with some other men drinking brandy and water. Cook complained that the brandy "burned his throat dreadfully," and put down his glass with a small quantity remaining in it. Palmer drank up what was left, and, handing the glass to Read asked him if he thought there was anything in it; to which Read replied, "What's the use of handing me the glass when it's empty?" Cook shortly afterwards left the room, called out Fisher and told him that he had been very sick, and, "He thought that damned Palmer had dosed him." He also handed over to Fisher £700 or £800 in notes to keep for him.7 He then became sick again, and was ill all night, and had to be attended by a doctor. He told the doctor, Mr. Gibson, that he thought he had been poisoned, and he was treated on that supposition.8 Next day Palmer told Fisher that Cook had said that he (Palmer) had been putting something into his brandy. He added that he did not play such tricks with people, and that Cook had been drunk the night before-which appeared not to be the case.9 Fisher did not expressly say that he returned the money to Cook, but from the course of the evidence it seems that he did,10 for Cook asked him to pay Pratt £200 at once, and to repay himself on the following Monday out of the bets which he would receive on Cook's account at the settling at Tattersall's.

About half-past ten on the Wednesday, and apparently shortly before Cook drank the brandy and water which he complained of, Palmer was seen by a Mrs. Brooks in the passage looking at a glass lamp, through a tumbler which contained some clear fluid like water, and which he was shaking and turning in his hand. There appears, however, to have been no secrecy in this, as he spoke to Mrs. Brooks and continued to hold and shake the tumbler as he did so.¹¹ George Myatt was called to contradict this for the prisoner. He said that he was in the room when Palmer and Cook came in; that Cook made a remark about the brandy, though he gave a different version of it from

All these facts go to show motive (section 8).

 State of things under which the following facts occurred (section 7).

7. Conduct of person against whom offence was committed and statement explanatory of such conduct (section 8, exp. 1).

 The administration of antimony by Palmer would be a fact in issue. as being one of a set of acts of poisoning which finally caused Cook's death. Cook's feelings were relevant as the effect of his being poisoned (section 7); and his statement as to them was relevant under section 14 as a statement showing the existence of a relevant bodily feeling.

9. Admission (sections 17, 18).

10. Motive (section 8).

11. Preparation (section 8).

Fisher and Read; that he did not see anything put in it, and that if anything had been put in it he should have seen. He also swore that Palmer never left the room from the time he came in till Cook went to bed. He also put the time later than Fisher and Read.¹² All this, however, came to very little. It was the sort of difference which always arises in the details of evidence. As Myatt was a friend of Palmer's he probably remembered the matter (perhaps honestly enough) in a way more favourable to him than the other witnesses.

It appeared from the evidence of Mrs. Brooks, and also from that of a man named Herring, that other persons besides Cook were taken ill, at Shrewsbury, on the evening in question with similar symptoms. Mrs. Brooks said, "We made an observation we thought the water might have been poisoned in Shrewsbury," Palmer himself vomited on his way back to Rugeley according to Myatt.¹⁸

The evidence as to what passed at Shrewsbury clearly proves that Palmer being then in great want of money, Cook was to his knowledge in possession of £700 or £800 in bank-notes and was also entitled to receive on the following Monday about £1,400 more. It also shows that Palmer may have given him a dose of antimony, though the weight of evidence to this effect is weakened by the proof that diarrhoea and vomiting were prevalent in Shrewsbury at the time. It is, however, important in connection with subsequent events.

On Thursday, November 15th, Palmer and Cook returned together to Rugeley, which they reached about ten at night. Cook went to the Talbot Arms, and Palmer to his own house immediately opposite. Cook still complained of being unwell. On the Friday he dined with Palmer in company with an attorney, Mr. Jeremiah Smith, and returned perfectly sober about ten in the evening.14 At eight on the following morning (November 17) Palmer came over, and ordered a cup of coffee for him. The coffee was given to Cook by Mills; the chambermaid, in Palmer's presence. When she next went to his room, an hour or two after wards, it had been vomited.15 In the course of the day, and apparently about the middle of the day, Palmer sent a charwoman, named Rowley to get some broth for Cook at an inn called the Albion. She brought it to Palmer's house, put it by the fire to warm, and left the room. Soon after Palmer brought it out, poured it into a cup and sent it to the Talbot Arms with a message that it came from Mr. Jeremiah Smith. The broth was given to Cook, who at first refused to take it: Palmer, however, came in, and said he must have it. The chambermaid brought back the broth which she had taken downstairs and left it in the room. It also was thrown up.16 In the course of the afternoon Palmer called in Mr. Bamford, a surgeon, eighty years of age, to see Cook and told him that when Cook dined at his (Palmer's) house he had taken too many champagne.17 Mr. Bamford, however, found no bilious symptoms about him and he said, he

 Facts rebutting inference suggested by preceding fact (section 9).

Introductory to what follows (section 9), and shows state of things under which following facts occur-

red (section 7).

15. Ibid.16. Facts in issue and its effect as this was an act of poisoning (section 5).

Conduct and statements explaining conduct (section 8).

^{12.} Evidence against last fact (section 5).

had only drunk two glasses.18 On the Saturday night Mr. Jeremiah Smith slept in Cook's room as he was still ill. On Sunday, between twelve and one, Palmer sent over his gardener, Hawley, with some more broth for Cook.19 Elizabeth Mills, the servant at the Talbot Arms, tasted it, taking two or three spoonfuls. She became exceedingly sick about half an hour afterwards, and vomited till 5 o'clock in the afternoon. She was so ill that she had to go to bed. This broth was also taken to Cook, and the cup afterwards returned to Palmer. It appears to have been taken and vomited, though the evidence is not quite explicit on that point.20 By the Sunday's post Palmer wrote to Mr. Jones an apothecary and Cook's most intimate friend, to come and see him. He said that Cook was "confined to his bed with a severe bilious attack combined with diarrhoea." The servant Mills said there was no diarrhoea.21 It was observed on the part of the defence that this letter was strong proof of innocence. The prosecution suggested that it was "part of a deep design, and was meant to make evidence in the prisoner's favour." The fair conclusion seems to be that it was an ambiguous act which ought to weigh neither way, though the falsehood about Cook's symptoms is suspicious as far as it goes.

On the night between Sunday and Monday Cook had some sort of attack. When the servant Mills went into his room on Monday he said, "I was just mad for two minutes." She sad, "Why did you not ring the bell?" He said, "I thought that you would be all fast asleep, and not hear it." He also said he was disturbed by a quarrel in the street. It might have waked and disturbed him, but he was not sure. This incident was not mentioned at first by Barnes and Mills, but was brought out on their being re-called at the request of the prisoners' counsel. It was considered important for the defence, as proving that Cook had had an attack of some kind before it was suggested that any strychnine was administered; and the principal medical witness for the defence, Mr. Nunneley, referred to it, with this view.²²

On Monday, about a quarterpast or half-past seven, Palmer again visited Cook; but as he was in London about half-past two, he must have gone to town by an early train. During the whole of Monday Cook was much better. He dressed himself, saw a jockey and his trainer, and the sickness ceased.²³

In the meantime Palmer was in London. He met by appointment a man named Herring who was connected with the Turf. Palmer told him he wished to settle Cook's account and read to him from a list, which Herring copied as Palmer read it, the particulars of the bets which he was to receive. They amounted to £984 clear. Of this sum Palmer instructed Herring to pay £450 to Pratt and £350 to Padwick. The nature of the debt to Padwick was not proved in evidence, as Padwick himself was not called. Palmer told Herring

- Rebuts inference in Palmer's favour suggested by preceding fact and explains the object of his conduct by showing that his statement was false (section 9). Cook's statement relates to his state of body (section 14).
 Fact in issue—administration of
- Fact in issue—administration of poisons (section 5).
- Effect of facts in issue (section 7).
 Conduct (section 8), and explanation of it (section 9).
- 22. Facts tending to rebut inference from previous fact (section 9).
- 23. Supports the inference suggested by the previous fact that Palmer's dosest caused Cook's illness (section 9).

the £450 was to settle the bill for which Cook had assigned his horses. He wrote Pratt on the same day a letter in these words: "Dear Sir,—You will place the £50 I have just paid you, and the £450 you will receive from Mr. Herring together £500, and the £200 you received on Saturday" (from Fisher) "towards payments of my mother's acceptance for £2,000 due on 25th October."²⁴

Herring received upwards of £800, and paid part of it away according to Palmer's directions. Pratt gave Palmer credit for the £450; but the £350 was not paid to Padwick, according to Palmer's directions, as part was retained by Mr. Herring for some debts due from Cook to him, and Herring received less than he expected. In his reply the Attorney General said that the £350 intended to be paid to Padwick was on account of a bet, and suggested that the motive was to keep Padwick quiet as to the ante-dated cheque for £1,000 given to Espin on Padwick's account. There was no evidence of this, and it is not of much importance. It was clearly intended to be paid to Padwick on account not of Cook (except possibly as to a small part), but of Palmer. Palmer thus disposed, or attempted to dispose, in the course of Monday, November 19th, of the whole of Cook's winning for his own advantage.²⁵

This is a convenient place to mention the final result of the transaction relating to the bill for £500, in which Cook and Palmer were jointly interested. On Friday when Cook and Palmer dined together (November 16th) Cook wrote to Fisher (his agent) in these words: "It is of very great importance to both Palmer and myself that a sum of £500 should be paid to a Mr. Pratt of 5, Queen Street, Mayfair: £300 has been sent up to-night, and if you would be kind enough to pay the other £200 tomorrow, on the receipt of this, you will greatly oblige me. I will settle it on Monday at Tattersall's." Fisher did pay the £200, expecting as he said, to settle Cook's account on Monday, and repay himself. On Saturday, November 17th (the day after the date of the letter, "a person," said Pratt, "whose name I did not know, called on me with a cheque, and paid me £300) on account of the prisoner that" (apparently the cheque not the £300) "was a cheque of Mr. Fisher's". When Pratt heard of Cook's death, he wrote to Palmer, saying, "The death of Mr. Cook will now compel you to look about as to the payment of the bill for £500 due on the 2nd December."1

Great use was made of these letters by the defence. It was argued that they proved that Cook was helping Palmer, and was eager to relieve him from the pressure put on him by Pratt; that in consequence of this he not only took up the £500 bill, but authorized Palmer to apply the £800 to similar purposes, and to get the amount settled by Herring, instead of Fisher, so that Fisher might not stop out of it the £200 which he had advanced to Pratt; it was asked how it could be Balmer's interest, on this supposition, that Cook should die, especially as the first consequence of his death was Pratt's application for the money due on the £500 bill.

Conduct and statement explanatory thereof (section 8, ex. 2).

^{25.} All this is Paimer's conduct and is

explanatory of it (sections 7, 9).

1. Motive for not poisoning Cook (section 8).

These arguments were, no doubt, plausible; and the fact that Cook's death compelled Pratt to look to Palmer for the payment of the £500 lends them weight; but it may be asked, on the other hand, why should Cook give away the whole of his winnings to Palmer? Why should Cook allow Palmer to appropriate to the diminution of his own liabilities the £200 which Fisher had advanced to the credit of the bill on which both were liable? Why should he join with Palmer in a plan defrauding Fisher of his security for this advance? No answer to any of these questions was suggested. As to the £300, Cook's letter to Fisher says, "£300 has been sent up this evening." There was evidence that Pratt never received it, for he applied to Palmer for the money on Cook's death. Moreover, Pratt said that on Saturday he did receive £300 on account of Palmer, which he placed to the account of the forged acceptance for £2,000. Where did Palmer get the money? The suggestion of the prosecution was that Cook gave it to him to pay Pratt on account of their joint bill and that he paid it on his own account. This was probably the true view of the case. The observation that Pratt, on hearing of Cook's death applied to Palmer to pay the £500 bill, is met by the reflection that that bill was genuine, and collaterally secured by the assignment of the race-horses, and that the other bill bore a forged acceptance, and must be satisfied at all hazards. The result was that on the Monday evening Palmer had the most imperious interest in Cook's death, for he had robbed him of all he had in the world, except the equity of redemption in his two horses.

On Monday evening (November 19th) Palmer returned to Rugeley, and went to the shop of Mr. Salt, a surgeon there, about 9 p.m. He saw Newton, Salt's assistant, and asked him for three grains of strychnine, which were accordingly given him.² Newton never mentioned this transaction till a day or two before his examination as a witness in London, though he was examined at the inquest. He explained this by saying that there had been quarrel between Palmer and Salt, his (Newton's) master, and that he thought Salt would be displeased with him for having given Palmer anything. No doubt the concealment was improper, but nothing appeared on cross-examination to suggest that the witness was wilfully perjured.

Cook had been much better throughout Monday, and on Monday evening Mr. Bamford, who was attending him, brought some pills for him, which he left at the hotel. They contained neither antimony nor strychnine. They were taken up in the box in which they came to Cook's room by the chambermaid, and were left there on the dressing-table about eight o'clock. Palmer came (according to Barnes the waitress) between eight and nine, and Mills said she saw him sitting by the fire between nine and ten.8

If this evidence were believed, he would have had an opportunity of substituting poisoned pills for those sent by Mr. Bamford just after he had according to Newton, procured strychnine. The evidence, however, was contradicted by a witness called for the prisoner, Jeremiah Smith, the attorney. He said that on the Monday evening, about ten minutes past ten, he saw Palmer

Preparation (section 8).
 Opportunity. The rest is introduc-

coming in a car from the direction of Stafford; that they went up to Cook's room together, stayed two or three minutes, and went with Smith to the house of old Mrs. Palmer, his mother. Cook said, "Bamford sent him some pills, and he had taken them, and Palmer was late, intimating that he should not have taken them if he had thought Palmer would have called in before." If this evidence were believed it would of course have proved that Cook took the pills which Bamford sent as he sent them.4 Smith, however, was crossexamined by the Attorney General at great length. He admitted with the greatest reluctance that he had witnessed the assignment of a policy for £13,000 by Walter to William Palmer; that he wrote to an office to effect an insurance for £10,000 on the life of Bates, who was Palmer's groom, at £1 a week; that he tried, after Walter Palmer's death, to get his widow to give up her claim on the policy; that he was applied to attest other proposals for insurances on Walter Palmer's life for similar amounts; and that he had got a cheque for f5 for attesting the assignment.5

Lord Campbell said of this witness in summing up, "Can you believe a man who so disgraces himself in the witness-box? It is for you to say what faith you can place in a witness, who, by his own admission, engaged in such fraudulent proceedings."

It is curious that though the credit of this witness was so much shaken in cross-examination, and though he was contradicted both by Mills and Newton, he must have been right and they wrong as to the time when Palmer came down to Rugeley that evening. Mr. Mathews, the inspector of police at the Euston station, proved that the only train by which Palmer could have left London after half past two (when he met Herring) started at five, and reached Stafford on the night in question at a quarter to nine. It is about ten miles from Stafford to Rugeley, so that he could not have got across by the road in much less than an hour,6 yet Newton said he saw him "about nine," and Mills saw him "between nine and ten." Nothing, however, is more difficult than to speak accurately to time; on the other hand, if Smith spoke the truth, Newton could not have seen him at all that night and Miss, if at all, must have seen him for a moment only in Smith's company. Mills never mentioned Smith, and Smith would not venture to swear that she or any one else saw him at the Talbot Arms. It was a suspicious circumstance that Serjeant Shee did not open Smith's evidence to the jury. An opportunity for jerjury was afforded by the mistake made by the witnesses as to the time, which the defence were able to prove by the evidence of the police inspector. If Smith were disposed to tell an untruth, the knowledge of this fact would enable him to do so with an appearance of plausibility.

Whatever view is taken as to the effect of this evidence it was clearly proved that about the middle of the night between Monday and Tuesday Cook had a violent attack of some sort. About twelve or a little before, his bell rang: he screamed violently. When Mills, the servant, came in he was sitting

^{4.} Evidence against the existence of

the fact last mentioned (section 5). This cross-examination tended to test the varacity of the witness and to test his credit (section 146).

^{6.} Facts inconsistent with a fact (section 11), and fixing the time of the occurrence of a relevant fact (section 9).

up in bed, and asked that Palmer might be fetched at once. He was beating the bed clothes; he said he should suffocate if he lays down. His head and neck and his whole body jumped and jerked. He had great difficulty in breathing, and his eyes protruded. His hand was stiff, and he asked to have it rubbed. Palmer came in, and gave him a draught and some pills. He snapped at the glass, and got both it and the spoon between his teeth. He had also great difficulty in swallowing the pills. After this he got more easy, and Palmer stayed by him some time, sleeping in an easy chair.

Great efforts were made in cross-examination to shake the evidence of Mills by showing that she had altered the evidence which she gave before the Coroner, so as to make her description of the symptoms tally with those of poisoning by strychnine, and also by showing that she had been drilled as to the evidence which she was to give by persons connected with the prosecution. She denied most of the suggestions conveyed by the questions asked her, and explained others.⁸ As to the differences between her evidence before the Coroner and at the trial, a witness (Mr. Gardner an attorney) was called to show that the depositions, were not properly taken at the inquest.⁹

On the following day, Tuesday, the 20th, Cook was a good deal better. In the middle of the day he sent the boots to ask Palmer if he might have a cup of coffee. Palmer said he might, and came over, tasted a cup made by the servant, and took it from her hands to give it to Cook. This coffee was afterwards thrown up.¹⁰

A little before or after this, the exact hour is not important, Palmer went to the shop of Hawkins, a druggist at Rugeley, and was there served by his apprentice Roberts with two drachms of prussic acid, six grains of strychnine, and two drachms of Batley's sedative. Whilst he was making the purchase, Newton from whom he had obtained the other strychnine the night before came in; Palmer took him to the door, saying he wished to speak to him; and when he was there asked him a question about the firm of a Mr. Edwin Salt—a matter with which he had nothing at all to do. Whilst they were there a third person came up and spoke to Newton, on which Palmer went back into Hawkin's shop and took away the things, Newton not seeing what he took. The obvious suggestion upon this is that Palmer wanted to prevent Newton from seeing what he was about. No attempt even was made to shake, or in any way discredit, Roberts, the apprentice. 12

At about 4 p.m. Mr. Jones, the friend to whom Palmer had written, arrived from Lutterworth.¹³ He examined Cook in Palmer's presence, and remarked

 Effect of fact in issue, viz., the administration of poison (section 7).

 Former statements inconsistent with evidence (section 155).

9. The depositions before the Corner would be a proper mode of proof as being a record of a relevant fact made by a public servant in the discharge of his official duty (section 35), and any document purporting to be such a deposition

would on production be presumed to be genuine and the evidence would be presumed to be duly taken (sections 79 and 80), but this might be rebutted (section 4), definition of 'shall presume.'

10. Part of the transaction of poisoning

(section 8).

Preparation (section 8).
 Conduct (section 8).
 Introductory (section 9).

that he had not the tongue of a bilious patient; to which Palmer replied, "You should have seen it before." Cook appeared to be better during Tuesday, and was in good spirits.14 At about 7 p.m. Mr. Bamford came in and Cook told him in Palmer's presence that he objected to the pills, as they had made him ill the night before. The three medical men then had a private consultation. Palmer proposed that Bamford should make up the pills as on the night before, and that Jones should not tell Cook what they were made of, as he objected to the morphine which they contained. Bamford agreed and Palmer went up to his house with him and got the pills, and was present whilst they were made up, put into a pill-box and directed. He took them away with him between seven and eight.16 Cook was well and comfortable all the evening; he had no bilious symptoms, no vomitting, and no diarrhoea,16

Towards eleven Palmer came with a box of pills directed in Bamford's hand. He called Jones' attention to the goodness of the handwriting for a man of eighty.17 It was suggested by the prosecution that the reason for this was to impress Jones with the fact that the pills had been made up by Bamford. With reference to Smith's evidence it is remarkable that Bamford on the second night sent the pills, not "between nine and ten," but at eleven. Palmer pressed Cook to take the pills, which at first he refused to do, as they had made him so ill the night before. At last he did so, and immediately afterwards vomited. Jones and Palmer both examined to see whether the pills had been thrown up and they found that they had not. This was about eleven. Jones then had his supper, and went to bed in Cook's room about twelve. When he had been in bed a short time, perhaps ten minutes, Cook started up and called out, "Doctor, get up; I am going to be ill; ring the bell for Mr. Palmer." He also said. "Rub my neck." The back of his neck was still and hard. Mills ran across the road to Palmer's and rang the bell. Palmer immediately came to the bed-room window and said he would come at once. Two minutes afterwards he was in Cook's room and said he had never dressed so quick in his life. He was dressed as usual. The suggestion upon this was that he had been sitting up expecting to be called.18

By the time of Palmer's arrival Cook was very ill. Jones, Elizabeth, Mills and Palmer were in the room, and Barnes stood at the door. The muscles of his neck were stiff; he screamed loudly. Palmer gave him what he said were two ammonia pills. Immediately afterwards-too soon for the pills to have any effect-he was dreadfully convulsed. He said, when he began to be convulsed, "Raise me up, or I shall be suffocated." Palmer and Jones tried to do so, but could not, as the limbs were rigid. He then asked to be turned over, which was done. His heart began to beat weakly. Jones asked Palmer to get some ammonia to try to stimulate it. He fetched a bottle, and was absent about a minute for that purpose. When he came back Cook was almost dead, and he died in a few minutes, quite quietly. The whole attack lasted about ten minutes. The body was twisted back into the shape of a bow and

State of things under which Cook was poisoned (section 7).
 Preparation (section 8).

L. E. 6

^{16.} Ibid

^{17.} Conduct and statement (section 8,

^{18.} Fact in issue (section 15). Conduct (section 8).

would have rested on the head and heels, had it been laid on its back. When the body was laid out, it was very stiff. The arms could not be kept down by the sides till they were tied behind the back with tape. The feet also had to be tied and the fingers of one hand were very stiff, the hand being clenched. This was about 1 a.m. half or three-quarters of an hour after the death.¹⁹

As soon as Cook was dead, Jones went out to speak to the house-keeper, leaving Palmer alone with the body. When Jones left the room he sent the servant Mills in, and she saw Palmer searching the pockets of Cook's coat and searching also under the pillow and bolster. Jones shortly afterwards returned, and Palmer told him that as Cook's nearest friend, he (Jones) ought to take possession of his property. He accordingly took possession of his watch and purse, containing five sovereigns and five shillings. He found no other money. Palmer said, "Mr. Cook's death is a bad thing for me, as I am responsible for £3,000 or £4,000 and I hope Mr. Cook's friends will not let me lose it. If they do not assist me all my horses will be seized." The betting-book was mentioned. Palmer said, "It will be no use to any one," and added that it would probably be found.²⁰

On Wednesday, the 21st instant, Mr. Wetherby, the London racing agent who kept a sort of bank for sporting men; received from Palmer a letter enclosing cheque for £350 against the amount of the Shrewsbury stakes (£381) which Wetherby was to receive for him. This cheque had been drawn on Tuesday, about seven o'clock in the evening under peculiar circumstances. Palmer sent for Mr. Cheshire, the post-master at Rugeley, telling him to bring a receipt stamp, and when arrived asked him to write out, from a copy which he produced, a cheque by Cook, on Wetherby. He said it was for money which Cook owed him, and that he was going to take it over for Cook to sign. Cheshire wrote out the body of the cheque, and Palmer took it away. When Mr. Wetherby received the cheque, the stakes had not been paid to Cook's credit. He accordingly returned the cheque to Palmer, to whom the prosecution gave notice to produce it at the trial.21 It was called for, but not produced.22 This was one of the strongest facts against Palmer in the whole of the case. If he had produced the cheque, and if it had appeared to have been really signed by Cook, it would have shown that Cook, for some reason or other, had made over his stakes to Palmer, and this would have destroyed the strong presumption arising from Palmer's appropriation of the bets to his own purposes. In fact it would have greatly weakened and almost upset the case as to the motive. On the other hand, the non-production of the cheque amounted to an admission that it was a forgery; and if that were so, Palmer was forging his friend's name for the purpose of stealing his stakes at the time when to all outward appearance there was every prospect of his speedy recovery which must result in the detection of the fraud. If he knew that Cook would die that night this was natural. On any other supposition it was inconceivable rashness.23

Either on Thursday, 22nd, or Friday, 23rd Palmer sent for Cheshire again' and produced a paper which he said Cook had given to him some days before.

^{19.} Cook's death, in all its detail, was a fact in issue (section 5).

fact in issue (section 5).

20. Conduct (section 8).

21. Conduct (section 8).

See section 66 as to notice to produce.

^{23.} As to these inferences, see section 114, illust. (g)

The paper purported to be an acknowledgment that certain bills—the particulars of which were stated—were all for Cook's benefit and not for Palmer's. The amount was considerable as at least one item was for £1,000, and another for £500. This document purported to be signed by Cook, and Palmer wished Cheshire to attest Cook's execution of it which he refused to do. This document was called for at trial, and not produced. The same observations apply to it as to the cheque.²⁴

Evidence was further given to show that Palmer, who, shortly before, had but £9 6s. at the bank, and had borrowed £25 to go to Shrewsbury, paid away large sums of money soon after Cook's death. He paid Pratt £100 on the 24th; he paid a farmer named Spilsbury £46 2s. with a bank of England note for £50 on the 22nd; and Bown, a draper, a sum of £60 or thereabouts in two £50 notes, on the $20\text{th}.^{25}$ The general result of these money transactions is, that Palmer appropriated to his own use all Cook's bets; that he tried to appropriate his stakes and that shortly before or just after his death, he was in possession of between £400 and £600 of which he paid Pratt £400, though very shortly before he was being pressed for money.

On Wednesday, November 21st, Mr. Jones went up to London and informed Mr. Stephens, Cook's step-father, of his step-son's death. Mr. Stephens went to Lutterworth, found a will by which Cook appointed him his executor and then went on to Rugeley, where he arrived about the middle of the day on Thursday. He asked Palmer for information about Cook's affairs, and he replied, "There are £4,000 worth of bills out of his, and I am sorry to say my name is to them; but I have got a paper drawn up by a lawyer and signed by Mr. Cook to show that I never had any benefit from them." Mr. Stephens said that at all events he must be buried. Palmer offered to do so himself and said that the body ought to be fastened up as soon as possible. The conversation then ended for the time. Palmer went out and without authority from Mr. Stephens ordered a shell and a strong oak coffin.²

In the afternoon Mr. Stephens, Palmer, Jones and a Mr. Gradford, Cook's brother-in-law dined together, and after dinner Mr. Stephens desired Mr. Jones to fetch Cook's betting-book. Jones went to look for it, but was unable to find it. The betting-book had last been seen by the chambermaid Mills, who gave it to Cook in bed on the Monday night, when he took a stamp from a pocket at the end of it. On hearing that the book could not be found, Palmersaid it was of on manner of use. Mr. Stephens said he understood Cook had won a great deal of money at Shrewsbury, to which Palmer replied: "It's no use, I assure you: when a man dies his bets are done with." He did not mention the fact that Cook's bets had been paid to Herring on Monday. Mr. Stephens then said that the book must be found, and Palmer answered that no doubt it would be. Before leaving the inn Mr. Stephens went to look at the

25. Conduct (section 8).1. Introductory and explanatory (sec-

tion 9).

 Admission and conduct (sections 17, 18; section 8).

 These facts and statements together make it highly probable that Palmer stole the betting-book which would be relevant as conduct (sections 8, 11).

Conduct (section 8). See section 66 as to notice to produce. As to these inferences, see section 114, illust. (g).

body before the coffin was fastened, and observed that both hands were clenched. He returned at once to town and went to his attorney. He returned to Rugeley on Saturday, the 24th, and informed Palmer of his intention to have a post-mortem examination, which took place on Monday, 26th.4

The post-mortem examination was conducted in the presence of Palmer by Dr. Harland, Mr. Devonshire, a medical student, assisting Mr. Monkton, and Mr. Newton. The heart was contracted and empty. There were numerous small yellowish white spots, about the size of mustard-seed at the larger end of the stomach. The upper part of the spinal cord was in its natural state; the lower part was not examined till the 25th January, when certain granules were found. There were many follicles on the tongue, apparently of long-standing. The lungs appeared healthy to Dr. Harland but Mr. Devonshire thought that there was some congestion.5 Some points in Palmer's behaviour, both before and after the post-mortem examination, attracted notice. Newton said that on the Sunday night he sent for him, and asked what dose of strychnine would kill a dog. Newton said a grain. He asked whether it would be found in the stomach, and what would be the appearance of the stomach after death. Newton said there would be no inflammation, and he did not think it would be found. Newton thought he replied. "It's all right," as if speaking to himself and added that he snapped his fingers. Whilst Devonshire was opening the stomach Palmer pushed against him, and part of the contents of the stomach was spilt. Nothing, particular being found in the stomach, Palmer observed to Bamford, "They will not hang us yet." As they were all crowding together to see what passed, the push might have been an accident; and as Mr. Stephens' suspicions were well known, the remark was natural, though coarse. After the examination was completed, the intestines, etc., were put into a jar, over the top of which were tied two bladders. Palmer removed the jar from the table to a place near the door, and when it was missed said he thought it would be more convenient. When replaced it was found that a split had been cut through both bladders.6

After the examination Mr. Stephens and an attorney's clerk took the jars containing the viscera, etc., in a fly to Stafford. Palmer asked the postboy if he was going to drive them to Stafford. The postboy said, "I believe I am". Palmer said, "Is it Mr. Stephens you are going to take." He said, "I believe it is." Palmer said, "I suppose you are going to take the jars?" He said, "I am." Palmer asked if he would upset them? He said, "I shall not." Palmer said if he would, there was a £10 note for him. He also said something about its being "a humbugging concern." Some confusion was introduced into this evidence by the cross-examination, which tended to show that Palmer's object was to upset Mr. Stephens and not the jars, but at last the postboy (j. Myatt) repeated it as given above. Indeed, it makes little difference whether Palmer wished to upset Stephens or the jars, as they were all in one fly, and must be upset together if at all.

Shortly after the post-mortem examination an inquest was held before Mr. Ward, the Coroner. It began on the 29th November and ended on the 5th

Introductory to what follows (section 9).

Facts supporting opinions of experts (section 46).

^{6.} Conduct (section 8).

Introductory (section 9).
 Conduct (section 8).

December. On Sunday, 3rd December, Palmer asked Cheshire, the postmaster "if he had anything fresh." Cheshire replied that he could not open a letter. Afterwards, however, he did open a letter from Dr. Alfred Taylor, who had analysed the contents of the stomach, etc., to Mr. Gardiner, the attorney for the prosecution, and informed Palmer that Dr. Taylor said in that letter that no traces of strychnine were found. Palmer said he knew they would not, and he was quite innocent. Soon afterwards Palmer wrote to Mr. Ward, suggesting various questions to be put to witnesses at the inquest and saying that he knew Dr. Taylor had told Mr. Gardiner there were no traces of strychnine, prussic acid, or opium. A few days before this, on the 1st December, Palmer had sent Mr. Ward as a present, a codfish, a barrel of oysters, a brace of pheasants, and a turkey. These circumstances certainly prove improper and even criminal conduct. Cheshire was imprisoned for his offence, and Lord Campbell spoke in severe terms of the conduct of the Coroner; but a bad and unscrupulous man, as Palmer evidently was, might act in the manner described, even though he was innocent of the particular offence charged.

A medical book found in Palmer's possession had in it some MS notes on the subject of strychnine, one of which was, "It kills by causing tetanic contraction of the respiratory muscles." It was not suggested that this memorandum was made for any particular purpose. It was used merely to show that Palmer was acquainted with the properties and effects of strychnine.¹⁰

This completes the evidence as to Palmer's behaviour before, at and after the death of Cook. It proves beyond all question that, having the strongest possible motive to obtain at once a considerable sum of money, he robbed his friend of the whole of the bets paid to Herring on Monday by a series of ingenious devices, and that he tried to rob him of the stakes; it raises the strongest presumption that he robbed Cook of the £300 which, as Cook supposed, was sent up to Pratt on the 16th, and that he stole the money which he had on his person, and had received at Shrewsbury; it proves that he forged his name the night before he died, and that he tried to procure a fraudulent attestation to another forged document relating to his affairs the day after he died. It also proves that he had every opportunity of administering poison to Cook, that he told repeated lies about his state of health, and that he purchased deadly poison, for which he had no lawful use, on two separate occasions shortly before two paroxysms of a similar character to each other, the second of which deprived him of life.

The rest of the evidence was directed to prove that the symptoms of which Cook died were those of poisoning by strychnine, and that antimony which was never prescribed for him, was found in his body. Evidence was also given in the course of the trial as to the stage of Cook's health.

At the time of his death Cook was about twenty-eight years of age. Both his father and mother died young, and his sister and half-brother were not robust. He inherited from his father about £12,000 and was articled to a soli-

⁹ Conduct and facts introductory 10. Fact showing knowledge (section thereto (sections 8, 9).

citor. Instead of following up that profession he betook himself to sporting pursuits, and appears to have led a rather dissipated life. He suffered from syphilis, and was in the habit of occasionally consulting Dr. Savage on the state of his health. Dr. Savage saw him in November 1854, in May, in June, towards the end of October, and again early in November 1855, about a fortnight before his death, so that he had ample means of giving satisfactory evidence on the subject, especially as he examined him carefully whenever he came. Dr. Savage said that he had two shallow ulcers on the tongue corresponding to bad teeth; that he had also a sore throat, one of his tonsils being very large, red and tender, and the other very small. Cook himself was afraid that these symptoms were syphilitic, but Dr. Savage thought decidedly that they were not. He also noticed "an indication of pulmonary affection under the left lung". Wishing to get him away from his turf associates, Dr. Savage recommended him to go abroad for the winter. His general health Dr. Savage considered good for a man who was not robust. Mr. Stephens said that when he last saw him alive he was looking better than he had looked for some time, and on his remarking, "You do not look anything of an invalid now," Cook struck himself on the breast and said he was quite well. His friend, Mr. Jones also said that his health was generally good though he was not very robust, and that he both hunted and played at cricket.11

On the other hand, witnesses were called for the prisoner who gave a different account of his health. A Mr. Serjeant said he was with him at Liverpool a week before the Shrewsbury races, that he called his attention to the state of his mouth and throat, and the back part of his tongue was in a complete state of ulcer. "I said," added the witness, "I was surprised he could eat and drink in the state his mouth was in. He said he had been in that state for weeks and months, and now he did not take notice of it". This was certainly not consistent with Dr. Savage's evidence.¹²

Such being the state of health of Cook at the time of his death, the next question was as to its cause. The prosecution contended that the symptoms which attended it proved that he was poisoned by strychnia. Several eminent physicians and surgeons-Mr. Curling, Dr. Todd, Sir Benjamin Brodie, Mr. Daniel, and Mr. Solly-gave an account of the general character and causes of the disease of tetanus. Mr. Curling said that tetanus consists of spasmodic affection of the voluntary muscles of the body which at last ends in death, produced either by suffocation caused by the closing of the windpipe or by the wearing effect of the severe and painful struggles which the muscular spasms produce. Of this disease there are three forms-idiopathic tetanus, which is produced without any assignable external cause; traumatic tetanus, which results from wounds; and the tetanus which is produced by the administration of strychnia, bruschia, and nux vomica, all of which are different forms of the same poison, Idiopathic tetanus is a very rare disease in England. Sir Benjamin Brodie had seen only one doubtful case of it. Mr. Daniel, who for twenty-eight years was surgeon to the Bristol Hospital, saw only two, Mr. Nunneley, professor of surgery at Leeds, had seen four. In India, however, it is comparatively common: Mr. Jackson, in twenty-five years' practice there saw about forty cases. It was agreed on all hands, that though the exciting cause of the two

^{11.} Conduct and facts introductory 12. State of things under which crime thereto (sections 8, 9).

diseases is different, their symptoms are the same. They were described in similar terms by several of the witnesses. Dr. Todd said the disease begins with stiffness about the jaw, the symptoms then extend themselves to the other muscles of the trunk and body. They gradually develop themselves. When once the disease has begun there are remissions of severity, but not complete intermission of the symptoms. In acute cases the disease terminates in three or four days. In chronic cases it will go on for as much as three weeks. There was some question as to what was the shortest case upon record. In a case mentioned by one of the prisoner's witnesses, Mr. Ross, the patient was said to have been attacked in the morning either at eleven or some hours earlier, it did not clearly appear which, and to have died at half-past seven in the evening. This was the shortest case specified on either side, though its duration was not accurately determined. As a rule, however, tetanus, whether traumatic or idiopathic, was said to be a matter not of minutes, or even of hours, but of days.¹⁸

Such being the nature of tetanus, traumatic and idiopathic, four questions arose. Did Cook die of tetanus? Did he die of traumatic tetanus? Did he die of idiopathic tetanus? Did he die of the tetanus produced by strychnia? The case for prosecution upon these questions was, first, that he did die of tetanus. Mr. Curling said no doubt there was spasmodic action of the muscles (which was his definition of tetanus) in Cook's case; and even Mr. Nunneley, the principal witness for the prisoner, who contended that the death of Cook was caused neither by tetanus in its ordinary forms nor by the tetanus of strychnia, admitted that the paroxysm described by Mr. Jones was "very like" the paroxysm of tetanus. The close general resemblance of the symptoms to those of tetanus was indeed assumed by all the witnesses on both sides, as was proved by the various distinctions which were stated on the side of the Crown between Cook's symptoms and those of traumatic and idiopathic tetanus, and on the side of the prisoner between Cook's symptoms and the symptoms of the tetanus of strychnia. It might, therefore, be considered to be established that he died of tetanus in some form or other.

The next point asserted by the prosecution was, that he did not die of traumatic or idiopathic tetanus, because there was no wound on his body, and also because the course of the symptoms was different. They further asserted that the symptoms were those of poison by strychnia.

Upon these points the evidence was as follows: Mr. Curling was asked, Q. "Were the symptoms consistent with any form of traumatic tetanus which has ever come under your knowledge or observation?" He answered, "No." Q. "What distinguished them from the cases of traumatic tetanus which you have described?" A. "There was the sudden onset of the fatal symptoms. In all cases that have fallen under my notice the disease has been preceded by the milder symptoms of tetanus." Q. "Gradually progressing their complete development, and completion and death?" A. "Yes." He also mentioned "the sudden onset and rapid subsidence of the spasms as inconsistent with the theory of either traumatic or idiopathic tetanus; and he said he had never known a

Opinions of experts, and facts on which they were founded (sections

^{45, 46).} The rest of the evidence falls under this head.

case of tetanus which ran its course in less than eight or ten hours. In the one case which occupied so short a time the true period could not be ascertained, In general the time required was from one to several days. Sir Benjamin Brodie was asked, "In your opinion are the symptoms those of traumatic, tetanus or not?" He replied, "As far as the spasmodic contraction of the muscles goes, the symptoms resemble those of traumatic tetanus; as to the course which the symptoms took, that was entirely different. He added, "The symptoms of traumatic tetanus always begin, as far as I have seen, very gradually, the stiffness of the lower jaw being I believe, the symptom first complained of-at least, so it has been in my experience, then the contraction of the muscles of the back is always later symptom, generally much later; the muscles of the extremities are effected in a much less degree than those of the neck and trunk, except in some cases, where the injury has been in a limb and an early symptom has been a contraction of the muscles of that limb. I do not myself recollect a case in which in ordinary tetanus there was that contraction of the muscles of the hand which I understand was stated to have existed in this instance. The ordinary tetanus rarely runs its course in less than two or three days, and often is protracted to a much longer period; I know one case only in which the disease was said to have terminated in twelve hours." He said, in conclusion, "I never saw a case in which the symptoms described arose from any disease: when I say that, of course, I refer not to the particular symptoms, but to the general course which the symptoms took." Mr. Daniel being asked whether the symptoms of Cook could be referred to idiopathic or traumatic tetanus, said, "In my judgment they could not." He also said that he should repeat Sir Benjamin Brodie's words if he were to enumerate the distinctions. Mr. Solly said that the symptoms were not referable to any disease he ever witnessed; and Dr. Todd said, "I think the symptoms were those of Strychnia." The same opinion was expressed with equal confidence by Dr. Alfred Taylor, Dr. Rees and Mr. Christison.

In order to support this general evidence witnesses were called who gave account of three fatal cases of poisoning by strychnia, and of one case in which the patient recovered. The first of the fatal cases was that of Agnes French, or Senet, who was accidentally poisoned at Glasgow Infirmary, in 1845, by some pills which she took, and which were intended for a paralytic patient. According to the nurse, the girl was taken ill three-quarters of an hour, according to one of the physicians (who, however, was not present) twenty minutes, after she swallowed the pills. She fell suddenly back on the floor; when her clothes were cut off she was stiff, "just like a poker," her arms were stretched out, her hands clenched; she vomited slightly; she had no lockjaw; there was a retraction of the mouth and face, the head was bent back, the spine curved. She went into severe paroxysms every few seconds, and died an hour after the symptoms began. She was perfectly conscious. The heart was found empty on examination.

The second case described was that of Mrs. Serjeantson Smyth, who was accidentally poisoned at Romsey in 1848, by strychnine put into a dose of ordinary medicine instead of salicine. She took the dose about five or ten minutes after seven; in five or ten minutes more the servant was alarmed by a violent ringing of the bell. She found her mistress leaning on a chair, went out to send for a doctor, and on her return found her on the floor. She screamed loudly. She asked to have her legs pulled straight and to have water

thrown over her. A few minutes before she died, she said, "Turn me over"; she was turned over, and died very quietly almost immediately. The fit lasted about an hour. The hands were clenched, the feet contracted and on a postmortem examination the heart was found empty.

The third case was that of Mrs. Dove, who was poisoned at Leeds by her husband (for which he was afterwards hanged) in February 1856. She had five attacks on Monday, Wednesday, Thursday, Friday and Saturday of the week beginning February 24th. She had prickings in the legs and twitchings in the hands. She asked her husband to rub her arms and legs before the spasms came on, but when they were strong she could not bear her legs to be touched. The fatal attack in her case lasted two hours and a half. The hands were semi-bent, feet strongly arched. The lungs were congested; the spinal cord was also much congested. The head being opened first, a good deal of blood flowed out part of which might flow from the heart.

The case, in which the patient recovered was that of a paralytic patient of Mr. Moore's. He took an overdose of strychnia, and in about three-quarters of an hour Mr. Moore found him stiffened in every limb. His head was drawn back; he was screaming and "frequently requesting that we should turn him, move him, rub him." His spine was drawn back. He snapped at a spoon with which an attempt was made to administer medicine, and was perfectly conscious during the whole time.

Dr. Taylor and Dr. Owen Rees examined Cook's body. They found no strychnia, but they found antimony in the liver, the left kidney, the spleen and also in the blood.

The case for the prosecution, upon this evidence was that the symptoms were those of tetanus and of tetanus produced by strychnia. The case for the prisoner was, first that several of the symptoms observed were inconsistent with strychnia; and secondly, that all of them might be explained on other hypotheses. Their evidence was given in part by their own witnesses, and in part by the witnesses for the Crown in cross-examination. The replies suggested by the Crown were founded partly on the evidence of their own witnesses given by way of anticipation, and partiy by the evidence obtained from the witnesses for the prisoner on cross-examination.

The first and most conspicuous argument on behalf of the prisoner was that the fact that no strychina was discovered by Dr. Taylor and Dr. Rees was inconsistent with the theory that any had been administered. The material part of Dr. Taylor's evidence upon this point was, that he had examined the stomach and intestines of Cook for a variety of poisons, strychnia among others, without success. The contents of the stomach were gone, though the contents of the intestines remained, and the stomach itself had been cut open from end to end and turned inside out, and the mucous surface on which poison, if present, would have been found was rubbing against the surface of the intestines. This Dr. Taylor considered a most unfavourable condition for the discovery of poison and Mr. Christison agreed with him. Several of the prisoner's witnesses on the contrary—Mr. Nunneley, Dr. Letheby and Mr. Rogers—thought it would only increase the difficulty of the operation, and not destroy its chance of success.

Apart from this Dr. Taylor expressed his opinion that from the way in which strychnia acts, it might be impossible to discover it even if the circumstances were favourable. The mode of testing its presence in the stomach is to treat the stomach in various ways, until at last a residue is obtained which, upon the application of certain chemical ingredients, changes its colour if strychnia is present. All the witnesses agreed that strychnia acts by absorptionthat is, it is taken up from the stomach by the absorbents, thence it passes into the blood, thence into the solid part of the body, and at some stage of its progress causes death by its action on the nerves and muscles. Its noxious effects do not begin till it has left the stomach. From this Dr. Taylor argued that if a minimum dose were administered, none would be left in the stomach at the time of death, and, therefore, none could be discovered there. He also said that if the strychnia got into the blood before examination, it would be diffused over the whole mass, and so no more than an extremely minute portion would be present in any given quantity. If the dose were half a grain, and there were twenty-five pounds of blood in the body, each pound of blood would contain only one-fiftieth of a grain. He was also of opinion that the "strychnia undergoes some chemical change by reason of which its presence in small quantities in the tissues cannot be detected." In short, the result of his evidence was that if a minimum dose were administered, it was uncertain whether strychnia would be present in the stomach after death, and that if it was not in the stomach, there was no certainty that it could be found at all. He added that he considered the colour tests fallacious, because the colours might be produced by other substances.

Dr. Taylor further detailed some experiments which he had tried upon animals jointly with Dr. Rees for the purpose of ascertaining whether strychnia could always be detected. He poisoned four rabbits with strychnia, and applied the tests for strychnia to their bodies. In one case where two grains had been administered at intervals, he obtained proof of the presence of strychnia both by a bitter taste and by the colour. In a case where one grain was administered he obtained the taste but not the colour. In the other two cases, where he administered one grain and half a grain respectively, he obtained no indication at all of the presence of strychnia. These experiments proved to demonstration that the fact that he did not discover strychnia did not prove that no strychnia was present in Cook's body.

Mr. Nunneley, Mr. Herapath, Mr. Rogers, Dr. Letheby and Mr. Wrightson contradicted Dr. Taylor and Dr. Rees upon this part of their evidence. They denied the theory that strychnine undergoes any change in the blood and they professed their own ability to discover its presence even in most minute quantities in any body into which it had been introduced, and their belief that the colour tests were satisfactory. Mr. Herapath said that he had found strychnine in the blood and in a small part of the liver of a dog poisoned by it; and he also said that he could detect the fifty-thousandth part of a grain if it were unmixed with organic matter. Mr. Wrightson (who was highly complimented by Lord Campbell for the way in which he gave his evidence) also said that he should expect to find strychnia if it were present, and that he had found it in the tissues of an animal poisoned by it.

Here, no doubt, there was a considerable conflict of evidence upon a point on which it was difficult for unscientific persons to pretend to have any opi-

nion. The evidence given for the prisoner, however, tended to prove not so much that there was no strychnia in Cook's body, as that Dr. Taylor ought to have found it, if there was. In other words, it has less to do with the guilt or innocence of the prisoner, than with the question whether Mr. Nunneley and Mr. Herapath were or were not better analytical chemists than Dr. Taylor. The evidence could not even be considered to shake Dr. Taylor's credit, for no part of the case rested on his evidence except the discovery of the antimony, as to which he was corroborated by Mr. Brande, and was not contradicted by the prisoner's witnesses. His opinion as to the nature of Cook's symptoms was shared by many other medical witnesses of the highest eminence, whose credit was altogether unimpeached. The prisoner's counsel were placed in a curious difficulty by this state of the question. They had to attack, and did attack, Dr. Taylor's credit vigorously for the purpose of rebutting his conclusion that Cook might have been poisoned by strychnine; yet they had also to maintain his credit as a skilful analytical chemist, for if they destroyed it, the fact that he did not find strychnine went for nothing. This dilemma was fatal. admit his skill was to admit client's guilt. To deny it was to destroy the value of nearly all their own evidence. The only possible course was to admit his skill and deny his good faith; but this too was useless, for the reason just mentioned.

Another argument used on behalf of the prisoner was that some of the symptoms of Cook's death were inconsistent with poisoning by strychnine. Mr. Nunneley and Dr. Letheby thought that the facts that Cook sat up in bed when the attack came on, that he moved his hands, and swallowed, and asked to be rubbed and moved, showed more power of voluntary motion than was consistent with poisoning by strychnia. But Mrs. Serjeantson Smyth got out of bed and rang the bell, and both she, Mrs. Dove and Mr. Moore's patient begged to be rubbed and moved before the spasms came on. Cook's movements were before the paroxysm set in, and the first paroxysm ended his life.

Mr. Nunneley referred to the fact that the heart was empty, and said that in his experiments, he always found that the right side of the heart of the poisoned animals was full.

Both in Mrs. Smyth's case, however, and in that of the girl Senet, the heart was found empty; and in Mrs. Smyth's case the chest and abdomen were opened first, so that the heart was not emptied by the opening of the head. Mr. Christison said that if a man died of spasms of the heart, the heart would be emptied by then, and would be found empty after death, so that the presence or absence of the blood proved nothing.

Mr. Nunneley and Dr. Letheby also referred to the length of time before the symptoms appeared, as inconsistent with poisoning by strychnine. The time between the administration of the pills and the paroxysm was not accurately measured. It might have been an hour, or a little less, or more; but the poison, if present at all, was administered in pills, which would not begin to operate till they were broken up, and the rapidity with which they would be broken up, would depend upon the materials of which they were made. Mr. Christison said that if the pills were made up with resinous materials, such as are within the knowledge of every medical man, their operation would be

delayed. He added, "I do not think we can fix, with our present knowledge, the precise time for the poison beginning to operate." According to the account of one witness in Agens French's case, the poison did not operate for three-quarters of an hour, though probably her recollection of the time was not very accurate after ten years. Dr. Taylor also referred (in cross-examination) to cases in which an hour and a half, or even two hours elapsed, before the symptoms showed themselves.

These were the principal points in Cook's symptoms said to be inconsistent with the administration of strychnia. All of them appear to have been satisfactorily answered. Indeed, the inconsistency of the symptoms with strychnia was faintly maintained. The defence turned rather on the possibility of showing that they were consistent with some other disease.

In order to make out this point various suggestions were made. In the cross-examination of the different witnesses for the Crown, it was frequently suggested that the case was one of traumatic tetanus, caused by syphilitic sores; but to this there were three fatal objections. In the first place, there were no syphilitic sores; in the second place, no witness for the prisoner said that he thought that it was a case of traumatic tetanus; and in the third place, several doctors of great experience in respect of syphilis—specially Dr. Lee, the physician to the Lock Hospital—declared that they never heard of syphilitic sores producing tetanus. Two witnesses for the prisoner were called to show that a man died of tetanus who had sores on his elbow and elsewhere, which were possibly syphilitic, but it did not appear whether he had rubbed or hurt them and Cook had no symptoms of the sort.

Another theory was that the death was caused by general convulsions. This was advanced by Mr. Nunneley; but he was unable to mention any case in which general convulsions had produced death without destroying consciousness. He said vaguely he had heard of such cases, but had never met with one. Dr. McDonald, of Garnkirk, near Glasgow, said that he considered the case to be one of "epileptic convulsions with tetanic complications." But he also failed to mention an instance in which epilepsy did not destroy consciousness. This witness assigned the most extraordinary reasons for supporting that it was a case of this form of epilepsy. He said that the fit might have been caused by sexual excitement, though the man was ill at Rugeley for nearly a week before his death; and that it was within the range of possibility that sexual intercourse might produce a convulsion fit after an interval of a fortnight.

Both Mr. Nunneley and Dr. McDonald were cross-examined with great closeness. Each of them was taken separately through all the various symptoms of the case, and asked to point out how they differed from those of poisoning by strychnia, and what were the reasons why they should be supposed to arise from anything else. After a great deal of trouble Mr. Nunneley was forced to admit that the symptoms of the paroxysm were "very like" those of strychnia, and that the various pre-disposing causes which he mentioned as likely to produce convulsions could not be shown to have existed. He said, for instance, that excitement and depression of spirits might predispose to convulsions; but the only excitement under which Cook had laboured was on winning the race

a week before; and as for depression of spirits, he was laughing and joking with Mr. Jones a few hours before his death. Dr. McDonald was equally unable to give satisfactory explanation of these difficulties. It is impossible by any abridgment to convey the full effect which these cross-examinations produced. They deserve to be carefully studied by anyone who cares to understand the full effect of this great instrument for the manifestation not merely of truth, but of accuracy and fairness.

Of the other witnesses for the prisoner, Mr. Herapath admitted that he had said that he thought that there was strychnine in the body, but that Dr. Taylor did not know how to find it. He added that he got his impression from newspaper reports; but it did not appear that they differed from the evidence given at the trial. Dr. Letheby said that the symptoms of Cook were irreconcilable with everything that he was acquainted with-strychnia poison included. He admitted, however, that they were not inconsistent with what he had heard of the symptoms of Mrs. Serjeantson Smyth who was undoubtedly poisoned by strychnine. Mr. Partridge was called to show that the case might be one of arachnitis, or inflammation of one of the membranes of the spinal cord caused by two granules discovered there. In cross-examination he instantly admitted with perfect frankness, that he did not think the case was one of araclinitis, as the symptoms were not the same. Moreover, on being asked whether the symptoms described by Mr. Jones were consistent with poisoning by strychnia, he said "Quite"; and he concluded by saying that in the whole course of his experience and knowledge he had never seen such a death proceed from natural causes. Dr. Robinson, from Newcastle, was called to show that tetanic convulsions preceded by epilepsy were the cause of death. He, however, expressly admitted in cross examination that the symptoms were consistent with strychnia, and that some of them were inconsistent with epilepsy. He said that in the absence of any other cause, if he "put aside the hypothesis of strychnia", he would ascribe it to epilepsy; and that he thought the granules in the spinal cord might have produced epilepsy. The degree of importance attached to these granules by different witnesses varied. Several of the witnesses for the Crown considered them unimportant. The last of the prisoner's witnesses was Dr. Richardson, who said the disease might have been "angina pectoris." He said, however, that the symptoms of "angina pectoris" were so like those of strychnine that he should have great difficulty in distinguishing them from each other.

The fact that antimony was found was never seriously disputed, nor could it be denied that its administration would account for all the symptoms of sickness, etc., which occurred during the week before Cook's death. No one but the prisoner could have administered it.

The general result of the whole evidence on both sides appears to be to prove beyond all reasonable doubt that the symptoms of Cook's death were perfectly consistent with those of poisoning by strychnine and that there was strong reason to believe that they were inconsistent with any other cause. Coupling this with the proof that Palmer bought strychnia just before each of the two attacks, and that he robbed Cook of all his property, it is impossible to doubt the propriety of the verdict.

Palmer's case is remarkable on account of the extraordinary minuteness and labour with which it was tried, and on account of the extreme ability with which the trial was conducted on both sides.

The intricate set of facts which show that Palmer had a strong motive to commit the crime; his behaviour before it; at the time when it was being committed, and after it had been committed; the various considerations which showed that Cook must have died by tetanus produced by strychnine; that Palmer had the means of administering strychnine to him; that he did actually administer what in all probability was strychnine; that he also administered antimony on many occasions; and that all the different theories by which Cook's death otherwise than by strychnine could be accounted for were open to fatal objections, form a collection of eight or ten different sets of facts, all connected together immediately or remotely either as being, or as being shown not to be, the causes or the effects of Cook's murder, or as forming part of the actual murder itself.

The scientific evidence is remarkable on various grounds but particularly because it supplies a singularly perfect illustration of the identity between the ordinary processes of scientific research, and the principles explained above, as being those on which Judicial Evidence proceeds. Take, for instance, the question, did Cook die of tetanus, either traumatic or idiopathic? The symptoms of those diseases are in the first place ascertained inductively, and their nature was proved by the testimony of Sir Benjamin Brodie and others. The course of the symptoms being compared with those of Cook, they did not correspond. The inference by deduction was that Cook's death was not caused by those diseases. Logically the matter might be stated thus:

All persons who die either of traumatic or of idiopathic tetanus exhibit a certain course of symptoms.

Cook did not exhibit that course of symptoms, therefore Cook did not die of traumatic or of idiopathic tetanus.

Every one of the arguments and theories stated in the case may easily be shown by a little attention to be so many illustrations of the rules of evidence on the one hand, and of the rules of induction and deduction on the other.

On the other hand, a flood of irrelevant matter apparently connected with the trial pressed, so to speak, for admittance, and if it had been admitted, would have swollen the trial to unmanageable proportions, and thrown no real light upon the main question. Palmer was actually indicted for the murder of his wife, Anne Palmer, and for the murder of his brother, Walter Palmer. Every sort of story was in circulation as to what he had done. It was said that twelve or fourteen persons had at different times been buried from his house under suspicious circumstances. It was said that he had poisoned Lord George Bentinck who died very suddenly some years before. He had certainly forged his mother's acceptance to bills of exchange, and had carried on a series of gross frauds on insurance offices. There was the strongest reason to suspect that the evidence of Jeremiah Smith, referred to in the case, was plotted an artful perjury. If Palmer had been tried in France, every one of these and innumerable other topics would have been introduced, and the real matter in dispute would not have been nearly so fully discussed.

No case sets in a clear light either the theory or the practical working of the principles on which the Evidence Act is based.

One special matter on which Palmer's trial throws great light is the nature of the evidence of experts. The provisions relating to this subject are contained in Sections 45 and 46 of the Evidence Act. The only point of much importance in connexion with them is that it should be borne in mind that their evidence is given on the assumption that certain facts occurred but that it does not in common cases show whether or not the facts on which the expert gives his opinion did really occur. For instance, Sir Benjamin Brodie and other witnesses in Palmer's case said that the symptoms they had heard described were the symptoms of poisoning by strychnine but whether the maid-servants and others who witnessed and described Cook's death were or were not speaking the truth was not a question for them, but for the jury. Strictly speaking, an expert ought not to be asked "Do you think that the deceased man died of poison?" He ought to be asked to what cause he would attribute the death of the deceased man, assuming the symptoms attending his death to have been correctly described; or whether any cause except poison would account for such and such specified symptoms? This, however, is a matter of form. The substance of the rules as to experts is that they are only witnesses, not judges; that their evidence, however important, is intended to be used only as materials upon which others are to form their decision; and that the facts which they have to prove is the fact that they entertain certain opinions on certain grounds and not the fact that grounds for their opinions do really exist.

14. Irrelevant facts. Having thus described and illustrated the theory of relevancy, it will be desirable to say something of irrelevant facts which might at first sight be supposed to be relevant.

From the revelations given in the earlier part of the chapter, it follows that facts are irrelevant unless they can be shown to stand in the relation of cause or in the relation of effect of facts in issue, every step in the connection being either proved or being of such a nature that it may be presumed without proof.

- (a) What facts are irrelevant? The vast majority of ordinary facts simply co-exist without being in any assignable manner connected together. For instance, at the moment of the commission of a crime in a great city, number-less other transactions are going on in the immediate neighbourhood; but no one would think of giving evidence of them unless they were in some way connected with the crime. Facts obviously irrelevant, therefore, present little difficulty. The only difficulty arises in dealing with facts which are apparently relevant but are not really so.
 - (b) Facts apparently relevant. The most important of these are three:
 - 1. Statements as to facts made by persons not called as witnesses.
 - 2. Transactions similar to but unconnected with the facts in issue.
 - 3. Opinions formed by persons as to the facts in issue or relevant facts.

None of these are relevant within the definition of relevancy given in Sections 6-11, both inclusive. It may possibly be argued that the effect of the

second paragraph of Section 11¹⁴ would be to admit proof of such facts as these. It may, for instance, be said A (not called as a witness) was heard to declare that he had seen B commit a crime. This makes it highly probable that B did commit that crime. Therefore A's declaration is a relevant fact under Section 11. This was not the intention of the section, as is shown by the elaborate provisions contained in the following part of Chapter II (Sections 32–39) as to particular classes of statements, which are regarded as relevant facts either because the circumstances under which they are made invest them with importance, or because no better evidence can be got. The sort of facts which the section was intended to include are facts which either exclude or imply more or less distinctly the existence of the facts sought to be proved. Some degree of latitude was designedly left in the working of the section (in compliance with a suggestion from the Madras Government) on account of the variety of matters to which it might apply. The meaning of the section would have been more fully expressed if words to the following effect had been added to it:

"No statement shall be regarded as rendering the matter stated highly probable within the meaning of this section unless it is declared to be a relevant fact under some other section of this Act."

- 15. Reason for exclusion of hearsay. The reasons why statements as to facts made by persons not called as witnesses are excluded, except in certain specified cases (see Sections 17—39) are various. In the first place, it is a matter of common experience that statements in common conversation are made so lightly, and are so liable to be misunderstood or misrepresented, that they cannot be depended upon for any important purpose unless they are made under special circumstances.
- 16. Objection. It may be said that it is an objection to the weight of such statements and not to their relevancy. There is some degree of truth in this remark. No doubt, when a man has to inquire into facts of which he receives, in the first instance, very confused accounts, it may and often will be extremely important for him to trace the most cursory and apparently futile report. And facts relevant in the highest degree to facts in issue may often be discovered in this manner. A policeman or a lawyer engaged in getting up a case, criminal or civil, would neglect his duty altogether, if he shut his ears to everything which was not relevant within the meaning of the Evidence Act.
- 17. Effect of Section 165. A Judge or Magistrate in India frequently has to perform duties which in England would be performed by the police officers or attorney. He has to sift out the truth for himself as well as he can and with little assistance of a professional kind. Section 165 is intended to arm the Judge with the most extensive power possible for the purpose of
 - 11. Section 11 is as follows:
 Facts not otherwise relevant are relevant—
 (1) If they are inconsistent with any fact in issue of relevant fact.
- (2) If by themselves, or in connection with other facts, they make the existence or non-existence of any fact in issue or relevant fact highly probable or improbable,

getting at the truth. The effect of this section, 16 is that, in order to get to the bottom of the matter before it, Court will be able to look at and inquire into every fact whatever. It will not, however, be able to found its judgment upon the class of statements in question for the following reasons:

If this were permitted, it would present a great temptation to indolent Judges to be satisfied with second-hand reports.

It would open a wide door to fraud. People would make statements for which they would be in no way responsible, and the fact that these statements were made would be proved by witnesses who knew nothing of the matter stated. Everyone would thus be at the mercy of people who might choose to tell a lie, and loose evidence could neither be tested nor contradicted.

Suppose that A, B, C and D give to E, F and G a minute detailed account of a crime which they say was committed by Z; E, F, and G repeat what they have heard correctly. A, B, C and D disappear or are not forthcoming. It is evident that Z would be altogether unable to defend himself in this case, and that the Court would be unable to test the statement of A, B, C and D. The only way to avoid this is to exclude such evidence altogether, and so to put upon both Judges and Magistrates as strong a pressure as possible to get to the bottom of the matter before them.

It would waste an incalculable amount of time. To try to trace unauthorized and irresponsible gossip, and to discover the grains of truth which may lurk in it is like trying to trace a fish in the water.

- 18. Unconnected transactions. The exclusion of evidence as to transactions similar to, but not specially connected with, the facts in issue rests upon the ground that, if it were not enforced, every trial, whether civil or criminal, might run into an inquiry into the whole life and character of the parties concerned. Litigants have frequently many matters in difference besides the precise point legally at issue between them, and it often requires a good deal of rigour to prevent them from turning Courts of Justice into theatres in which all their affairs may be discussed. A very slight acquaintance with French procedure is enough to show the evils of not keeping people close to the point in judicial proceedings.
- 19. Exclusion of evidence of opinion. As to evidence of opinion it is excluded because its admission would in all cases be mere waste of time.
- 20. Exception to rules as to irrelevancy. The concluding part of the chapter on the relevancy of facts enumerates the exceptions which are to be made to the general rules as to irrelevancy. The rules as to admissions, statements made by persons who cannot be called as witnesses, and statements, made
 - 15. Section 165 is as follows: "The judge may, in order to discover or obtain proper proof of relevant facts, ask any question he pleases in any form, at any time, of

any witness, or of the parties, about any fact relevant or irrelevant, and may order the production of any document or thing. under circumstances which in themselves afford a guarantee for their truth, are an exception to the exclusion of statements as proof of the matter stated.

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Judgments in Courts of Justice on other occasions form an exception to the exclusion of evidence transactions not specifically connected with facts in issue, and the provisions as to the admission of evidence of opinion in certain cases are contained in Sections 45—55.

- 21. Admissions. The general rule with regard to admissions, which are defined to mean all that the parties or their representatives in certain degrees say about the matter in dispute, or facts relevant thereto, is that they may be proved as against those who made them, but not in their favour. The reason of the rule is obvious. If A says, "B owes me money," the mere fact that he says so does not even tend to prove the debt. If the statement has any value at all, it must be derived from some fact which lies beyond it; for instance A's recollection of his having lent B the money. To that fact, of course, A can testify but his subsequent assertions add nothing to what he has to say. If, on the other hand, A had said, "B does not owe me anything," this is a fact of which B might make use, and which might be decisive of the case.
- 22. Confessions. Admissions in reference to crimes are usually called confessions. Sections 25, 26 and 27 were transferred to the Evidence Act verbatim from the Code of Criminal Procedure, Act XXV of 1861. They differ widely from the law of England, and were inserted in the Act of 1861 in order to prevent the practice of torture by the police for the purpose of extracting confessions from persons in their custody.
- 23. Statements by witness who cannot be called. Statements made by persons who are dead or otherwise incapacitated from being called as witnesses are admitted in the cases mentioned in Sections 32 and 33. The reason is that in the cases in question no better evidence is to be had.
- 24. Statements under special circumstances. In certain cases statements are made under circumstances which in themselves are a strong reason for believing them to be true, and in these cases, there is generally little use in calling the person by whom the statement was made. The sections which relate to them are 34—38.

It may be well to point out here the manner in which the Evidence Act affects the proof of evidence given by a witness in a Court of Justice. The relevancy of the fact that such evidence was given, depends partly on the general principles of relevancy. For instance, if a witness were accused of giving false testimony the fact that he gave the testimony alleged to be false would be a fact in issue. But the Act also provides for cases in which the fact that evidence was given on a different occasion is to be admissible, either to prove the matter stated (Section 33), or in order to contradict (Sections 155, 3) or in order to corroborate (Section 157) the witness. By reference to these sections it must be ascertained whether the fact that the evidence was given is relevant. If it is relevant, Section 35 enacts that an entry of it in a record made by any public servant in the discharge of his duty shall be relevant as a morle of proving it. The Codes of Civil and Criminal Procedure direct all judicial officers to make records of the evidence given before them; and Section 80 of the Evidence Act provides that a document purporting to be a

record of evidence, shall be presumed to be genuine, that statements made as to the circumstances under which it was taken shall be presumed to be true, and the evidence to have been duly taken. The result of these sections taken together is that when proof of evidence given on previous occasions is admissible, it may be proved by the production of the record or a certified copy (see Section 76).

- 25. Judgments in other cases. The sections as to judgments (40-41) designedly omit to deal with the question of the effect of judgments in presenting further proceedings in regard to the same matter. The law upon this subject is to be found in Section 2 of the Code of Civil Procedure and in Section 460 of the Code of Criminal Procedure. The cases, which the Evidence Act provides for, are cases in which the judgment of a Court is in the nature of law, and creates the right which it affirms to exist.
- 26. Opinions. The opinions of any person, other than the Judge by whom the fact is to be decided, as to the existence of facts in issue or relevant facts, are, as a rule, irrelevant to the decision of the cases to which they relate for the most obvious reasons. To show that such and such a person thought that a crime had been committed, or a contract had been made, would either be to show nothing at all, or would invest the person whose opinion was proved with the character of a Judge. In some few cases, the reasons for which are self-evident, it is otherwise. They are specified in Sections 45–51.
- 27. Character, when important. The sections as to character require little remark. Evidence of character is, generally speaking, only a makeweight, though there are two classes of cases in which it is highly important—
- (1) Where conduct is equivocal, or even presumably criminal. In this class of cases, evidence of character may explain conduct and rebut the presumptions which it might raise in the absence of such evidence. A man is found in possession of stolen goods. He says he found them and took charge of them to give them to the owner. If he is a man of very high character this may be believed.
- (2) When a charge rests on the direct testimony of a single witness and on the bare denial of it by the person charged. A man is accused of an indecent assault on a woman with whom he was accidentally left alone. He denies it. Here a high character for morality on the part of the accused person would be of great importance.

CHAPTER V

GENERAL OBSERVATIONS ON THE INDIAN EVIDENCE ACT

No reference to English cases. In the preceding pages I have stated and illustrated the theory of judicial evidence on which the Evidence Act is based. I have but little to add to that explanation. The Act speaks for itself. No labour was spared to make its provisions complete and distinct. As the first section repeals all unwritten rules of evidence, and as the Act itself supplies a distinct body of law upon the subject, its object would be defeated by elaborate references to English cases. In so far as it is obscure or incomplete, the Judges and the Legislature are its proper critics. If it is turned into an abridgment of the law which it was meant to replace, it will be injurious instead of being useful to those for whom it was intended. I shall accordingly content myself with a very short description of the contents of the remainder of the Act, referring for a full explanation of the matter to the Act itself.

Scheme of Part II. The general scheme of Part II, which relates to proof and consists of four chapters, containing forty-five sections, may be expressed in the following propositions:

- 1. Judicial notice. Certain facts are so notorious in themselves, or are stated in so authentic a manner in well-known and accessible publications, that they require no proof. The Court, if it does not know them, can inform itself upon them without formally taking evidence. These facts are said to be judicially noticed.
- 2. Oral evidence. 'All facts except the contents of documents may be proved by oral evidence which must in all cases be direct. 'That is, it must consist of a declaration by the witness that he perceived by his own senses the fact to which he testifies.
- 3. Documents. The contents of documents must be proved either by the production of the document, which is called primary evidence, or by copies or oral accounts of the contents, which are called secondary evidence. Primary evidence is required as a rule, but this is subject to seven important exceptions in which secondary evidence may be given. The most important of these are (1) cases in which the document is in the possession of the adverse party, in which case the adverse party must in general (though there are several exceptions) have notice to produce the document before secondary evidence of it can be given.
- And (2) cases in which certified copies of public documents are admissible in place of the documents themselves.
- 4. Many classes of documents, which are defined in the Act, are presumed to be what they purport to be, but this presumption is liable to be rebutted. Two sets of presumptions will sometimes apply to the same document. For instance, what purports to be a certified copy of a record of evidence

is produced. It must by Section 76 be presumed to be an accurate copy of the record of evidence. By Section 80 the facts stated in the record itself as to the circumstances under which it was taken, e.g., that it was read over to the witness in a language which he understood, must be presumed to be true.

5. Writings when exclusive evidence. When a contract, grant, or other disposition of property is reduced to writing, the writing itself (or secondary evidence of its contents) is not only the best, but is the only admissible evidence of the matter which it contains. It cannot be varied by oral evidence, except in certain specified cases.

It is necessary in applying these general doctrines (the expediency of which is obvious) in practice to go into considerable detail, and to introduce provisions, exceptions, and qualifications which appear more intricate and difficult than they really are. If, however, the propositions just stated are once distinctly understood and borne in mind, the details will be easily mastered when the occasion for applying them arises. The provisions in the Act are all made in order to meet real difficulties which arose in practice in England, and which must of necessity arise over and over again, and give occasion to litigation unless they are specifically provided for beforehand.

Principle of provisions in documentary evidence. One single principle runs through all the propositions relating to documentary evidence. It is that the very object for which writing is used is to perpetuate the memory of what is written down, and so to furnish permanent proof of it. In order that full effect may be given to this, two things are necessary, namely that the document itself should, whenever it is possible, be put before the Judge for his inspection, and that if it purports to be final settlement of a previous negotiation, as in the case of a written contract, it shall be treated as final and shall not be varied by word of mouth. If the first of these rules were not observed the benefit of writing would be lost. There is no use in writing a thing down unless the writing is read. If the second rule were not observed people would never know when a question was settled, as they would be able to play fast and loose with their writings.

By bearing these leading principles in mind the details and exceptions will become simple. Their practical importance is indeed as nothing in comparison to the importance of the rules which they qualify.

The third part of the Act, which contains three chapters (Chapters VII, VIII and IX) and sixty-seven sections, relates to the production and effect of evidence.

Chapter VII, which relates to the burden of proof, deals with a subject which requires a little explanation. This is the subject of presumptions. Like most other words introduced into the law of Evidence, it has various meanings, and has besides a history to which I shall refer very shortly.

In times when the true theory of proof was very imperfectly understood, inasmuch as physical science, by the progress of which that theory was gradually discovered, was in its infancy, numerous attempts were made to construct theories as to the weight of evidence which should supply the want of one

testimony of a certain number of witnesses in particular cases; such a fact must be proved by two witnesses, such another by four, and so on. In other cases particular items of evidence were regarded as full proof, half full proof, proof less than half full and proof more than half full.

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Presumptions. The doctrine of presumptions was closely connected with this theory. Presumptions were inferences which the Judges were directed to draw from certain states of facts in certain cases, and these presumptions were allowed a certain amount of weight in the scale of proof; such a presumption and such evidence amounted to full proof, such another to half full, and so on. The very irregular manner in which the English law of evidence grew up has had, amongst other effects, that of making it an uncertain and difficult question how far the theory of presumptions, and the other theories of which they formed a part affect English law, but substantially the result is somewhat as follows:

Presumptions are of four kinds according to English law:

- 1. Conclusive presumptions. These are rare, but when they occur they provide that certain modes of proof shall not be liable to contradiction.
- 2. Presumptions which affect the ordinary rule as to the burden of proof that he who affirms must prove. He who affirms that a man is dead must usually prove it, but if he shows that the man has not been heard of for seven years, he shifts the burden of proof on his adversary.
- 3. There are certain presumptions which, though liable to be rebutted, are regarded by English law as being something more than mere maxims, though it is by no means easy to say how much more. An instance of such a presumption is to be found in the rule that recent possession of stolen goods unexplained raises a presumption that the possessor is either a thief or a receiver.
- 4. Bare presumption of facts, which are nothing but arguments to which the Court attaches whatever value it pleases.

Chapter VII of the Evidence Act deals with this subject as follows: First it lays down the general principles which regulate the burden of proof (Sections 101-106). It then enumerates the cases in which the burden of proof is determined in particular cases, not by the relation of the parties to the cause but by presumptions (Sections 107-111). It notices two cases of conclusive presumptions, the presumption of legitimacy from birth during marriage (Section 112), and the presumption of a valid cession of territory from the publication of a notification to that effect in the Gazette of India (Section 113). This is one of several conclusive statutory presumptions which will be found in different parts of the Statutes and Acts. Finally, it declares in Section 114, that the Court may in all cases whatever draw from the facts before it whatever inferences it thinks just. The terms of this section are such as to reduce to their proper position of mere maxims which are to be applied to facts by the Court in their discretion, a large number of presumptions to which English law gives to a great or less extent, an artificial value. Nine of the most important of them are given by way of illustration.

All notices of certain general legal principles which are sometimes called presumptions, but which in reality belong rather to the substantive law than the law of Evidence, was designedly omitted, not because the truth of those principles was denied, but because it was not considered that the Evidence Act was the proper place for them. The most important of these is the presumption, as it is sometimes called, that everyone knows the law. The principle is far more correctly stated in the maxim that ignorance of the law does not excuse a breach of it, which is one of the fundamental principles of Criminal Law.

The subject of estoppels (Chapter VIII) differs from that of presumptions in the circumstance that an estoppel is a personal disqualification, laid upon a person peculiarly circumstanced, from proving peculiar facts. A presumption is a rule that particular inferences shall be drawn from particular facts whoever proves them. Much of the English learning connected with estoppels is extremely intricate and technical, but this arises principally from two causes, the pecularities of English special pleading and the fact that the effect of prior judgments is usually treated by the English text-writers as a branch of the law of Evidence and not as a branch of the law of Civil Procedure.

The remainder of the Act consists of a reduction to express propositions of rules as to the examination of witnesses, which are well established and understood. They call for no commentary or introduction, as they sufficiently explain their own meaning, and do not materially vary the existing law and practice.

CHAPTER VI

SOME CRITICISMS OF THE ACT

It has been said that its main features the arrangement of Sir James Fitzjames Stephen is not capable of being improved upon, 16 and it will generally be conceded that, except as regards Section 5–16 of Chapter II, a great advantage has undoubtedly been given to the legal practitioner by the codification of the law of Evidence which the Act has effected. The criticism, perhaps more discriminating, of others may be divided into two classes. Some there are who approve of the general principle upon which the Act proceeds (viz., that it is both possible and advisable positively to determine what is Evidence), but criticise the actual terms in which such determination is made. Others disapprove, preferring the more practical and historical method of English law which confines itself mainly to the negative task of declaring not what is, but what is not, Evidence.

Of the first class Mr. Whitworth in his able pamphlet on the theory of relevancy¹⁷ while of opinion that probably no enactment in such few words as Sections 6—16 brought so much assistance to the administration of justice, says that the question yet suggests itself whether even these rules give the theory of relevancy in its simplest form, and states that they certainly do not show in themselves upon what principle it is that they have been founded. Differing from the author of the Act in regard to the adequacy of his definition of relevancy as the connection of events as cause and effect, he works out from the rules propounded under the Act what he conceives to be a fuller and more satisfactory statement. He arrives by this process of exposition at exactly the same result as Sir James Fitzjames Stephen, but claims for the new rules which suggests that although different in form, they are identical with those of the Act in their effect.¹⁸

Mr. Whitworth uses the word "relevant" as Sir James Fitzjames Stephen uses it in the third chapter of his Introduction, and not as it is sometimes used as co-extensive with "admissible". What is thus meant by a relevant fact is a fact that has a certain degree of probative force. All such facts are not admissible. They may be excluded under rules of Evidence other than those which treat of relevancy. For example, as he points out, a fact may be rele-

16. Reynold's Theory of the Law of Evidence, 3rd Ed., 1897, Preface, vi. See also observations in Preface, to Rice's General Principles of the Law of Evidence.

17. The theory of relevancy for the purpose of Judicial Evidence, by George Clifford Whitworth, 2nd Ed., 1881. "Mr. George Clifford Whitworth, of the Bombay Civil Service, has lately criticised this theory in an ingenious and able pamphlet.

and the frank acceptance of his criticism by Mr. Stephen enables us to enjoy the contemplation as gratifying as it is rare, of a controversy which was ended in a real advancement of knowledge, and in manner perfectly satisfying and honourable to both parties."—Fortnightly Review, 1876.

18. See Law Magazine and Review,

1875-76.

vant, but it may be one of a kind so easy to fabricate, or so difficult to test, or of so suspicious an origin, that it is more convenient to declare that it shall not be taken into consideration at all. With such questions he is not concerned, but only with the simpler and narrower question as to what facts are relevant in the strict sense of the term.

He points out that the word is used in both senses in the Evidence Act, as will appear from a reference to the Table of Contents. Part I treats of "Relevancy of Facts", and, in this Part, Chapter II has several divisional headings, one of which is "of the Relevancy of Facts." Part I deals with relevancy in its wide sense: Chapter II of Part I with relevancy in its strict sense; the ambiguity is unfortunate. Sir Fitzjames Stephen has said that relevancy is fully defined in Sections 6–11 of the Act, and until the double meaning of the word is observed, it seems as Mr. Whitworth points out inconsistent with this that many subsequent sections should declare certain things to be relevant as do Sections 22, 23, 24, 28, 32, etc. What such sections as these have to declare is really not that the things they mention are relevant or irrelevant (using the words strictly), but (that question being decided by Sections 6–16), that those things are not to be excluded or admitted under rules relating to subjects other than relevancy, which would, without the provision made, exclude or admit them.

The theory of relevancy is concerned with the question: Why is one thing relevant and another thing irrelevant? There must, Mr. Whitworth says, be some principle applicable to all cases by which it may be determined whether a particular fact is or is not relevant to another fact, without reference to a number of rules framed to meet different classes of cases. The purpose of judicial enquiries is not a purpose peculiar to them. All men upon occasions endeavour to ascertain, as quickly and as satisfactorily as they can, whether facts unknown to them personally have or have not happened. And what is calculated to aid the human mind in such inquiries must be something capable of being defined by the enunciation of its essential difference, as well as by an enumeration of its details. Sir James Fitzjames Stephen, in the third chapter of his Introduction to this Act, has briefly considered this question, and has said that relevancy means the connection of events as 'cause' and 'effect'. "If these two words were taken in their widest acceptation, it would be correct to say that when any theory has been formed which alleges the existence or any fact, all facts are relevant which, if that theory was true, would stand to the fact alleged to exist either in the relation of cause or in the relation of effect." Mr. Whitworth criticises this definition as follows: "But the proviso that the words 'cause' and 'effect' must be taken in their widest acceptation does not seem to be sufficient. It seems necessary rather to take them, in a transcendent sense. Suppose a man is charged with stabbing another, and it is alleged that at the moment of striking he uttered a certain expression. What he said is by the rules of Evidence relevant (not merely upon the issue as to his intention, but also) upon the issue whether he stabbed the man or not. But in what acceptation of the words is the expression a cause or effect of the act of stabbing? Or consider the case of the Whitechapel murder in London. Upon the issue, did Wainwright murder Harriet Lane? It is offered in evidence that the body before the Court is that of a woman who never bore children. How is this a cause or effect of the fact in issue The widest acceptation of the words 'cause' and 'effect' will not include such facts as these. And if we give them the meaning necessary to make true the statement that relevancy means the connection of events as cause and effect, then the statement itself becomes of no use, because every fact will be relevant. No doubt to a being of such capacity of intelligence as to see the whole cause of every effect and the whole effect of every cause, everything that ever happened becomes one rigid fact and nothing is irrelevant. But, for human purposes, there is no question that relevancy and irrelevancy are realities; the difference between the two is recognizable by an ordinary human capacity, and must be something expressible in ordinary language.

"The definition that relevancy means the connection of events as cause and effect, leaves us, then, in this difficulty that if we take the words in any, even the widest comprehensible sense, the definition does not include all facts which we know from our experience to be really relevant; and if we give them a transcendent meaning based upon our knowledge that all things precedent have gone together to make up the state of things existing at any time, and that no fact could ever have existed without the co-existence of every other fact that did exist at the same time, then the definition includes everything, and so ceases to be a definition.

"Thus the statement that relevancy means the connection of events as cause and effect, requires some addition, if the words are used in any ordinary sense, and some limitation, if they are given a transcendent sense.

"Mr. Stephen, using the words in the latter sense imposes one limitation and declares practical existence of another. He says, (a) the rule is to be subject to the caution that every step in the connection must be made out, and (b) that wide, general causes, which apply to all occurrences, are in most cases admitted, and do not require proof. The first of these limitations goes far to get rid of the objection that everything is relevant. The connection must be discernible, and every step in the connection proved or presumable. But if it is meant that each step must be recognizable as a proceeding from cause to effect, then as shown above, things really relevant will be excluded. And if any other kind of connection will suffice, then it may be said of both the limitations, that they are of little service, that the help they give in deducing practical rules from the general principles is small. For those rules are least likely to be appealed to in the case of wide general causes or occurrences, the connection of which with the fact in issue is not traceable. The object of the rules is to keep out irrelevant matter that is brought forward. As to a fact, such matter is submitted as evidence every day. Such matter does not usually consist of wide general causes that are admitted, nor of occurrences that have no connection with the facts in issue, and therefore these limitations do not exclude it. Therefore these limitations are not sufficient.

"Now as the theory propounded falls short of defining what relevancy is, so we may expect to find in the rules themselves things that cannot be explained by the theory. Again, as the rules are not deduced from first principles but are generalizations from actual experience, it is possible that in some unusual cases the language of the rules may not prescribe with accuracy the true limit of the relevancy. And, thirdly, and for the same reason it is possible that the rules laid down may not be in every part strictly confined to the subject of relevancy.

"Thus it is not immediately apparent, from the theory set forth, why one part of transaction throws light upon another, part which is so distinct from the first as to form in itself a fact in issue. When Mr. Hall shot three or four Gaekwari sowars, and it was a fact in issue whether he shot a particular one, no doubt the fact he shot the others increased the probability of his having shot the one in question. But the theory does not afford a ready explanation of this.

"By Section 7 those facts are relevant to facts in issue, which constitute the state of things under which they happened. A magistrate lately convicted some persons of rioting, and, the object of the riot having been to offend some Hindu religious Reformers, he commenced his judgment with a general history of Religion and religious Reformation down to the present time. The Judge, before whom the case came on appeal, remarked upon the irrelevancy of this, and of course it was utterly useless; but the rule quoted does not seem to exclude evidence of it. By the same section facts, which afford an 'opportunity' for the occurrence of a fact in issue, or relevant facts, are relevant. The theory does not explain why. When Mr. Hall shot the sowars, the fact that he had a rifle, gave him an opportunity of shooting the men he shot; but it gave him equal opportunity of shooting other persons whom he did not shoot. Its particular bearing upon the fact in issue to make it relevant is not explained.

"Section 8 is partly concerned with the admissibility of evidence of statement. It includes the substance of the English rule that declarations which are part of the res gestae may be proved. But this has nothing to do with strictly so-called......[v. post, remarks upon Ill, (j) of this section].

"Section 9 declares facts necessary to explain or introduce a fact in issue to be relevant, but prescribes no test of the necessity. Is there no danger of useless matter being brought upon the record under this rule on the ground that it explains or introduces something to follow? It is true there is a provision under the law for the examination of witnesses, that when either party proposes to give evidence of any fact, the Judge may ask in what manner the fact would be relevant, and need not admit it unless he thinks it would be relevant (Section 136, Evidence Act); but still whether or not the fact is necessary to explain or introduce may be a disputable matter. The first illustration says that when the question is whether a given document is the Will of A, the estate of A's property and his family at the date of the alleged Will may be relevant facts. Now, it is obvious that some particulars about the property would be useful to be known, and some would be useless. So the rule seems partly to fail of its object, in that it does not define what class of particulars is relevant.

"Section 10 is a rule relating to one particular kind of transaction, conspiracy; and Section 12 refers only to the question of damages. But the mind sets to work to ascertain such facts as these in just the same way as any other facts, and it does not appear why special rules are requisite. When any person is charged with conspiracy, one of the facts in issue is the existence of the conspiracy, its absolute existence without reference to the accused person; and from the nature of the thing itself, requiring as it does the action of more than one mind, it is to be expected that causes of it and effects of it will be found existing outside the mind, and without the knowledge of a particular person.

Therefore no rule is required to make such causes or effects or other connected facts relevant to the fact in issue.

"But the rule goes on to declare that such facts are relevant also for the purpose of showing that the accused person was a party to the conspiracy. Well, if such facts will show that clearly they are in very truth relevant. But it is obvious that very many such facts will have no bearing whatever upon the question of the accused person's complicity. And it seems an error in the rule to declare all such facts relevant for that purpose, instead of showing which are and which are not. Consider some such conspiracy as that which went by the name of Fenianism. Suppose a man is being tried in Ireland for so conspiring. Suppose he had been in prison for a month before trial. Suppose the Court had received abundant evidence of the existence, nature and objects of the conspiracy. Still, under this rule the Court could not refuse to listen to witnesses just arrived from America stating that a party of Fenians had burnt a farm there a fortnight before the day of trial—thus to prove the accused person's complicity in the conspiracy.

Section 14 declares that facts which show the existence of any state of mind are relevant when the existence of such 'state of mind' is in issue or relevant. Looking at the illustration, it seems doubtful whether the expression 'state of mind' is wide enough. One of the states of mind mentioned is 'Knowledge'. Illustration (c) is an example of this. There the question is whether a man knew that his dog was ferocious; and the facts that the dog had bitten several persons and that they had complained to the owner are relevant. These facts are really connected with the fact in issue through the owner's knowledge. But Illustration (a) also purports to be an example of fact being relevant as tending to show knowledge. The question there is whether a person found in possession of a stolen article knew that it was stolen; and it is said that the fact that, at the same time, he was in possession of many other stolen articles is relevant as tending to show that he knew each and all of the articles to be stolen. No doubt the fact is relevant, but it is not through the receiver's knowledge that it is connected with the fact in issue. What it proves is not a state of mind, but a habit, a habit which makes the receiving with a guilty knowledge a more likely fact than it would be without proof of the habit."

Mr. Whitworth then proceeds to propound his theory of relevancy with the new rules which he deduces from it.

"Every fact in issue may be affirmed or denied and that not merely in the bare form in which it may be stated as a fact in issue, but in every detail of the meaning of that statement. The whole includes the part; if any fact is affirmed as a whole, any part of it may be affirmed or denied; anything implied by an affirmation is really part of that affirmation and may be expressly affirmed or denied. It may be an issue merely, did A murder B? But if, as the affirmation is inquired into, it is found to mean that A murdered B at a particular nour and a particular place, then that A was in that place at that hour may be ffirmed or denied. The issue may be merely, did Wainwright murder Harriet ane? But if those affirming it produce a body saying it is Harriet Lane's, hen anything showing that it is or is not may be put forward. Or the issue nay be, did the accused person attempt to poison Colonel Phayre? But if it is

found that the charge means that the accused person put arsenic into a glass of sherbet which, from his knowledge of Colonel Phayre's habits, he knew Colonel Phayre would drink, then Colonel Phayre's habit of drinking sherbet at a particular time and the prisoner's knowledge of this are parts of the fact in issue.

But, besides the matter expressly or vitally in issue, some surrounding matters may aid in determining any unknown fact. Knowing that the progress of events is from cause to effect, any fact that seems likely to have caused the fact to be determined, or any fact that suggests the fact to be determined as a cause of it, may be of use.

Again, one cause may have many effects and the cause may be ascertainable from one effect as well as from another. If then in endeavouring to ascertain whether a particular event has happened we see some other event that suggests as its cause something that would probably have caused the things we want to ascertain then that event will be of use. For example, we want to ascertain whether A stabbed B, and we hear on the occasion on which he is said to have done so, A said to B, "then die." Now this seems to imply just such volition employing the tongue as would employing an armed hand stab B. The words and the fact in issue are effects of the same volition. Similarly, were A charged with poisoning B, the fact that before the death of B he procured poison of the kind that was administered to B would be relevant. The procuring of the poison is an effect of a cause which might be the cause of the fact in issue."

Thus there are four classes of facts which aid in determining a fact in issue:

- (1) Any part of the fact alleged or any fact implied by the fact alleged;
- (2) Any cause of the fact;
- (3) Any effect of the fact;
- (4) Any fact having a common cause with the fact in issue.

But it is not the whole of these facts that are of use. Some facts connected with the fact in issue in one of the four ways mentioned may be of a general nature and existing whether or not the fact in issue happened and therefore indicating nothing as to whether it happened or not. For example: A is charged with the murder of B by pushing him over a precipice. Here the fall of B to the ground after he was pushed over is as much a cause of his death as the pushing over, and as much an effect of the push as his death is. But gravitation is a general fact and exists all the same whether B went over the precipice or not and proof of it is therefore needless.

Besides such general facts there may be facts connected with the fact in issue in one of the four ways, but with such a very slight bearing upon it that their probative force is quite insignificant, as, for instance, if a boyish quarrel of fifty years ago were brought forward to prove ill-feeling between two men who had joined in partnership twenty years before.

To meet both these classes of cases, one provise only is requisite, namely, that no fact is relevant to another unless it makes the existence of that other more likely. It is not necessary to say anything of the degree of probability the fact must raise. The test is obvious. The Judge who has eventually to decide whether the fact in issue is proved or not must decide whether the fact offered in evidence will, if proved, aid him in that decision.

The theory, then, so far as we have gone, is thus: Those facts are relevant to a fact in issue, the existence of which makes the existence of the fact in issue more probable, and they are found to be connected with the fact in issue in one of these ways: as being (a) part of the fact in issue; (b) cause of it, (c) effect of it, or (d) an effect of a cause of it.

But as, relying upon the principle that effects follow causes, we take from the surrounding circumstances facts that appear to be probable causes or probable effects of a fact unknown, as a means of proving it; so, upon the same principle we may first consider what would be probable causes or effects of the fact unknown and look upon their absence as a means of disproving it.

Therefore, in addition to the four classes of facts above mentioned, which may be said to be positively relevant, we have the following four classes which may be called negatively relevant: (a) facts showing the absence of what might be expected as part of a fact in issue or of what seems to be implied by a fact in issue; (b) facts showing the absence of cause of the fact in issue; (c) facts showing the absence of effects (other than the fact in issue) of the probable cause of the fact in issue. And as it is essential to facts positively relevant that they make the fact in issue more likely, so those facts only are negatively relevant which make the existence of the fact in issue less likely.

Again, as facts are relevant only by reason of their being connected with the fact in issue, it follows, that to disprove the connection of an alleged relevant fact with the fact in issue is as efficacious as to disprove the existence of the fact. To show, for instance, that an alleged cause of a fact in issue would not really have as effect the fact in issue, or to show that an alleged effect of a fact in issue is really the effect of some other cause, does as well as to show that the alleged facts never existed. And as the connection of an alleged relevant fact may be disputed, so it may be affirmed in anticipation of dispute. That is to say, all facts which tend to prove or disprove the connection in the way of relevancy between facts in issue and alleged relevant fact are themselves relevant.

As relevant facts may be proved and as the mode of proof of any fact is (beyond the affirmation of witnesses of the fact) by means of facts relevant to it, it follows that "facts relevant to relevant facts are themselves relevant."

These considerations suggested to Mr. Whitworth the following rules, which he considered sufficient to decide, and the simplest test by which to decide, whether any fact offered in evidence is relevant:

Rule I. No fact is relevant which does not make the existence of a fact in issue more likely or unlikely, and that to such a degree as the Judge considers will aid him in deciding the issue.

Rule II. Subject to Rule I, the following facts are relevant:

- Facts which are part of, or which are implied by, a fact in issue; or which show the absence of what might be expected as a part of, or would seem to be implied by, a fact in issue;
- (2) Facts which are a cause, or which show the absence of what might be expected as a cause, of a fact in issue;
- (3) Facts which are an effect, or which show the absence of what might be expected as an effect of fact in issue;
- (4) Facts which are an effect of a cause, or which show the absence of what might be expected as an effect of a cause, of a fact in issue.

Rule III. Facts which affirm or deny the relevancy of facts alleged to be relevant under Rule II are relevant.

Rule IV. Facts relevant to relevant facts are relevant.

Mr. Whitworth gives a single example of each kind of relevancy according to his classification, taking all examples from a simple case, that of Muller, who was tried for the murder of an old gentleman, a banker, named Briggs, by beating him with a life-preserver, as they were travelling together by rail, and then throwing him out of the train. Muller tried to make his escape to America, but was pursued and arrested on his arrival there. One point urged in the prisoner's defence was that he was not physically strong enough to commit the murder as alleged. His object appeared to be robbery.

The kinds of relevancy according to Rule II are four; but as the first clause contains two classes with an apparent difference, they may, Mr. Whitworth says, be taken for the purpose of illustration as five; and as each kind may be either positive or negative, the number becomes ten. And as by Rule III the connection of a fact with the fact in issue may be disputed as well as its existence, the number of illustrations required is twenty.

These he gives in the following order.19

19. (a) Part of fact in issue,—It would be relevant to prove that, at the time the offence was said to be committed, a witness by the road-side got a glimpse, as the train passed of the prisoner standing up in the carriage with his hand raised above his head.

(b) Disputing the connection.—It would be relevant to show that at the time in question the prisoner had occasion to close a ventilator in the top of the carriage.

(c) Absence of what might be expected as part of the fact in issue.—It would be relevant to show that no noise was heard by the occupants of the next compartment.

(d) Disputing the connection.—It would be relevant to show that the occupants of the next compartment were fast asleep.

(e) Fact implied by a fact in issue.— It would be relevant to show that Muller was armed with a weapon.

(f) Disputing the connection. — It would be relevant to show that such a weapon could not have caused the marks found on the body.

After giving this single example of each kind of relevancy according to his classification, Mr. Whitworth proceeds to decide by reference to the above rules all the cases quoted in illustrations of the rules set forth in this Act, and shows that his rules are identical in effect with the Law by reference to them of the illustrations in the Act as follows:

Section 6: Illustration (a).20 For upon examination every part of a transaction will be found to be connected with every other part as cause or effect or as effects of one cause.

Illustration (b).21 That war was waged is one of the facts in issue. These occurrences are part of that fact.

Illustration (c).22 Besides the fact of the publication, there may be in issue the question of B's good faith or malice, of the sense in which the words were used, whether the occasion was privileged or not. Other parts of the

(g) Absence of fact implied by fact in issue.—It would be relevant to show that Muller was physically a very weak man.

(h) Disputing the connection.—It would be relevant to show that under the circumstances but a little strength was required.

 (i) Cause.—It would be relevant to show that Mr. Briggs had done Muller some great injury.

(j) Disputing the connection.—It would be relevant to show that Muller was not aware that it was Mr. Briggs who had done him an injury.

(k) Absence of cause.—It would be relevant to show that Mr. Briggs had nothing valuable about him to tempt a robber.

(I) Disputing the connection.—It would be relevant to show that Muller had reason to believe that Mr. Briggs had valuables in his pos-

(m) Effect.—It would be relevant to show that immediately after the occurrence Muller took passage for America.

(n) Disputing the connection.—It would be relevant to show that Muller had sudden and urgent business that

called him to America.

(o) Absence of effect.—It would be relevant to show that the railway
carriage bore no marks of a struggle.

(p) Disputing the connection.—It would be relevant to show that Mr. Briggs was too old and feeble to offer any considerable resistance.

(q) Effect of a cause of a fact in issue.— It would be relevant to show that Muller had just before provided himself with a life-preserver.

(r) Disputing the connection.—It would be relevant to show that Muller anticipated violence to himself on the day in question.

(s) Absence of effect of cause of fact in issue.—It would be relevant to show that Muller and Mr. Briggs had travelled together for a long distance before the fatal occurrence and that through all that time Muller had equal opportunity to attack Mr. Briggs and had not done so.

(t) Disputing the connection.—It would be relevant to show that Muller had ascertained how far Mr. Briggs was going to travel, and that he (Muller) could best effect his escape by getting out at some place the the train came to after the occurrence.

20. A is accused of the murder of B by beating him. Whatever was said or done by A to B or the bystanders at the beating, or so shortly before or after it as to form part of the transaction, is a relevant fact.

21. A is accused of waging war against the Queen by taking part in an armed insurrection in which property is destroyed, troops are attacked and gaols are broken open. The occurrence of these facts is relevant as forming part of the general transaction though A may not have been present at all of them.

22. A sues B for a libel contained in a letter forming part of a correspondence. Letters between the parties relating to the object out of which the libel arose and forming part of the correspondence in which it is contained are relevant facts though they do not contain the libel itself.

correspondence may be causes or effects of the publication, or effects of B's good faith or malice, or effects of the words having been used in a particular sense, or effects of a relationship between the parties showing that the occasion was or was not privileged.

Illustration (d) 23 Each delivery is a relevant fact as being part of the fact in issue: Did the goods pass from B to A?

Section 7: Illustration (a).24 The first fact is relevant as a fact implied by the fact in issue; and the second is relevant as a cause of the fact in issue.

Illustration (b).25 The marks are relevant facts as effects of part of the fact in issue.

Illustration (c). That B was ill before the symptoms ascribed to poison is relevant as denying the connection of cause and effect between the fact in issue (the poisoning) and the relevant fact (the death): that B was well is relevant as asserting this connection. The habits of B are, if it is alleged that the opportunity was availed of, relevant as part of the fact in issue. (If the opportunity was not availed of, the habits are not relevant).

Section 8: Illustration (a).2 That facts are relevant as causes of the fact in issue.

Illustration (b).3 The fact is relevant as a cause of the fact in issue.

Illustration (c).4 The fact is relevant as an effect of a cause of the fact in issue.

23. The question is whether certain goods ordered from B were delivered to A. The goods were delivered to several intermediate parties successively. Each delivery is a relevant fact.

24. The facts that shortly before the robbery B went to fair with money in his possession and that he showed it, or mentioned the fact that he had it to a third person are rele-

vant

25. The question is whether A murdered B. Marks on the ground produced by a struggle at or near the place where the murder was committed are relevant facts.

1. The question is whether A poisoned B. The state of B's health before the symptoms ascribed to poison and habits of B known to

A which afforded an opportunity for the administration of poisons are relevant facts.

2. A is tried for the murder, of B.

That A murdered C, that B knew that A had murdered C, and that B had tried to extort money from A, by threatening to make his knowledge public are relevant.

knowledge public are relevant.

3. A sues B upon a bond for the payment of money. B denies the making of the bond. The fact that at the time when the bond was alleged to be made. B required money for a particular purpose, is

relevant.

 A is tried for the murder of B by poison. The fact that before the death of B. A procured poison similar to that which was administered to B. is relevant.

Illustration (d).5 The facts are relevant as effects of the cause of the fact in issue.

Illustration (e).6 The facts are relevant; for they are all effects of the immediate cause, (namely, A's resolution to commit the offence) of the fact in issue.

Illustration (f).7 The latter fact is relevant as an effect of the fact in issue, and the former as a cause of the latter. As to the sense in which C's statement is relevant, see remarks below, illustration (j), post.

Illustration (g).8 For A's going away without making any answer is an effect of the fact in issue, and the other two facts are causes of that effect.

Illustration (h).9 The first fact is relevant as an effect of the fact in issue, and the second as a cause of that effect.

Illustration (i).10 The facts are relevant as effects of a fact in issue.

Illustration (j).11 The facts are relevant as effects of the fact in issue. The illustration goes on to say that the fact that without making a complaint she said that she had been ravished, is not relevant as conduct under Section 8 though it may be relevant as a dying declaration or as corroborative evidence. Nowhere, as Mr. Whitworth points out, the strict use of the term 'relevant' has been departed from. That the woman said she had been ravished is rele-

5. The question is whether a certain document is the Will of A. The facts that not long before the date of the alleged Will, A made inquiry into matters to which the provisions of the alleged Will relate, that he consulted vakils in reference to making the Will, and that he caused draft of other Wills to be prepared of which he did to be prepared of which he did

6. A is accused of a crime. The facts that either before or at the time of, or after the alleged crime, A provided evidence which would tend to give to the facts of the case an appearance favourable to himself or that he destroyed or concealed evidence or prevented the presence, or procured the ab-sence of persons who might have been witnesses or suborned persons to give false evidence respecting it, are relevant.

7. The question is whether A robbed B. The fact that, after B was robbed, C said in A's presence"The police are coming to look for the man who robbed B," and that afterwards A ran immediately away, are relevant.

8. The question is whether A owes B

10,000 rupees. The facts that A asked C to lend him money, and that D said to C in A's presence and hearing, "I advise you not to trust A, for he owes B 10,000 rupees," and that A went away without making any answer, relevant facts.

9. The question is whether A committed a crime. The fact that A absconded after receiving a letter warning him that inquiry was being made for the criminal, and the contents of the letter are relevant.

10. A is accused of a crime. The facts of the that after the commission alleged crime he absconded, or was in possession of property proceeds of property acquired by the crime, or attempted to conceal things which were or might have been used in committing relevant.

11. The question is whether A was ravished. The facts that, shortly after the alleged rape, she made a complaint relating to the crime, the circumstances under which and the terms in which the complaint was made, are relevant.

vant though it does not follow that it is admissible. The Act declares when statements of facts in issue or relevant facts may be proved. When the statement is a dying declaration is one instance; that such statements may under certain circumstances be proved as corroborative evidence is another, and another is to this effect, that when the conduct of any person is a relevant fact, his statements accompanying or explaining that conduct, or statements made to him or in his hearing affecting that conduct, may be proved. This has nothing to do with relevancy, and the rule seems out of place in Section 8. It is because the woman's statement without complaint is not admissible under this rule, that the Act says that statement is "not relevant as conduct under this section". So above in illustrations (f), (g) and (h) some of the relevant facts are statements. They are also admissible as being connected with conduct. They are simply pronounced relevant. It is plain that it is meant that they may be proved. But that the statements are relevant in the strict sense is sufficient for the present purposes.

Illustration (k).12 The facts in the first sentence of the illustration are relevant as effects of the fact in issue. The fact that he said he had been robbed without making any complaint, is relevant, though whether it is admissible or not depends upon the law relating to the question what statements may be proved.

Section 9: Illustration (a).18 The Act says the state of A's property and of his family at the date of the alleged Will may be relevant facts. But it may be stated absolutely that so much of the state of A's property or of his family as shows probable cause for his making such a Will as the alleged one, or as shows the absence of such probable cause, is relevant.

Illustration (b).14 Upon this issue so much of the position and relations of the parties at the time when the libel was published as shows cause for B's publishing a true libel or a false one, or the absence of such causes and so much as bear upon the matter asserted in the libel as cause of its truth or otherwise, is relevant.

The particulars of a dispute between A and B about a matter unconnected with the alleged libel are, the illustration says, irrelevant, because they do not make any fact in issue more or less likely to have happened. But the fact that there was a dispute is relevant if it affected any part of the position and relations of the parties defined above.

Illustration (c).15 The absconding is relevant as an effect of fact in issue.

- 12. The question is whether A was robbed. The fact that, soon after the alleged robbery, he made a complaint relating to the offence, the circumstances under which and 15. A is accused of a crime. The fact the terms in which the complaint that soon after the commission of
- was made, are relevant.

 13. The question is whether a given document is the Will of A.
- 14. A sues B for a libel imputing disgraceful conduct to A; B affirms that the matter alleged to be libellous is true.
- that soon after the commission of the crime A absconded from his house, is relevant under Sec. 8 as conduct subsequent to, and affected

The fact of the sudden call is relevant as denying the connection of cause and effect between the fact in issue and the alleged relevant fact.

The details further than as stated in the illustration do not make the fact in issue more likely or unlikely to have happened.

Illustration (d). 16 This statement is relevant as affirming the connection of cause and effect between the fact in issue (B's persuasion) and the relevant fact (C's leaving A's service).

Illustration (e).17 B's statement is relevant as an effect of a fact in issue.

Illustration (f). 18 That the riot occurred is a fact in issue, and the cries of the mob are relevant as parts or as effects of the fact.

Section 10: Illustration.¹⁹ And any of these facts that are so connected with the other fact in issue, A's complicity, as to make it more or less likely, are relevant for that purpose also.

Section 11: Illustration (a).20 Presence at Lahore is relevant as denying a part of the fact in issue. The other fact is relevant as making a part of the fact in issue unlikely.

by facts in issue. The fact, that at the time he left home, he had sudden and urgent business at the place to which he went, is relevant as tending to explain the fact that he left home suddenly. The details of the business on which he left are not relevant except in so far as they are necessary to show that the business was sudden or urgent.

16. A sues B for inducing C to break a contract of service made by him with A. C, on leaving A's service says to A, "I am leaving you because B has made me a better offer." This statement is a relevant fact as explanatory of C's conduct which is relevant as a fact in issue.

17. A, accused of the t, is seen to give the stolen property to B who is seen to give it to A's wife. B says, as he delivers it, 'A says you are to hide this.' B's statement is relevant as explanatory of a fact which is part of the transaction.

18. A is tried for a riot and is proved to have marched at the head of a mob. The cries of the mob are relevant, as explanatory of the nature of the transaction.

19. Reasonable ground exists for beligving that A has joined in a

1. Subs. by the A. O. 1950 for "Queen".

Conspiracy to wage war against the

[Government of India]1.

The fact that B procured arms in Europe for the purpose of the conspiracy, collected money in Calcutta for a like object, D persuaded persons to join the conspiracy in Bombay, E published writing advocating the object in view in Agra; and F transmitted from Delhi to G at Kabul, the money which C had collected at Calcutta, and the contents of a letter written by H giving an account of the conspiracy are each relevant to prove the existence of the conspiracy although he may have been ignorant of all of them and although the persons by whom they were done were strangers to him, and although they may have taken place before he joined the conspiracy or after he left it.

mitted a crime at Calcutta on a certain day, the fact that on that day A was at Lahore is relevant. The fact that near the time when the crime was committed A was at a distance from the place where it was committed, which would render it highly improbable, though not impossible, that he committed

it, is relevant.

Illustration (b).21 That the crime was committed is adduced as an effect of the fact in issue that A committed it. To show that some other person committed it is relevant as denying the connection of cause and effect between the fact in issue and relevant fact; and to show that no other person committed it is relevant as affirming that connection.

Section 12: Illustration.22 For the amount of damages is a fact in issue, and any fact which will enable the Court to determine it will be found to be connected with the fact in issue in one of the ways specified.

Section 13: Illustration.23 The deed is relevant as a cause of the fact in issue. The mortgage is relevant as an effect of the father's right, which is relevant as a cause of A's right. The subsequent grant of A's right is relevant as denying a fact implied by that relevant fact. Particular instances of exercise of the right are relevant facts as effects of the father's right. And instances in which the exercise of the right were stopped are relevant as contradicting those relevant facts.

Section 14: Illustration (a).24 The fact that, at the same time, he was in possession of many other stolen articles is relevant as an effect of a habit of receiving stolen goods, the habit being relevant as a cause of his receiving the particular article with a knowledge that it was stolen.

Illustration (b).25 The fact is relevant as effect of a habit, which habit is a cause of his delivering the particular piece with a knowledge that it was counterfeit.

Illustration (c).1 The facts are relevant as the causes of a fact in issue, B's knowledge that the dog was ferocious.

21. The question is whether A com-mitted a crime. The circumstances are such that the crime must have been committed by A, B, C or D. Every fact which shows that the crime could have been committed, by no one else and that it was not committed by either B, C, or D, is relevant.

22. In suits in which damages are claimed any fact which will enable the Court to determine the amount of damages which ought to be

awarded is relevant.

23. The question is whether A has a right to fishery. A deed conferring the fishery on A's ancestors, a mortgage of the fishery by A's father, a subsequent grant of the fishery by A's father irreconcilable with the mortgage, particular ins-tances in which A's father exercised the right, or in which the exercise of the right was stopped by A's neighbours, are relevant facts.

24. A is accused of receiving stolen

goods, knowing them to be stolen. It is proved that he was in possession of a particular stolen article. (The fact that at the same time he was in possession of many other stolen articles is relevant, as tending to show that he knew each and all of the articles of which he was in possession to be stolen.)

25. A is accused of fraudulently delivering to another person a piece of counterfeit coin which at the time when he delivered it, he knew to be counterfeit. The fact that at the time of its delivery A was possessed of a number of other pieces of counterfeit coin is relevant. (The rest of the illustration was added after Mr. Whitworth's pamphlet by Act III of 1891.)

1. A sues B for damage done by a dog of B's which B knew to be ferocious. The fact that the dog had previously bitten X, Y and Z and that they had made complaints

to B, are relevant.

Illustration (d). For A's knowledge on the previous occasions is a cause of his knowledge on the occasion in question, and that there was no time for the previous bills to be transmitted to him by the payee if the payee had been a real person is a cause of his knowledge on the previous occasions and the fact that A accepted the bills is an affirmation of the connection of cause and effect between the fact concerning time and the fact of A's knowledge.

Illustration (e). The fact of previous publications is relevant as an effect of the same cause as that of which the fact in issue is an effect.

The fact that there was no previous quarrel between A and B, is relevant as alleging absence of fact in issue. The fact that A reported the matter as he heard it is relevant as denying the connection of cause and effect between the two facts, the malicious intention and the publication.

Illustration (f). For A's good faith is in issue, i.e., did A, when he represented C as solvent, think him solvent? is in issue. As C's insolvency may be put forward on one side as a cause of A's thinking him not solvent, so that his neighbours and persons dealing with him supposed him to be solvent, may be put forward as effects of causes which are causes also of A's thinking him solvent. Thus the neighbours' suppositions are effects of causes of a fact in issue.

Illustration (g).⁵ The fact that A paid C for the work in question is relevant. For it is in issue,—was B's contract with A? Therefore that A contracted for the same piece of work with C is relevant as showing absence of cause to contract with B, that he paid C is relevant as an effect of the relevant fact that he contracted with C.

 The question is, whether A, the acceptor of a bill of exchange, knew that the name of the payee was fictitious.

The fact that A had accepted other bills drawn in the same manner before they could have been transmitted to him by the payee if the payee had been a real person, is relevant, as showing that A knew that the payee was a fictitious

person.

3. A is accused of defaming B by publishing an imputation intended to harm the reputation of B. The fact of previous publications by A respecting B, showing ill-will, on the part of A .towards B is relevant as proving A's intention to harm B's reputation by the particular publication in question. The facts that there was no previous quarrel between A and B, and that B repeated the matter complained of as he heard it are relevant as

showing that A did not intend to harm the reputation of B.

A is sued by B for fraudulently representing to B that C was solvent, whereby B, being induced to trust C, who was insolvent suffered loss. The fact that, at the time when A represented C to be solvent, C was supposed to be solvent by his neighbours and by persons dealing with him is relevant, as showing that A made the representation in good faith.
 A is sued by B for the price of work done by B upon a house of

5. A is sued by B for the price of work done by B upon a house of which A is owner by the order of C, a contractor. A's defence is that B's contract was with C. The fact that A paid C for the work in question is relevant, as proving that A did, in good faith, make over to C the management of the work in question, so that C was in a position to contract with B on C's account and not as agent for A.

Illustration (h) 6 The fact of notice is relevant as a cause of his know-ledge that the real owner could be found.

The other fact is relevant as showing that the alleged cause of the fact in issue had not the effect of causing the fact in issue.

Illustration (i).7 For A's intention is a fact in issue. The fact is one which may continue through a space of time, and the shooting is an effect of it.

Illustration (j).8 For the intention to cause fear is a fact in issue. It is a fact capable of prolonged existence, and the previous letters may be effects of it.

Should it, however, be objected that the fact in issue is intention at a particular moment and not intention through a space of time, Mr. Whitworth's reply is, that previous intention is a cause of subsequent intention or both are effects of the same cause.

Illustration (k).9 The expressions are relevant as effects of the cause of the fact in issue or as showing absence of cause of the fact in issue.

Illustration (l).10 The statements are relevant as effects of the fact in issue.

Illustration (m).11 The statements are relevant as effects of the fact in issue.

Illustration (n).¹² The drawing of B's attention is relevant as a cause of B's knowledge, which is a fact in issue.

6. A is accused of the dishonest misappropriation of property which he had found, and the question is whether, when he appropriated it, he believed in good faith that the real owner could not be found. The fact that public notice of the loss of the property had been given in the place where A was is relevant, as showing that A did not in good faith believe that the real owner of the property could not be found. The fact that A knew, or had reason to believe, that the notice was given fraudulently by C, who had heard of the loss of the property and wished to set up a false claim to it, is relevant, as showing that the fact that A knew of the notice did not disprove A's good faith.

7. A is charged with shooting at B with intent to kill him. The fact of A's having previously shot at B may be proved.

8. A is charged with sending threatening letters to B. Threatening letters previously sent by A to B may be proved, as showing the intention of the letters.

 The question is whether A has been guilty of cruelty towards B, his wife. Expressions of their feeling towards each other shortly before or after the alleged cruelty are relevant facts.

10. The question is whether A's death was vaused by poison. Statements made by A during his illness as to his symptoms, are relevant facts.

his symptoms, are relevant facts.

11. The question is, what was the state of his health at the time when an assurance on his life was effected. Statements made by A as to the state of his health at, or near, the time in question are relevant facts.

12. A sues B for negligence in providing him with a carriage for hire not reasonably fit for use whereby A was injured. The fact that B's attention was drawn on other occasions to the defect of the particular carriage is relevant. The fact that B was habitually negligent about the carriages which he left for hire is irrelevant.

The fact that B was habitually negligent is irrelevant, for it is not connected with the fact in issue.

Illustration (o).18 The fact is relevant as an effect of a fact in issue, B's intention.

The fact that A was in the habit of shooting at people is irrelevant for it is not connected with a fact in issue.

Mr. Whitworth adds that this case, in which a habit is declared irrelevant, has some resemblance to that of Illustration (a), where a habit is relevant, but that there is a real difference between the two. He says: "The man who habitually shoots at people with intent to murder them has in each case a definite intention of killing the particular person shot at. There is not, as far as the facts are stated, any ulterior common object to connect together the fact of the previous shooting and the fact in issue. But in the case of receiving stolen property the ulterior common object of making dishonest gain by receiving supplies the connection."

Illustration (p).14 The first fact is relevant as an effect of the cause of his committing the crime.

The second fact is irrelevant, as it is not connected with the fact in issue, namely, whether he committed the particular crime.

Section 15: Illustration (a).15 The facts are relevant as effects of the cause of the fact in issue.

Illustration (b).16 The facts are relevant as effects of the cause of A's making the particular false entry intentionally.

Illustration (c).17 The facts are relevant as effects of the cause of the intentional delivery of the rupee in question.

13. A is tried for the murder of B by intentionally shooting him dead. The fact that A on other occasions shot at B is relevant as showing his intention to shoot B. The fact that he was in the habit of shooting at people with intent to murder them is irrelevant.

14. A is tried for a crime. The fact that he said something indicating an intention to commit that particular crime is relevant. The fact that he said something indicating a general, disposition to commit crimes of that class is irrelevant.

15. A is accused of burning down his house in order to obtain money for which it is insured. The facts that A lived in several houses successively, each of which he insured, in each of which a fire occurred, and after each of which fires A received payment from different insurance offices are relevant, as tending to show that the fires were not acci-

dental.

16. A is employed to receive money from the debtors of B. It is his duty to make entries in a book, showing the amount received by him. He makes an entry showing that on a particular occasion he received less than he really did receive. The question is whether this false entry was accidental or intentional. The facts that other entries made by A in the same book are false, and that the false entry is in each case in favour of A are relevant.

17. A is accused of fraudulently delivering to B a counterfeit rupee. The question is whether the delivery of the rupee was accidental. The facts that soon before or soon after the delivery to B, A delivered counterfeit rupees to C, D and E are relevant, as showing that the delivery to B was not accidental.

Section 16: Illustration (a).18 The facts are relevant as causes of the act in issue.

Illustration (b).19 The facts are relevant, the first as a cause of the fact in ssue, and the second as affirming the connection of cause and effect between he first and the fact in issue.

Mr. Whitworth was unfortunately prevented by want of leisure from lealing generally with the criticisms which his essay provoked. One of these vas that his first rule was a particular abandonment of the scientific form of he others. Mr. Whitworth's answer to this in his Preface to the Second Ediion of his Pamphlet was that an examination of the connection of the first vith the other rules would show that their scientific form was of independent ralue. The second, third and forth rules supplied, he contended, a definition of relevancy and would be complete if the subject were the theory of relevancy bsolutely. The qualification applied by the first rule was required, because he subject is the theory of relevancy for the purpose of judicial evidence. The heory is one thing; its application to a particular purpose is another. He dded:

"It might be well to have rules that would express at once both the principle and its limitation. Failing this, I have propounded one rule (an unscientific one) as to the limitation and three others (scientific in form) as to the principle. But the importance or unimportance of the failure is to be measured by considering whether questions of difficulty in actual practice usually relate to the limitation of the principle or to the principle itself; in other words, whether, for the solution of such questions unscientific or scientific rules are provided. Now the first rule relates chiefly to what Sir James Stephen speaks of as wide general causes which apply to all occurrences, are in most cases, admitted, and do not require proof; and the test in cases of disputed relevancy will, I think, usually be found to be one or the other, the scientific rules."

The theory contained in Mr. Whitworth's essay was subsequently adopted by Sir James Stephen himself in the earlier edition of his Digest of the Law of Evidence.20 In the present edition Sir J. F. Stephen substituted another definition of relevancy in place of that contained in the earlier editions and taken from Mr. Whitworth's essay, not as Sir J. F. Stephen observes, because he thought the former definition wrong, but because it gave rather the principle on which the rule depends than a convenient practical rule.21

Dr. Wharton²² while defining relevancy as that which conduces to the proof of a pertinent hypothesis, a pertinent hypothesis being one which, if

18. The question is whether a parti-cular letter was despatched. The facts that it was the ordinary course of business for all letters put in a certain place to be cafried to the post, and that that particular letter was put into that place are relevant.

The question is whether a parti-cular letter reached A. The facts that it was posted in due course,

and was not returned through the Dead Letter Office are relevant. 20. Steph. Dig., pp. 156, 157. 21. Ib., p. 158. The substituted definition is given, post, in the Intro-duction to Ch. II.

22. A Commentary on the Law of Evidence in Civil Issues by F. Wharton, LL. D. 3rd Ed., 1888, Philadelphia, ss., 20, 26.

sustained, would logically influence the issue; adopting several of Sir J. F. Stephen's positions, offers two criticisms as explaining why he cannot accept his scheme as affording a complete solution of the difficulties which beset this branch of evidence. In the first place, the words "cause" and "effect" are open, when used in this connection, to an objection which though subtle is in some cases fatal. The "cause" of a fact in issue, it is alleged, is relevant; yet whether such a cause produced such a fact is the question the action is often instituted to try; and it is a petitio principii to say that the "cause" is relevant because it is the "cause" and that it is shown to be the cause because it is relevant. In the second place, the distinction between "facts in issue" and "fact relevant to fact in issue", cannot be sustained. An issue is never raised as to an evidential fact; the only issues the law knows are those which affirm or deny conclusion from one or more evidential facts. Thus, Sir J. F. Stephen when explaining the supposed distinction says: "A is indicated for the murder of B and pleads guilty. The following facts may be in the fact that A killed B, etc." But if the group of facts classified as facts in issue be scrutinised it will be found that, as they are facts which could not be put in evidence they are not relevant acts, though they might be relevant hypotheses to be sustained by relevant facts. If counsel should ask a witness whether "A killed B" the question would, if excepted to, be ruled out, on the ground that it called not for "facts", but for a conclusion from facts, and to such conclusions witnesses are not permitted to testify.23 The only way of proving "facts in issue," as they are called by Sir J. F. Stephen, is by means of what he calls "facts relevant to the issue". Did A kill B? We cannot say that it would be relevant to the issue for a witness to say "A killed B" for a witness would not be permitted so to testify. No facts are relevant which are inadmissible; and the fact that A killed B. being in this shape inadmissible, is irrelevant. It is, however, admissible. adopting Sir J. F. Stephen's illustration of facts relevant to the issue to prove that "A had a motive for murdering B; the fact that A admitted that he had murdered B" and the like. From such facts, taken in connection with facts which lead to the conclusion that A struck the blow from which B died, the hypothesis that A murdered B is to be verified or discarded. We must there fore, it is said, strike out from the category of relevant facts what Sir J. F. Stephen calls "facts in issue", or what may be more properly called pertinent hypothesis, and limit ourselves to the position that all facts relevant to "facts in issue" (or to pertinent hypotheses) are, as a rule admissible. If we discord as ambiguous the word "fact" and substitute for it the word "condition," then the position we may accept is that all conditions of a pertinent hypothesis are relevant to the issue; and that such conditions may be either proved or disproved.24

The other class of criticism to which we have referred is altogether adverse to the system on which the Act proceeds, namely, its departure from the principle of English law which consists of negative rules declaring what, (as the expression runs), is not evidence, and its attempt instead to positively define evidence by placing its rules wholly into terms of relevancy. As pointed out by Professor Thayer,28 it is here that Sir James Stephen's treatment of the Law

much to our knowledge of principles of evidence since Bentham. Markby's Evidence Introd.

^{23.} See Wharton, Ev., s. 507.
24. Wharton, Ev., s. 26.
25. Who during, at any rate, the last century was, as Mr. Markby justly says the only writer who added

of Evidence is perplexing and has the aspect of a 'tour de force'. Helpful as his writings on this subject have been, they are injured by the small consideration that he shows for the historical aspect of the matter and by the overingenious attempt to put the rules of evidence wholly into terms of relevancy.1 The difficulty of dealing with the subject of evidence is increased by the confused way in which in several respects the subject is treated in the Act, particularly the obscurity which is thrown over the rules of evidence by the false assumption that rules of exclusion are based solely upon irrelevancy.2 Sections 5-16 are, even when intelligible, for the most part difficult to practically apply, and as the practising lawyer knows, many of them are scarcely ever referred to, and then only for the most part to support a case for the reception of "evidence" which bears on its face so little the aspect of relevance that for an attempt to receive its admission some section or other must be pressed into service. The Legislature has entertained the idea of instructing Judges and juries as to what constitutes relevancy giving, as Sir William Markby says3 in Section 7 a statement in quasi-scientific language of the meaning of relevancy; in Section 11 a statement in popular language of what in Section 7 is attempted be stated in scientific language and lastly an enumeration of a few facts which are declared to be relevant though the catalogue of such relevant facts is inexhaustible. The truth is that everybody is assumed (and rightly assumed) to know what evidence is in the sense that the law takes it for granted that people know how to find out what is and what is not probative as a matter of reason and general experience. The rules which govern here are the general rules which govern everywhere; the ordinary rules of human thought and human experience to be sought in the ordinary sources and not in law books. There is a principle-not so much a rule of evidence as a presupposition involved in the very conception of a rational system of evidence as contrasted with the old formal and mechanical system, which forbids receiving anything irrelevant that is not logically probative.8 How, asks Professor Thayers are we to know what these forbidden things are? Not by any rule of law. The English law furnishes no test of relevancy. For this it tacitly refers to logic and general experience-assuming that the principles of reasoning are known to its Judges and Ministers just as a vast multitude of other things are assumed as already sufficiently known to them. Unless excluded by some rule or principle of law all that is logically probative is admissible. The Judge simply has to ask himself: Does testimony of this fact help me to determine the issue I have to decide? Whether it does or not, his reason and experience will tell him. If it does not then the rule of reason excludes it. If it does, then since there are tests of admissibility other than logical relevancy, inquiry must be made whether there is any rule of law which excludes it. It is this excluding function which is the characteristic one in the English Law of Evidence, which is as Professor Thayer calls it, the child of the jury system. It seems, he says,7

"that our Law of Evidence, while it is emphatically a rational system, as contrasted with the old formal methods is yet a peculiar one. In the shape it has taken, it is not at all a necessary development of the rational

Markby's Evidence Act.

Thayer's Preliminary Treatise on Evidence at the Common Law, p. 266n. The whole of Ch. VI in which this passage occurs is worthy, as is indeed the rest of the work, of the most careful study.

Introd.

Markby's Evidence Act 17.
 Thayer, op. cit., 268n.
 Thayer, op. cit., 275, 264.

^{6.} Ib. 265.

^{7.} Ib. 270.

method of proof; so that where people did not have the jury, or having once had it, did not keep it, as on the Continent of Europe although they, no less than we, worked out a rational system, they developed under the head of evidence no separate and systematized branch of the law."

The main object of the law is to determine not so much what is admissible in proof as what is inadmissible. Assuming in general that what is evidential is receivable, it is occupied in pointing out that part of this mass of matter is excluded; and it demes to this excluded part not the name of evidence but the name of admissible evidence. Some things are rejected as being of too slight a significance or as having too conjectural and remote a connection; others as being dangerous in their effect on the jury and likely to be misused or over-estimated by that body; others as being impolitic or unsafe on public grounds; others on the bare ground of precedent. It is in fact this sort of thing—the rejection on one or another practical ground, of what is really probative which is characteristic of the English Law of Evidence, stamping it as the child of the jury system.8 Admissibility is thus determined, first by relevancy—an affair of logic and experience and not at all of law; secondly, but only indirectly, by the Law of Evidence which declares whether any given matter which is logically probative is excluded.

A practical experience of many years in the working of the Act shows it to be a matter of regret that the English system, which has its basis in the historical reasons to which we have referred, was rejected in favour of the attempt at a constructive treatment adopted in Sections 5–16 of the Act. As Sir William Markby very justly puts it:

"What then it will be asked, is a Judge to do when he has to consider whether a fact is relevant? In the first place I answer that this is a question which he has very rarely to consider. Parties to a litigation or their advocates very rarely attempt to offer irrelevant evidence. Their only object in doing so would be to waste time. They hope to influence the opinion of the Judge—and this they cannot expect to do by evidence which is really irrelevant. But if a Judge thinks that he is being asked to listen to what is really irrelevant he would certainly not resort to any abstruse consideration about cause and effect; he would simply consult his own experience."

The real discussions which take place before a Judge upon evidence are, as he points out, not as to its relevancy but to its admissibility. And this Act would have been far more intelligible if the language of it had corresponded

8. Thayer op., cit., 264-269. It is thus the creature of experience rather than of logic. Founded as being a rational system upon the laws of thought, it yet recognizes another influence (the jury) that must at every moment be taken into account; for it is this which brought it into being as it is the absence of this which alone accounts for the non-existence of it in all other than English speaking countries, whether ancient or modern; ib., pp. 267-268. In fact it may be added that the English rules of evidence are

never very scrupulously attended to by tribunals, which like the Court of Chancery, adjudicate both on law and on fact through the same organs and the same procedure.

9. Evidence Act, pp. 17, 18. According to the learned author notwithstanding that this is an Act which professes to contain the whole law of evidence, two at least of the general rules of exclusion (including that against hearsay) are not treated in it. The language of s. 60, he contends, does not, as is generally supposed, exclude hearsay.

with a collection of rules not upon relevancy but upon admissibility. In that case whilst their own reason and commonsense would have told the Judge and parties what was relevant, it would only have been necessary on an objection to look into the provisions of the Act to see whether there was any rule prohibiting the reception of the particular evidence in question. Whether or not certain kinds of evidence shall be admissible depends on a variety of considerations besides relevancy; and the putting forward of relevancy in the Act as if it were the only test is not only erroneous but unfortunate, as it makes the Act difficult to explain and adds to the mystery by which this branch of the law is usually supposed to be surrounded. There is, however, no mystery, about the matter if it be remembered that the ordinary processes of reasoning or argument are not left at the door of the Court House and that within it the law does not properly undertake to regulate these processes except as helping by certain rules which may be presented in a readily intellibible manner to discriminate and select the material of fact upon which these are to operate. Legal reasoning, at bottom, is like all other reasoning, though practical considerations come into shape it. Rules, principles and methods of legal reasoning have, however, figured as rules of evidence to the perplexity and confusion of those who sought for a strong grasp of the subject. The notion may be dismissed that legal reasoning is some natural process by which the human mind is required to infer what does not logically follow. What is called the "legal mind" is still the human mind and must reason according to the laws of its constitution. But to understand properly the Law of Evidence one must detach and hold apart from it all that belongs to that other untechnical and far wider subject.10 The position may be summed up by saying that the laws of reasoning indicate what facts are relevant. The Law of Evidence declares which of those facts are inadmissible. These latter should be concisely stated and codified. But just as other organic processes are ordinarily and in most cases are the better carried on unconsciously, so little of use is attained and the risk of confusion is involved in an attempted analysis of the reasons. The commonsense and experience of both the parties and the Judge will tell them .hat they have to prove and what should be proved, and what is relevant for that purpose. And if these do not, abstract considerations of casualty will not help them, interesting though these may be in inquiries less practical than those which come before a Court of Justice.11

It is sometimes said, as pointed out by Mr. Cross in his Evidence at p. 21, that in addition to recognising the separate concepts of relevancy and admissibility we should allow two further concepts, "materiality" and "receivability". If this were done, relevancy would imply that the evidence tendered tends to prove that it purports to establish, that materiality would mean direct evidence to a fact in issue, admissibility would denote that the evidence did not infringe

Thayer op. cit., Ch. VI, and the same author's Select Cases on Evidence, 1-4.

reluctance to enter into the mazes of the law of casualty that there is such popular resort to s. 11. In a Code which aimed merely at embodying the rules of exclusion, all evidence would be prima facie admissible unless the objecting party could show some positive rule in the Code excluding it.

^{11.} As matters now stand on an objection to evidence, the party tendering it has to search the Act for the section which justifies its reception. This is not always an easy matter, and it is probably owing to this and not an unnatural

the exclusionary rule, while receivability would mean that the evidence was relevant, material and admissible. But, as pointed out by Mr. Cross, these dual concepts are not employed in practice, and in fact it is by no means certain that their adoption would render the exposition of the law any clearer.

But apart from these criticisms, the modern science of psychology has been seeking to undermine our faith in the basic concepts of the law of evidence adumbrated above. This is not the place for discussing the many criticisms to which the Indian Evidence Act has been subjected to by psychologists. Those desirous may refer to the discussions in Arnold's Psychology applied to Legal Evidence; Bose's Introduction to Jurist Psychology and McCarty's Psychology for the Lawyer, the last mentioned being the clearest exposition on the subject. If some of their criticisms are indicated here, it is done only as food for thought and nothing more.

Arnold criticises the Law of Evidence, because it requires in many cases the splitting up of a logical single transaction, some of it being admissible and some not. This is possible because of the rule that all evidence must be logically relevant to be admissible; but some logically relevant evidence is not legally relevant, and therefore not admissible. He cites several examples, such as the rule, that it is not admissible to prove the fact-in issue by showing that similar facts have occurred on several occasions. Another is a confession made by one person implicating another with whom he is jointly tried for a different offence committed in the same transaction. The confession would not be competent evidence admissible as against the other. Yet when the Judge or jury has heard the whole transaction, why not the confession as part of the transaction be admissible? He concludes that the rules of evidence are framed "on the assumption that because parts of a transaction can be separated off in description from one another, a similar separation can be made in the effect of all the evidence on the mind, whereas as he has said, the truth is grouped as a whole by intuition and not by deductive steps in corresponding each to so much of the evidence given". He then points out that it is an intellectual impossibility for a Judge or jury thus to separate the parts and use one discarding the other. The whole transaction is in mind and cannot thus be waived aside.

Arnold then contends that lawyers seek to apply general rules in the shape of legal maxims to particular cases excluding from consideration the particular circumstances of the case itself and to justify this legal shorthand by assertions that they cannot enter into all the considerations, because litigation would never terminate. "In short, the law cannot embrace all the complexities of human life." The reply to this in substance is that it is impracticable to concrete the abstract, and such methods are artificial and fictitious and cannot produce anything but injustice.

In order to facilitate proof, the law of evidence has built up certain presumptions. Experience has shown that from certain facts a certain inference usually follows and as a short-cut the inferred facts are presumed when the basic facts are shown. These presumptions are not free from attack. Arnold says that the legal profession, instead of relying on science, draws a number of arbitrary assumptions, e.g., that a man must be presumed to know and therefore he intends the probable consequences of his act which contradict both the

teachings of other sciences and the experience of mankind. He contends that in the realm of mental qualities, human motives and conduct, legal presumptions must yield to the conclusions of psychology when they clash, for psychology has especially studied this branch.

One method of proof is by showing other similar acts. The general rule, however, is that it is not admissible to prove the fact in issue by saying that similar facts have occurred on other occasions. To make such similar but unconnected facts admissible it is usually necessary to show some cause and effect connection, from which inference may be drawn. The necessity for showing the casualty result in excluding much that is of real evidential value. Arnold points out what he considers to be weakness of this rule, and says:

"Now it is quite clear that the evidence of the occurrence of similar facts on other occasions may be decidedly valuable, but it is probability and not causalty, which is here the ground of admission. Similar events are really relevant as tending to make the event in question more probable because they are evidence of the uniformity of nature. It is a case really of induction by simple enumeration which can never be causalty. But the larger the number of instances, the greater becomes the probability to the mind of the inquirer of the uniformity alleged or assumed."

As a general proposition adduced from experience and supported by psychology, it is stated that it is safe to say that a person is more apt than not under similar circumstances to do what he has done before. The more such conduct is a matter of habit, the more certain is this result. Even with considerable volition present, the tendency is to follow previous action. On the basis of this probability, there is a probative value to evidence of similar acts or occurrences.

Then, it is stated that a class of irrelevant facts comes under the broad title of hearsay. It has long been a rule of evidence that hearsay testimony is not admissible. A witness must be sworn in court and be subjected to cross-examination, for otherwise, says the law, there would be no assurance that he is telling the truth. 'Conversation is not evidence'. Yet exceptions and modifications of the rule bulk so large as almost to obscure the rule itself. This result shows the futility of building up a rule upon such narrow foundations. The assumption that a statement not made in court is unreliable is not borne out by experience. Res gestae is no doubt excepted from this rule; but the Indian Evidence Act puts such limitations as to exclude much useful evidence. Human mind works like chain lightning, sometimes very sluggishly. Different minds vary in rapidity very materially. Therefore, arbitrary limitations in regard to time, place and person based upon res gestae do not rest on any sound psychological basis.

The objection that a statement of the witness is an opinion and conclusion is a common weapon. Ordinary witnesses are prone to drop into common every-day expressions. Thus, in telling what a certain agreement was, the witness says, "we agreed that", and counsel interrupts and raises the objection that it is not evidence but the conclusion and opinion of the witness. This is sustained and the witness is admonished not to give his opinion but to state the facts; not quite sure what it is all about, the witness again starts to tell you

his story, and after stating some of the talk winds it up with 'we agreed that', only to be again stopped and the court saying, "Never mind your conclusion, just state what was said"; still more confused and having lost the thread of his story by the repeated objections, the witness does very well if he gets through without getting mixed up and saying something which he does not mean or forgetting some vital part of the transaction. From a procedural standpoint, the rule is worse than the evil it is aimed to correct. Logically, there is a distinction between fact and conclusion. From the psychological side. "We agreed" is often a more definite fact and better proof than hours of conversation. Mere words do not give facial gestures, inflections, the nod of agreement or the tacit assumptions that are an integral part of many transactions. The human element gets entirely eliminated by such an artificial rule of evidence.

The psychologists finally fasten upon the strange individual with whom every judge, lawyer and policeman is acquainted, viz., Mr. Ordinary-Prudent-Man. It is stated that we meet him face to face in many cases, and yet none of us can describe his appearance accurately. There is an air of mystery about him and a vagueness that is very disconcerting. In fact in recent decision, "this reasonable man or the Ordinary-Prudent-Man" has been described by Lord Justice Greer as the man in the street or the man on the Clapham omnibus or as I recently read in an American author the man who takes the magazines home and in the evening pushes the lawn-mower in his shirt sleeves.12 This authority has a dominant position, in the law especially in the law of negligence. This pictorial and artificial creature has no counterpart in real life and leaves out of consideration the variations of personality. The result is that Mr. Ordinary-Prudent-Man is a creation of every individual judge who presides and appellate Courts which read: "How can justice be done it is said, unless we can take into account the entire human personality, the mental constitution of the individual as well as the more or less direct environmental influences which contribute to the act in question?" Instead of setting up, therefore, a strawman, why not set up some such standard as a reasonable care at the time under the circumstances of a particular case and the personality of the actor.

Thus, it is concluded by McCarty, at page 342, that the Law of Evidence based upon the old Common Law and upon a physical and mental knowledge of bygone days with very little attempt to adopt evidentiary rules of modern scientific or psychological knowledge should be modernized, and that all facts of whatever nature which have any relations, however, remote, to the question under investigation should be made admissible and that whatever in short, brings or contributes to bring the mind to the just conviction of the truth or falsehood of any fact asserted or denied should be made evidence.¹⁸

These criticisms are set up not because they are irrefutable. On the other hand, Sir James Stephen in his Introduction to the Indian Evidence Act has shown how these criticisms are really unsubstantial. Legal evidence, as Sir James point out, is a little more than commonsense view of what constitutes sufficient probability, upon which to act or form an opinion. In is in reality

Hall v. Brooklands Club, (1933)
 McCarty: Psychology for the Lawyer, Chapter XI.

a body of simple and untechnical rules which it is not too much to say any intelligent and impartial man would be led by the light of nature to act upon in prosecuting the enquiry or setting a dispute in private life. The only difference is that in a court of justice on the facts permitted to be placed before it a greater degree of probability—moral certainty as it is termed—and a more rigid process of proof would be required.

Therefore, in private life also, if one is independent and impartial in prosecuting an enquiry or settling a dispute, having regard to the fact that these matters will have to be disposed of as expeditiously as possible and adopting ready methods of weighing evidence, irrelevancies will have to be eschewed. He will insist upon evidence being confined to the matters in issue. Otherwise, whereas Judges and parties are mortal, controversies will become immortal. Evidence, which might even be highly relevant in a protracted academic investigation, is treated as too remote from the issue in a forensic enquiry, because that body is controlled by the time factor.14 "If we live for a thousand instead of sixty or seventy years and every case was of sufficient importance, it might be possible not to mention considerations such as dealing with matters which are not being litigated and dangerous distractions from the real controversy on hand." A case in point is the story told to account for the origin of the trite expression "Let us come back to our sheep". A lawyer pleading the case of a client who had lost some sheep talked of everything but the matter in question, when, his unfortunate client recalled him to the above expression. In private enquiries, undoubtedly, irrelevancies become overwhelming. Generally, an ordinary person listens to everything that is said and indeed invites irrelevancies by suggesting that the witness shall tell him everything he knows. "Now let me hear all that you have to say", is a common method of opening an inquiry conducted without reference to legal evidence. But the Court, for obvious reasons, cannot follow such methods and has to rule out all irrelevancies into which we all too frequently glid with unconscious facility. In fact, the moment our attention is relaxed, we are apt to run off the lines of our inquiry. It is not always minds accustomed to logical processes of thought that have to apply the law of evidence. The bulk of our civil and criminal work falls to be disposed of by laymen other than trained judges. Therefore rigid rules of inclusion (Sections 5 to 11) and rigid rules of exclusion have been enacted confining evidence to matters in issue and relevant facts. In course of time to make material of belief the best that can possibly be secured, English Jurisprudence has built the following principles, viz., that a witness should not be allowed to give hearsay or second-hand evidence; he will not be allowed to give his opinion; courts will not admit similar though unconnected facts; they will not admit facts as to the character of the person whose conduct is in question. These rules, however, are not inflexible, because exceptions are made to them such as would naturally suggest themselves as reasonable and proper.

It is quite true that what the witness had heard other witnesses say and what the witness's own private opinion was about the matter, adduction of unconnected facts which though similar were unconnected with the case in question and of facts which tended to throw discredit on the person charged might to

Per Rolfe, B. in Hitchcok, (1849) Exch. 91 at p. 99.
 E. 9

some extent be relevant. But a moment's reflection will show, they are clearly insufficient to establish a grave charge and would be unsafe to make them the grounds of a decision. The reasons why, hearsay evidence is not received as relevant evidence are:

- (a) The person giving evidence does not feel any responsibility. If he is cornered he has a line of escape by saying "I do not know, but so and so told me";
- (b) truth is diluted and diminished with each repetition; and
- (c) if permitted, gives ample scope for playing fraud by saying, "someone told me that....."

It would be attaching importance to a false rumour flying from one foul lip to another. Pope says:

"The flying rumours gathered as they rolled,

Scarce any tale was sooner heard than told;

And all who told it added something new,

And all who heard it made enlargements too;

In every ear it spread, on every tongue it grew."

So, what the witness heard other people say might be mere gossip. It will be clear that it is not the best evidence. It is not, moreover, a statement on oath, but a mere report of what had been told by an absentee who may have spoken inadvertently, lightly or ignorantly and who was under no obligation to speak the truth and there is no protection for such statements being made in cross-examination. In other words, such evidence is not likely to be true, or at least it is not sufficient, so as to make it trustworthy. There are exceptions, when hearsay is likely from its nature or the circumstances under which it is given to be true, e.g., voluntary confession, an admission against one's own proprietary or precuniary interest, or a dying declaration or a declaration against his own interest in the course of business. Then, under such guarantees of likelihood of truth, the hearsay rule is relaxed.

In addition, the law relating to res gestae "the event which happened" or, more accurately, the events which happened in the affair, which is now being considered by the Court, 15 allow hearsay evidence which will be found to help to establish the existence or non-existence of the fact in issue to be adduced. Res gestae, to cite Kenny, comprise all relevant facts or events which are either in issue or which, though not themselves in issue, yet accompany some fact which is in issue, so as to constitute circumstantial evidence which goes to explain or establish that fact. It is only repetition of second-hand testimonial utterances which gets excluded, but all other utterances, uttered so close to the

^{15.} Vide Dr. Kenny; Outlines of Criminal Law, 17th Ed., p. 463.

fact in issue in time, place and circumstances, constituting circumstantial evidence and helpful to establish the existence or non-existence of the fact in issue, get admitted. It may also be borne in mind that if spoken words are themselves a fact in issue then they are admissible notwithstanding, for instance, that a witness speaks to the slanderous words uttered by a defendant and thereby to a statement at third-hand. Thus the bogy of restrictive res gestae harming the usefulness of judicial investigation may be laid at rest. The doctrine of res gestae, properly interpreted, makes available all really useful circumstantial material.

In regard to opinions, apart from the waste of time that would be caused by allowing people to air their opinions in the witness-box and which we with the greatest difficulty have often to repress, there is a further objection that the witness would be usurping the functions of the judge and the jury. But, there are well-recognised exceptions when such opinions will be valuable, e.g., expert's testimony. Evidence of similar transactions is not allowed to be given on the simple ground that, but for this rule, a man charged with an offence, for instance, will have to submit to imputations which, in many cases, will be fatal to him, or else defend every action of his whole life in order to explain his conduct on the particular occasion. In addition, unless two actions are linked together by the chain of cause and effect in some unassailable way, we cannot draw logical inferences from one transaction to another merely because they resemble each other. There are important exceptions to this rule in criminal proceedings, where it would be safe to draw such inferences in the context of those transactions. Thus, where it is necessary to prove intention, knowledge, malice or other state of mind, similar facts will be admitted to prove the existence on the occasion in question of the accused's state of mind. Thus, if a man is charged with having received property, knowing it to have been stolen, the fact that he has received many stolen articles and pledged them would be deemed relevant to show that he knew the property was stolen. And, in like manner, where a man is charged with uttering counterfeit coin, evidence that he uttered on other occasions counterfeit coins will be admitted to show that he knew the coins to be counterfeit. In regard to character, it has been evolved by reason of long experience that evidence of good or bad character is irrelevant and inadmissible in civil cases unless character be the substance of issue, and that, in criminal cases, good character is admissible, but not the fact that he is a bad character unless it be itself the fact in issue or unless evidence has been given that he has a good character. In giving such evidence, it is permissible to give evidence only of general reputation and not of particular acts by which that reputation is shown. All this, as pointed out by Sir James Stephen, is natural and reasonable and free from difficulty. We all know how fallacious a guide reputation is, in estimating the probability of a man's conduct oil a particular occasion. The great bard William Shakespeare has rightly said that reputation is an idle thing, oft got without merit and oft lost without reason. We know the danger and injustice of giving a dog a bad name, and how readily it is assumed that a man of bad character must be guilty. And, on the other hand, we know how often a spotless reputation is ruined by a single false step of momentary weakness. Evidence of character, therefore, is rightly excluded. At the same time, it is consistent with our laws leaning towards mercy that an accused should be allowed to give evidence of good character subject to the reasonable condition that such evidence may be rebutted by evidence of bad character.

These arise from the differing concepts of the psychologist and the jurist in regard to the discovery of truth under prescribed evidential procedure. In the case of the psychologist, as mentioned by Mr. Beecher and cited by McCarty at page 361, the field of evidence from the point of view of the psychologist is the whole field of knowledge. That is, all facts of whatever nature which have any relation, however remote, to the question under investigation, are admissible. Such facts have different degrees of probative force but they have all some probative force. Under the law of the human mind, it is absurd, for instance, to exclude hearsay evidence or the evidence of a wife against her husband, or an accused's confession made under threats or promises from a police officer, or to refuse to examine an accused person, or forbid a party to discredit his own witness, no matter whether we have other testimony or not. Whatever in short, to use Livingstone's definition, brings or contributes to bring the mind to a just conviction of the truth or falsehood of any fact asserted or denied is, evidence; it may be weak or strong, but it is still evidence and everything that can throw light upon the matter at issue is collected and submitted. It follows, therefore, according to Mr. McCarty that we must re-write our law of evidence and method of proof of facts in the light of the knowledge gained by psychology and in line with modern human experience and replace the rules of evidence which are a heritage of past generations from Common Law of England under vastly different social and economic conditions. On the other hand, the restrictions imposed by the English rules of evidence, which appear in marked contrast to the laxity of proof allowed in some continental tribunals,-for example, France, unlike England, permits:

- (a) leading question,
- (b) hearsay evidence,
- (c) evidence of matters only remotely relevant—are based upon sound reason.

To reiterate the chief general rules of evidence consist, excepting for Sections 5 to 11, mainly of rules of exclusion which are not limited to excluding such matters as are relevant to the issue to be tried. We exclude relevant testimony also in the case of evidence of matters so slightly relevant as not to be worth the time occupied in proving them. If every instance which might tend to throw light on matters of issue is allowed, trials would be protracted to intolerate length and extraordinary ingenuity would be exhibited in discovering every fact which has the remotest bearing on the question under litigation. Secondly, evidence, though related to facts, that are not only relevant but even important, is itself of such a character, that experience shows it, likely to mislead minds not accustomed to rigid logical process of thought as being a more cogent proof of those facts than it really is. These are the two fundamental reasons for this principle of exclusion, viz., that untrained minds might thereby be led to a false conclusion and lest the time of the court should be wasted. The third is that an accused person must be treated fairly and equitably at all stages of the proceedings, and which has done much towards producing confidence in our courts and has kept the public feeling in full sympathy with the administration of law and has thereby facilitated the task of Government,18

^{16.} Kenny's Outlines of Criminal Law, 17 Ed. Chap. xxvii, p. 435.

Again, on the whole, as pointed out by Dr. Fleming,17 the law has chosen external, objective standard of conduct. This means that individuals are often held guilty of legal default for failing to live up to a standard which, as a matter of fact, they cannot meet. Moral blameworthiness and legal default do not invariably coincide. In the first place, legal control stops short of inquiry into the internal phenomena of conscience; because of administrative limitations, the law can only work between the sphere of external manifestations of conduct. Consequently, legal standards are standards of general application. When men live in society, a certain average degree of sacrifice of individual peculiarities, going beyond a certain point, is necessary for a general welfare. Otherwise, substandard behaviour would get elevated as the norm. One moment's reflection would show, how, for instance, in cases of negligence, if the standards were relaxed for defendants, who cannot attain the normal, the burden of accident-loss, resulting from the extreme hazards created by society's dangerous groups of accident-prone individuals, would be thrown on the innocent victims of substandard behaviour. Although the legal standard insisted upon is that of a reasonable man of ordinary prudence in order to eliminate personal equations and idosyncracies in actual practice within the limits of our principles of evidence, subjective factors are not wholly ignored and allowances are made for many of the personal characteristics of the defendant himself. In fact, as Dean Pound cited by McCarty at page 332, puts it:

"In framing standards the law seeks neither to generalise by eliminating the circumstances nor to particularise by including them; instead the law seeks to formulate the general expectation of society as to how individuals will act in the course of their undertakings and thus to guide the commonsense or expert intuition of jury or commission when called on to judge of particular conduct under particular circumstances."

And here, to conclude, on a perusal of the foregoing pages some such idea as the following must have been awakened in our minds. Assuredly the object and aim of the law of evidence is of the highest and most momentous importance; no science, save indeed that which concerns itself with purely moral precepts, can be more elevated than this whose function it is pro bono publico to weigh with the nicest scales in the adjudication of disputes the permissible material of belief, that is to say, what facts are relevant and may be proved, and in what way each of the facts constituting the material is to be proved. How may we estimate its principle? A merely casual glance at them will show that they are based on truth and justice-a more profound acquaintance with them would convince how admirably they are adapted to the changing wants and exigencies of society. The doctrines enunciated by British jurists-modified conformably to the requirements of more varied manner and more practical views-are still blended and incorporated with our law and from this land they have spread to Trans-Africo-Asiatic regions and the deference yielded to them throughout realms thus varied and vast-testifies to the wisdom from whence they have sprung. True, these principles are sometimes artificially expounded-practically misapplied-or lost in technicalities-but in the abstract they are sound-they readily adapt themselves to advancing knowledge-and aid every onward step in that great career of improvement which man has to make. In this sense we may safely predict that they will be Eternal.

^{17.} Law of Torts.

CHAPTER VII

COMING CHANGES

(Recommendations of the Law Commission)

The Law Commission of India in their XIV Report on Judicial Administration in Chapter 24, Vol. I, page 516, set out the observations regarding the information gathered by them with reference to the questionnaire issued by them and printed at page 1259 of Vol. II of their XIV Report:

- "Our Questionnaire referred to the need for the reform and the modernization of the law of evidence with particular reference to the relaxation of rules against the admission of what has been called 'hearsay evidence', the admissibility of secondary evidence and cognate matters.
- What is commonly known as 'hearsay' is what the term conveys; something that is heard by a witness from a third party. It may be described as oral secondary evidence of an oral statement. The expression is, however, understood by some writers in a much wider sense and applies to what has been called 'unoriginal' evidence. "All evidence is either original or unoriginal. The original is that which a witness reports himself to have seen or heard through the medium of his own senses. Unoriginal, also called derivative, transmitted secondhand or hearsay, is, that which a witness is merely reporting not what he himself saw or heard, not what has come under the immediate observation of his own bodily senses, but what he has learnt respecting the fact through the medium of a third person". In its wider sense of unoriginal evidence it will include not only oral statements but written statements by persons not called as witnesses.
- "2. In England where broadly speaking the admission of evidence is regulated by the English Common Law, exceptions have from time to time been made to the strict rule against the admission of hearsay evidence. These exceptions relate in the main to statements made by deceased persons.
- "3. In many cases the admission of hearsay evidence was hedged in with limitations and qualifications which created difficulties. For example, dying declarations of deceased persons were excluded from evidence if at the time of the declarations there was any prospect of their recovery,
- Best on Evidence, 9th edition, Sec.
 cited in Law of Evidence.

however slight. Statements and documents prepared by public officers in the course of their duties were admitted but such documents had to be available for public inspection. Though evidence of statements of deceased persons could be admitted subject to certain restrictions the law would not admit in evidence the statements of witnesses where the witnesses though alive were for good and sufficient reasons not available for giving evidence.

- "4. These and various other difficulties in regard to the admission of hearsay evidence gave rise to considerable criticism and eventually led to the enactment of the English Evidence Act of 1938. Leaving intact the exceptions to the rule of hearsay developed by the common law the Act has enacted some further exceptions. The legislation has however been criticised as not having gone far enough in relaxing the rule against hearsay.
- "5. Attempts have also been made in the United States to mitigate the rigour of the application of the rule. Attention may be drawn in this connection to the American Model Code of Evidence compiled and published by the American Law Institute in 1942.
- "6. The suggestions received by us in answer to the questionnaire and the evidence given before us has not afforded much assistance to us.

"Considering the provisions in regard to the admission of hearsay evidence in our Evidence Act such as Section 32 of the Act, it appears to us that our Act contains provisions for the admission of hearsay evidence in several matters in which it became admissible in England only after the Act of 1938. Indeed in certain matters the provisions of the Act are wider and permit evidence to be given of matters which may not be admissible evidence in England even after the recent legislation. It is unnecessary to discuss the matter further in detail. We do not feel justified on the evidence before us in making any recommendations in this respect. The matter may call for further consideration at our hands at a later stage when the revision of the Evidence Act is undertaken by us and proper material is made available to us.

- "7. The admission of secondary evidence of documents is governed by the provisions of Chapter V of the Indian Evidence Act. The primary evidence is the document itself produced for the inspection of the Court. The law however, enables secondary evidence of the document to be given in certain cases. The circumstances under which secondary evidence can be given of the existence, condition or contents of a document are stated in Section 65 and Section 66 of the Act. In so far as documents inter partes are concerned, the rules relating to their proof by secondary evidence seem to be sufficiently wide and no suggestions have been made to us for their enlargement.
- "8. The position appears to be different however in regard to public documents. The law enables the proof of the contents of public

documents to be made by the production of certified copies thereof. It has been justly said that delays in the disposal of cases are frequently caused by the need for the production of certified copies of public documents. But it is difficult to conceive of any manner other than the production of a certified copy by which the contents of public documents can be permitted to be proved. If it were left open to parties to adduce other proof of such documents the Court would have to enter into conflicting evidence about their contents and assess its worth. This is obviously undesirable when the document is a public document, the contents of which can be proved beyond dispute by the production of a certified copy. This question may also receive the further attention of the Commission at the time of the revision of the Evidence Act.

"9. Under Section 90 of the Evidence Act, when any document purporting or proved to be thirty years old is produced from any custody which the Court in the particular case considers proper, the Court may presume that the signature and every other part of such document which purports to be in the handwriting of any particular person is in that person's handwriting and in the case of a document executed or attested that it was duly executed and attested by the person by whom it purports to be executed and attested. A question has been raised whether this presumption should be made applicable to certified copies of documents thirty years old. What is urged is that if a certified copy is produced before the Court of a document which purports to be thirty years old, the presumption of genuineness should be extended to the original document itself although it is not produced. It is to be noted that what is produced in Court is a certified copy. All that Court can therefore rightly presume is that it is a true copy of the original document. But no inherent testimony is afforded by the certified copy as to the circumstances under which the original came into existence and whether the original itself possessed any feature which would have destroyed or affected its validity. In order to enable the Court to draw the presumption mentioned in Section 90; two requirements are necessary. The first is that the document should be thirty years old and the other is that it should be produced from custody which the Court considers proper. By what process or reasoning could the Court raise these presumptions in regard to the original document when all that is produced before the Court is a mere certified copy? It may be that the original of which a certified copy more than thirty years old is produced was a fabricated document. It does not therefore seem to us reasonable to extend these presumptions to the original when it is not before the court."

A view was once taken¹⁹ that Section 90 enables the presumptions menioned above to be drawn in the case of the original on the production of a

Subrahmanya Somayajulu v. Seethayya, I. L. R. (1923) 46 Mad.
 70 I. C. 729: A. I. R. 1923
 M. I. Reversed on another point in

certified copy of a document more than 30 years old. That view is however no longer good law.²⁰

'10. For these reasons we do not recommend the acceptance of the suggestion.

"What we recommended is that questions relating to the relaxation of the rule against hearsay evidence, the rule as to circumstances under which secondary evidence should be admissible, judicial notice and ancient documents may be examined by Commission when revising the Evidence Act."

The Indian Evidence Act, 1872

(Act No 1 of 1872)21

AS AMENDED UP TO DATE

(Received the assent of the Governor-General on the 15th March, 1872)

SYNOPSIS

1. Title.

2. Lex fori.

- 1. Title. The title of an Act is undoubtedly part of the Act itself and it is legitimate to use it for the purpose of interpreting the Act as a whole and ascertaining its scope.²² It is not conclusive of the intent of the Legislature but constitutes only one of the numerous sources from which assistance might be obtained.²³ It may be resorted to for explaining an enacting clause when doubtful.²⁴ As to the title of an Act giving colour to, and controlling its provisions, vide footnote.²⁵
- 2. Lex fori. The law of evidence applicable in every case is that of the lex fori which "governs the Courts whether a witness is competent or not, whether a certain matter requires to be proved by writing or not, whether certain evidence proves a certain fact or not; these and the like questions must be determined, not lege loci contractus but by the law of the country where the question arises, where the remedy is sought to be enforced and where the Court sits to enforce it." The 'lex fori' is, in Anglo-American practice, deemed determinative on the general principle that procedure is governed by the rules of the forum, and the Law of Evidence is part of the Law of Procedure. With this result practical convenience also coincides. Thus, where
 - 21. For Statement of Objects and Reasons, see Gazette of India, 1868, P. 1574; for the draft or preliminary Report of the Select Committee, dated 31st March, 1871, see ibid., 1871, Pt. V. p. 273, and for the second Report of the Select Committee, dated 30th January, 1872, see ibid., Pt. V. p. 34; for discussions in Council, see ibid., 1868 Supplement. pp. 1060 and 1209 ibid., 1871 Extra Supplement. p. 42; and Supplement. p. 1641, and ibid., 1872, pp. 136 and 230.

1872, pp. 136 and 230.

22. See In re the Kerala Education Bill,
I. L. R. 1958 Kerala 1167: 1959
SCA 450: 1958 Ker. L. T. 465: 1959
SCJ 321: 1959 SCR 995: A. I. R.
1958 S. C. 956; E. M. Chacko, In
re. (1954) 2 M. L. J. 737; Mangi v,
Scate of Madhya Pradesh, A. I. R.
1955 Nag, 153, 157.

- Vacher & Sons, Ltd. v. London Society of Compositors, 1913 A. C. 107, 128.
- 24. Panna Lal Lahoti v. State of Hyderabad, 1954 Hyd. 129; I. L. R. 1954 Hyd. 441; Aswini Kumar Ghose v. Arbinda Bose N. R., 1953 S. C. R. I: A. I. R. 1952 S. C. 369.

25. Hurro v. Shooro Dhonee, (1868) 9
W. R. 402, 404, 405 (F.B.) Beng L.
R. Supp. Vol. 985: Karachi Urban
Co-operative Bank v. Sahibdin, 1940
Sind 147: 191 I. C. 31: see Salkeld
v. Johnson, 2 Exch. 256, 282, 283

Uda v. Imam-ud-din, (1878) 2 A.
 74 at 90; and see Alangamanjori v.
 Sonamoni, (1882) 8 C. 637, 639, 643;
 Crawford v. Spooner, (1846) 4 M.
 I. A. 179, 187.

I. A. 179, 187.

2. Bain v. Whitehaven Railway Co (1850) 3 H. L. Cas. I, 19, Per Lord Brougham.

the question is one of the proper methods in India of proving an event which occurred in England, the law applicable is the Indian, and not the English, Law of Evidence.3 Whatever conflicting views may have been expressed as to the proper law to apply to contracts in relation to land where the lex loci contractus and the lex loci rei sitae or, as Professor Dicey calls it, the lex situs differ, it seems to be generally agreed by Stercy, Dicey, Westlake and other text-writers that in so far as the formalities of alienation or conveyances are concerned, the law applicable is that of the country where the land is situated.4 Hence, a document relating to and situated in India and not requiring attestation in this country may be proved merely by proving the signature of the executant, even if the document was executed in England and requires to be attested under the English law.5

PREAMBLE

Whereas it is expedient to consolidate, define and amend the Law of Evidence: It is hereby enacted as follows:

SYNOPSIS

 Preamble.
 "To consolidate, define and amend 4. General Construction: the Law of Evidence".

3. Interpretation of Statutes:

(a) Headings.(b) Interpretation clauses.

(c) Illustrations.

(d) Marginal notes.

(e) Intention of Legislature.

(a) Reasonable construction.

(b) Meaning of words.(c) "May".

(d) Exceptions.

(e) Some rules of Interpretation. 5. Interpretation of the Act with reference to English law.

- 1. Preamble. The preamble to an Act is, according to Chief Justice Dyer, "a key to open the minds of the makers of the Act, and the mischief which they intended to redress.6 The preamble has for long been regarded as a legitimate aid to construction. The rule is that it may not be used to control or qualify enactments which are in themselves precise and unambiguous, but that if any doubt arises as to the meaning of a particular enactment, recourse may be had to the preamble to ascertain the reasons for the statute, and hence the intentions of Parliament.7 The title and preamble, whatever their value might be as aids to the construction of a statute, undoubtedly throw light on the intent and design of the Legislature and indicate the scope and purpose of the Legislature itself.8 But it is only when there is ambiguity and when an expression used by the Legislature is capable of more than one meaning, that it is permissible to the Court to look at the preamble, and even to look
 - 3. Wigmore on Evidence, S. 8, 3rd Ed.,
 - Niharendu Dutt Majomder v. Emperor, A. I. R. 1942 F. C. 22: 200 I. C. 289: 1942 M. W. N. 417.
 See Dicey, Conflict of Laws, Ch. 23,
 - and Appendix, Note 17; see also Adams
 - and Appendix, Note 17; see also Adams
 v. Clutterbuck, (1883) 10 Q. B. D.
 403: 31 W. R. 723: 52 L. J. Q. B.
 607: 48 L. T. 614.
 6. See Income-Tax Commissioners v.
 Pemsel, 1891 A. C. 531 at 542: 65
 L. J. Q. B. 265: 65 L. T. 621: 55
 J. P. 805 H. L.; Bhola Prasad v.
 Emperor A. J. R. 1942 F. C. 17. Emperor, A. I. R. 1942 F. C. 17; Janki Singh v. Jagannath, A. I. R. 1918 Pat. 398; 44 I. C. 94; Devji
- Meghji v. Lalmiya Mosammiya, (1977) 18 Guj. L. R. 515.

 7. Halsbury's Laws of England Simonds Ed., Vol. 36, p. 370, para, 544: Surejmal v. State of Rajasthan, A. I. R. 1974 Raj, 116 at 122; Y. A. Mamarda v. Authority under Mini-Mamarde v. Authority under Mini-mum Wages Act, A. I. R. 1972 S. C. 1721 at 1726.
- 8. Popatlal Shah v. State of Madras, A. I. R. 1953 S. C. 274 at 276; 1953 Cr. L. J. 1105: 1953 S. C. J. 369; (1953) 1 Madh. Pra. 739: 1953 S. C. A. 466: 66 Mad. L. W. 573; 1957 S. C. R. 677: 8 D. L. R. (S. C.) 513.

at the title of the Act, in order to find out what was the object with which the Legislature put the legislation upon the statute book, or what was the mischief which the Legislature was out to remedy."9 In case of a conflict between the preamble and a section it is the section that prevails.10

The rule of interpretation is that when the statute is clear its meaning cannot be curtailed or extended by reference to the preamble.11 Where the meaning of the words is plain, it is not the duty of the Courts to busy themselves with supposed intentions.12 In construing statutes, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnancy or inconsistency with the rest of the enactment, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no further. The only rule for the construction of statutes is that they should be construed according to the intent of the Legislature which passed them. If the words of the statute are, in themselves, precise and unambiguous, then no more can be necessary than to expound these words in their natural and ordinary sense. The words themselves alone do, in such case, best declare the intention of the lawgiver. But, if any doubt arises from the terms employed by the Legislature, it is the safe means of collecting the intention to call in aid the ground and cause of making the statute and to have recourse to the preamble, which as already stated, is a key to open the minds of the makers of the Act and the mischief which they are intended to redress.18

In Attorney-General v. Prince Ernest Augustus of Hanover,14 Viscount Simonds observed that it is a settled rule that the preamble cannot be made use of to control the enactments themselves where they are expressed in clear and unambiguous terms. But it must often be difficult to say that any terms are clear and unambiguous until they have been studied in their context. No one should profess, to understand any part of a statute before he has read the whole of it. Until he has done so, he is not entitled to say that it, or any part of it, is clear and unambiguous. The context of the preamble is not to influence the meaning otherwise ascribable to the enacting part, unless there is a compelling reason for it.

The title and the preamble undoubtedly throw light on the intents and designs of the Legislature, and indicate the scope or the purpose of the Legis-

9. Commissioner of Labour v. Associated Cement Co., Ltd., A. I. R. 1955 B. 363; see also Tuka Ram Savalaram v. Narain Bal Krishna, A. I. R. 1952 B. 144: I. L. R. 1952 B. 565: 54 Bom. L. R. 88; Tej Bahadur Singh v. State, A. I. R. 1954 All. 655: 1954 A. L. J. R. 1954 All. 655; 1954 A. L. J. 681; Deorajain Devi v. Satyadhavan Ghoshal, 1954 Cal. 119; 58 C. W. N. 64; Nageswara Rao v. State of Madras, A. I. R. 1954 M. 643; (1953) 2 M. L. J. 724; 1953 M. W. N. 909; Mohammad Ali Fakharuddin v. Gokul Prasad, A. I. R. 1954 Nag. 200; I. L. R. 1954 Nag. 1954 Nag. 209; I. L. R. 1954 Nag.

323: District Board, Bhagalpur Province of Bihar, A. I. R. Pat. 529; Aswani Kumar Ghose

Arabinda Bose, 1952 S. C. 369: 1953 S. C. R. I.

10. Secretary of State for India v. Maharaja of Bobbili, 46 I. A. 302: I. L. R. 43 Mad. 529 (P.C.).

See Pakala v. Emperor, L. R. 66
 I. A. 66; I. L. R. 18 Pat. 234;
 I. L. R. 1939 Kar. 123; A. I. R. 1939 P. C. 47; 180 I. C. 1.

13. Ibid.

14. (1957) 1 All E. R. 49.

- (1) where the text of the statute is susceptible of different construction; lature itself,15 and might be used as aids to the construction of statute.16 Recourse may be had to the terms of the preamble-
 - (2) where it is clear that the Legislature intended that the very general language used in the enactment must have some limitations put upon it, or extended.
- 2. "To consolidate, define and amend the law of Evidence". The preamble shows that this Act is not merely a fragmentary enactment but a consolidatory enactment repealing all rules of evidence other than those saved by the last part of the second section.17

The Law of Evidence applicable to India is contained in this Act and in certain Statutes. Acts and Regulations relating to the subject of Evidence saved by the proviso of the second section,18 or enacted subsequent to this Act. This Act does not therefore contain the whole of the Law of Evidence governing this country. It has repealed all rules of evidence not contained in any Statute, Act or Regulation in force in any part of India. A person tendering evidence must, therefore, show that such evidence is admissible under some provisions either of this Act or the Acts abovementioned; for there are no other rules of evidence in force in India except such as are contained in these Acts. Thus, it was held that since, under Section 2, the English Extradition Act, which was applicable to this country as part of the lex fori records authenticated in the manner prescribed by that Act were admissible.19 So, where certain administration papers were tendered on behalf of the plaintiff, the Privy Council observed and held:

"The Indian Evidence Act has repealed all rules of evidence not contained in any Statute or Regulation, and the plaintiff must therefore show that these papers are admissible under some provision of the Indian Evidence Act,20 "Instead of assuming the English Law of Evidence and then inquiring what changes the Evidence Act has made in it, the Act should be regarded as containing the scheme of the law in principles, and the application of these principles to the cases of most frequent occurrence."21

- In re The Kerala Education Bill,
 I. L. R. 1958 Ker. 1167: A. I. R.
 1958 S. G. 956; 1958 Ker. L. T.
 465: 1959 S. C. J. 321; 1959 S. C.
- 16. Popat Lal Shah v. State of Madras, A. I. R., 1953 S. C., 274; Bengal Immunity Co. v. State of Bihar, (1955) 2 S. C. R. 603; A. I. R., 1955 S. C. 661; 1955 S. C. A., 1140; I. L. R., 34 Pat. 905; (1955) 2 Mad. L. J. S. C. 168; 1955 S. C. J. 672; 1955 S. C. 446.

17. Collector of Gorakhpur v. Palakdhari Singh, (1889) 12 A. I. at 35. As to construction of consolidating

- Acts, see Introduction. Repealed by the Repealing Act, 1938 (1 of 1938), S. 2 and Sch.
- In the matter of Stalimann, (1911)

- 39 C. 164,
- See Lekhraj Kuar v. Mahpal, (1879) 7 I. A. 63, 70; 5 C. 744 P. C. 70; see also Collector of Gorakhpur v. Palakdhari Singh, (1889) 12 A. 1 at 11, 12, 19, 20, 34, 35, 43. Sec. 2 in effect prohibited the employment of any kind of evidence not specifiany kind of evidence not specifically authorised by the Act itself; R. v. Abdullah, (1885) 7 A. 385 at 399 (F.B.); but see also ibid. p. 401; see also Alexander Perera Chandarasekera v. The King, A. I. R. 1937 P. C. 24: 166 I. C. 330: 1937 A. L. J. 420; Muhammad Allahdad v. Muhammad Ismail, (1888) 10 A. 289: R. v. Pitamber, (1877) 2 B. 289; R. v. Pitamber, (1877) 2 B. 61 at 64.
- 21. R. v. Ashootosh, (1878) 4 C. 483 at 491 (F.B.) per Jackson, J.

In State of Punjab v. Sodhi Sukhdev Singh,22 Subba Rao, J. has observed:

"It has been acknowledged generally with some exceptions that the Indian Evidence Act consolidate the English Law of Evidence. In the case of doubt or ambiguity over the interpretation of any of the sections of the (Indian) Evidence Act, the Court can with profit look to the relavant English Common Law for ascertaining the true meaning."

The Evidence Act is, as it was intended to be, a complete Code of the Law of Evidence for India.28 The Act is a complete Code repealing all rules of evidence not to be found therein. There is, therefore, no scope for introducing a rule of evidence in criminal cases unless it is within the four corners of the Act. So a person in India cannot avail himself of the English Common Law maxim, 'nemo tenetur, accusare' no one is bound to criminate himself.24

3. Interpretation of Statutes. (a) Headings. The headings pre-fixed to sections or sets of sections are regarded as preambles to those sections.25 The headings are not to be treated as if they were marginal notes, or were introduced into the Act merely for the purpose of classifying the enactments. They constitute an important part of the Act itself, and may be read not only as explaining the sections which immediately follow them as a preamble to a statute may be looked to, to explain its enactments, but as affording a better way to the construction of the sections which follow, than might be afforded by a mere preamble.1 But, the headings or sub-headings cannot either restrict or extend the scope of the sections when the language used is free from ambiguity.2 Heading cannot be used to cut down the clear words of the section.3

In the arrangement of the sections of an enactment, the headings play an important part. Prefixed to sections, or a set sections, they may be considered as a part of the sections. They fulfil the object and serve as a key to constructing, in case of logical defects, the meaning, scope and intention of the sections. They cannot control the plain words of the statutes but may explain ambiguous words. If there is any doubt they help to resolve that doubt.4

22. A. I. R. 1961 S. C. 493; 1961 Mad. L. J. (Cri.) 731; (1961) 2 Mad. L. J. (S.C.) 203; (1961) 2 S. C. R. 371; (1961) 2 N. W. R.

S. C. R. 371: (1961) 2 N. W. R. (S.C.) 203.

23. R. v. Kartick, (1887) 14 C. 721 at 728 (F.B.).

24. H. H. Advani v. State of Maharashtra, (1970) 1 S. C. R. 821; (1970) 2 S. C. A. 10: (1970) 2 S. C. J. 192: 1970 M. L. J. (Cr.) 490: 1971 Mah. L. J. 274; A. I. R. 1971 S. C. 44, 55 and 56.

25. Maxwell on Statutes, 11th Ed. p. 48. Eastern Counties, etc. Companies v. Marriage, (1860) 9 H. L. C. 32; Dwarkanath v. Tafzar, (1947) 44 C. 267; 39 I. C. 64; A. I. R. 1917 C. 715, per Woodroffe, J.
 Durga v. Narain, 1931 All. 597;

1931 A. L. J. 875 (F.B.); Mst. Savitri Devi v. Dwarka Prasad, A. I. R. 1939 All. 305: I. L. R. 1939 All. 275: 182 I. C. 845: 1939 A. L. J. 71; Har Prasad Singh v. District Magistrate, Ghazipur, A. I. R. 1949 All. 408: 50 Cr. I. I. I. R. 1949 All. 403: 50 Cr. L. J. 657; Suresh Kumar Sohan Lal v. Town Improvement Trust, 1975 M. P. L. J. 413: 1975 Jab. L. J. 468: A. I. R. 1975 M. P. 189. 3. Gurudas v. Charu Panna, A. I. R. 1977 Cal. 110 at 114 (F.B.).

4. Bhinka v. Charan Singh, A. I. R. 1959 S.C. 960: 1959 A. L. J. 557; K. Mukundan v. The Circle Inspector, Neyyattinkara and others, 1976 Ci. L. J. 1438 at 1441 (Kerala),

(b) Interpretation clauses. Legislative definitions or interpretations, being necessarily of a very general nature, not only do not control, but are controlled by subsequent and express provisions on the subject-matter of the same definition; they are by no means to be strictly construed; they must yield to enactments of a special and precise nature, and like words in Schedules, they are received rather as general examples than as overruling provisions.5 The effect of an interpretation clause is to give the meaning assigned by it to the word interpreted in all places of the Act in which that word occurs; wherever that word appears it must, unless the contrary plainly appears, be understood in accordance with the meaning put upon it by the interpretation clause. But an interpretation clause is not to be taken as substituting one set of words for another or as strictly defining what the meaning of a term must be under all circumstances but rather as declaring what may be comprehended within the term where the circumstances require that it should be so comprehended.6 cannot, therefore, be said that the interpretation clause must necessarily apply, wherever the word 'interpreted' is used in the statute in spite of the fact that there are indications in the statute and in the sections where it occurs to control and modify and explain the meaning of the word in a different sense than what is borne out by the interpretation clause.7 While the construction of the definition of a term in a statute should be such as not to be repugnant to the context, it must equally be such as would aid the achievement of the purpose that is sought to be served by the Act.8 Again, it is by no means the effect of an interpretation clause that the thing defined shall have annexed to it every incident which may seem to be attached to it by any other Act of the Legislature.9

The word "include" or the phrase "shall be deemed to include" is very generally used in interpretation clauses in order to enlarge the meaning of words or phrases occurring in the body of the statute, or where it is intended that while the term defined should retain its ordinary meaning, its scope should be widened by specific enumeration of certain matters which its ordinary meaning may or may not comprise so as to make the definition enumerative and exhaustive, and when it is so used, these words or phrases must be considered as comprehending not only such things as they specify according to their natural import, but also those things which the interpretation clause declares that they shall include.10 Where a definition "includes" certain persons or things, it does not, therefore, necessarily exclude other persons and things not so included; for when a definition is intended to be exclusive, it would seem the form of words (as in the definition of "fact") is "means and includes." Where a particular expression has for a long time previously acquired a special technical signification, that special sense, in the absence of a defining clause in the Act

5. Uda v. Imam-ud-din, (1878) 2 A. 74, 86; Dwarris on Statutes, 2nd Ed. (1848) at p. 509; R. v. Justice of Cambridgeshire, 7 A. & E. 480, 491.

6. Craies on Statute Law, 4th Ed.

(1936) at p. 195.
7. Per Dar, J., in Pratap Singh v. Gulzari Lal, A. I. R. 1942 All. 50 at p. 65; I. L. R. 1942 All. 185; 199 I. C. 57; Union Medical Agency v. State of Gujarat, (1973) 31 S. T. C. 396.

- K. V. S. Vassan Bros. v. Official Liquidator, A. I. R. 1952 T. C.
- Uma Churn v. Ajadannissa, (1885)
 C. 430, 432, 433; see also R. v. Ashootosh, (1878) 4 C. 483 at p. 492 (F.B.).

 Chandra Mohan v. Union of India. A. I. R. 1953 Assam 193: I. L. R. 1953 Assam 326 (F.B.),

11. R. v. Ashootosh, (1878) 4 C. 483 a. 493 (F.B.).

may be attached to that expression.12 Where a phrase has been introduced and then defined, the definition prima facie must entirely determine the application of the phrase; but the definition must itself be interpreted before it is applied, and interpreted, in case of doubt, in a sense appropriate to the phrase defined and to the general purpose of the enactment,13

(c) Illustrations. Illustrations are considered as a part of the statute itself.14 They are of value, sometimes, in the construction of the section. But, as illustration only illustrates the section, it does not restrict or modify the sense of the section, nor enlarge its plain meaning.15 Where an illustration is in conflict with the section, it must give way to the section. But it is not to be readily assumed that an illustration is repugnant to the section and should not be rejected.16 The illustrations appended to a section are valuable guides in ascertaining the meaning of a section and they should only be rejected as repugnant to the section as the last resort of construction.17

The words of the section are not limited to the illustrations given. Illustrations ought never to be allowed to control the plain meaning of the section itself, and certainly they ought not to do so, where the effect would be to curtail a right which the section in its ordinary sense would confer.18 Illustrations, although attached to, do not in legal strictness form part of, the Act and are not absolutely binding on the Courts. They merely go to show the intention of the framers of the Acts, and in that and other respects they may be useful, provided they are correct.19 The practice of looking more at the illustration than at the words of the section of the Act is a mistake. The illustrations are only intended to assist in construing the language of the Act.20

- (d) Marginal notes. A marginal note is not strictly part of a section, but it is now well established that the Court may look-at indeed should look-at the marginal note in order to determine what the drift of the section is or what is being aimed at by the Legislature in enacting a particular section.21 On the assumption, that the marginal note is not put there by the Legislature

12. Ruckmaboye v. Lulloobhoy, (1852)
5 M. I. A. 234; Futter-shangji v.
Dessai, (1874) 21 W. R. 178.
13. Cadija Umma v. Don Manis Appu,
A. I. R. 1939 P. C. 63: 180 I.C.
971 (P. C.).
14. Balla Mal v. Ahad Shah, A. I. R.
1918 P. C. 249.
15. Bengal Nagpur Railway v. Rutanji
Ramji, L. R. 65 I. A. 66: 173
I. C. 15: I. L. R. (1938) 2 C.
72: A. I. R. 1938 P. C. 67.
16. Jumma Masjid v. Kodimaniandra,
(1962) 2 S. C. A. 422: (1962) 2
S. C. J. 303: A. I. R. 1962 S. C.
847: (1962) 1 Ker. L. R. 309:
(1963) 1 Andh. L. T. 119. (1962)
2 An. W. R. (S. C.) 90.
17. Mahomed Syed Ariffin v. Yeoh Ooi
Gark, (1916) 2 A. C. 575 (P.C.):
Murlidhar v. International Film
Co., A. I. R. 1943 P. C. 34: 70
I. A. 35: 206 I. C. I: 1943 A.
I. J. 387: Jumma Musjid v. K. A.
Devaiah, A. I. R. 1953 Mad. 637:
I. L. R. 1953 Mad. 427: Kumaraswami v. Karuppaswami, A. I. R.

1953 Mad. 380: 1. L. R. 1953 Mad. 488.

18. Koylash v. Sonatun, (1881) 7 C.
132, 135; 8 C. L. R. 281, "Exempla illustrant non restringunt legem," Co. Litt., 24 (a).

19. Nanak v. Mehin, (1887) 1 A, 487,

Nanak v. Mchin, (1887) 1 A. 487, 495, 496; see Dubey v. Ganeshi, (1875) 1 A. 34, 36.
 Shaikh Om d v. Nidhee, (1874) 22 W. R. 367; see also R. v. Rahimat, (1876) 1 B. 147, 155; Soorjo v. Bissambhur, (1875) 23 W. R. 311; Gujju Lal v. Fatch Lal, (1880) 6 C. 171, 185, 187 (F.B.) illustration referred to, to show meaning of word in S. 13, (post); R. v. Chidda, (1881) 3 A. 573, 575 (F.B.).
 M. S. Kumar & Co. v. Official Assignee of Bombay, A. I. R. 1956 Bom. 38; Dettatraya Motiram

Assignee of Bombay, A. I. R. 1956 Bom. 38: Dettatraya Motiram More v. State of Bombay, A. I. R. 1953 B. 311: I. L. R. 1953 B. 842: 55 Bom. L. R. 323; Indian Aluminium Company v. Kerala State Electricity Board, (1975) 2 S.C.C. 414: A. I. R. 1975 S. C. 1957.

On the assumption, that the marginal note is not put there by the Legislature or is assented to by them, it was held, that the marginal note does not form part of the Act and cannot be used for the construction of the Act.22 But, it was found that in modern statutes marginal notes are assented to expressly or tacitly by the Legislature and it was therefore held that the marginal note inserted by, or under the authority of, the Legislature, forms part of the Act, and, as such, like the headings of chapters or the headings of groups of sections, can properly be regarded as giving a contemporane expositio of the meaning of a section when the language of the section is obscure or ambiguous.23 As Maxwell points out,24 the rule regarding the rejection of marginal notes for the purposes of interpretation is now of imperfect obligation, and as was observed by Collins, M. R. in Bushell v. Hammond,25 "the side note, although it forms no part of the section, is of some assistance, inasmuch as it shows the drift of the section." The marginal note cannot control the meaning of the body of the section, if the language employed therein is clear and unambiguous,1 but, when the words used in the section are ambiguous, there should be no objection to looking at the marginal note to understand the drift of the section.2 The marginal note, however, cannot be permitted to create an ambiguity in the section.3

Marginal notes are not strictly a part of the section. When the language of a section is clear, and unambiguous, they cannot control the meaning of the body.4 For, in such case, there is a possibility that there is an accidental slip in the marginal note rather than that the marginal note is correct and the accidental slip is in the body of the section itself.5 There can be no justification for restriction, or differently interpreting the plain contents of the section by the marginal note, and they are clearly inadmissible for cutting down the plain meaning of a section6 though in case of doubt they do furnish some clue as to the meaning and purpose of the section.7

- Balraj (Kunwar v. Jagatpal Singh, 31 I. A. 132; 26 All. 393 at 406 followed in Commissioner of Income-tax, Bombay v. Ahmed Bhai Umar Bhai, A. I. R. 1950 S. C. 184 at 141: 52 Bom. L. R. 719: 1950 S. C. J. 374: 1950 S. G. R.
- 23. Ramsaran Das v. Bhagwati Prasad, A. I. R. 1929 All. 53 at 58: I. L. R. 51 All. 411: 113 I. C. 442: 1929 A. L. J. 290 (F.B.); Bengal Immunity Co. v. State of Bihar, 1955 S. C. 661 at 676: (1955) 2 Mad. L. J. (S.C.) 168: I. L. R. 34 Pat. 905. 24. Maxwell on Interpretation of Sta-tutes, p. 45.
- tutes, p. 45. (1904) 2 K. B. 563: 73 L. J. K. B. 1005.
- 1. Nalinakhya Bysack v. Shyam Sun-1. Nalinakhya Bysack v. Shyam Sunder Haldar, A. I. R. 1953 S. C. 148; 1953 S. C. A. 191; 1953 S. C. J. 201; 1953 S. C. R. 533; Basheshwar Dayal v. Bhagwati Devi, A. I. R. 1954 All. 742; 1954 A. L. J. 433; I. T. Officer v. K. P. Varghese, 1973 Ker. L. T. 1 (F.B.): 1972 K. L. R. 749.

 2. State of Bombay v. Heman Sant Lal, A. I. R. 1952 Bom. 16; 53

- Bom. L. R. 837; State v. Jamna-bai, A. I. R. 1955 Bom. 280.
- 3. Nalinakhya Bysack v. Shyam Sundar Haldar, supra.
- Municipal Corporation, 1959 S. C. A. 145: 1959 S. C. J. 390; A. I. R. 1959 S. C. 586: 61 Bom. L. R. 954: (1959) 2 S. C. A. 145: 1959 S. C. 390.

 Nalinakhya Bysack v. Shyam Sunder, Haldar 1953 S. C. B. 533. A. I. P.
- Haldar, 1953 S.C.R. 533: A.I.R. 1953 S.C. 148: 1953 S.C.A. 191: 1953 S.C. J. 201: 8 D.L.R. (S.C.)
- 194.
 6. Per Venkatarama Ayyar, J., in Bengal Immunity Co. v. State of Bihar, (1955) 2 S. C. R. 603: A. I. R. 1955 S. C. 661: I. L. R. 34 Pat. 905: (1955) 2 Mad. L. J. (S. C.) 168: 1955 S. C. A. 1140: 1955 S. C. J. 672: Balraj Kumar v. Jagatpal Singh, L. R. 31 I. A. 132: I. L. R. 26 A. 393; Subhas Ganpat Rao Buty v. Maroti Krishnaii Dorlik, 1975 Mah. L. J. 244: 77 ji Dorlik, 1975 Mah. L. J. 244; 77 Bom. L. R. 517; A. I. R. 1975 Bom. 244.
- 7. Per Das. C. J., Bhagwati and Imam, II., in Bengal Immunity Co. v. State of Bihar, supra.

- (e) Intention of Legislature. Where the language of an enactment is plain and clear, the normal rule of construction, that the intention of the legislature should be gathered from the words used, should be followed, and no extraneous matter should be considered in the interpretation of its provisions.8 But where the language is doubtful, or ambiguous, the constitutional principles and practice, with surrounding circumstances and the proceedings of the legislature can be looked into for ascertaining the object or purpose of the legislature in enacting a particular provision, for the understanding of the circumstances under which the statute in question was passed and the reasons which necessitated it.9
- (f) Provisos. A proviso is a part of the section itself. It is attached to the main clause for the purpose of explaining,10 varying, substracting, or adding to the particular matter referred to therein. It should be read along with the main clause, whose operation it restricts, controls, or modifies, and be interpreted with reference to it.11 It is an important appendage which cannot be ignored. Its proper function is to accept and deal with a case, or classes of cases, which otherwise would fall within the general ambit of the main clause.12 Its effect, must, however, be confined to those specific cases which are specifically referred to in it and not beyond.

A proviso is always subordinate to the main clause to which it is appended, either to allay unfounded fears, or as a condition precedent to the enforcement of that clause, or for explaining what particular matters are not within the meaning of the main clause, or for provided exceptions and qualifications to the provision contained in the main clause. A proviso should not be construed so as to attribute to the legislature an intention to give with one hand and take back with the other.13 It embraces only the field which is covered by the main clause, and carves out something out of it, but never destroys it as a whole; and it carves out an exception to that main provision only to which it is enacted as a proviso and to no other.14 But even a proviso can exist in the nature of substantive provision.15

 Administrator-General v. Prem Lal, L. R. 22 I. A. 107; I. L. R. 22 C. 788, 798, 799; Income-tax Commissioner v. Sodra Dqvi, M. P. and Bhopal, A. I. R. 1957 S.C. 832; (1957) 32 I. T. R. 615: 1958 I M. L. J. S.C. 1: 1958 S. C. J. 1; (1958) I All. W. R. S.C. 1.
 Charanjit Lal v. Union of India, 1950 S. C. R. 869; A. I. R. 1951 S.C. 41: 1951 Bih. L. J. R. S.C. 40; 1951 C. W. N. S.C. 235: 1951 M. W. N. 111: 64 L. W. 47: 53 Bom. L. R. 499: 1951 S. C. J. 29: 1950 S. C. R. 869, per Fazal Ali, J., see also Income-tax Commissioner v. Sodra Devi, supra; Express News-Sodra Devi, supra; Express Newspapers, Ltd. v. Union of India, 1958 S. C. A. 952: 1958 S. C. J. 1113: A. I. R. 1958 S. C. 578: 1958-59 F. J. R. 211: 1959 S. C. R.

10. Local Government Board v. South Stonehem Union, 1909 A. C. 57 11. Tahsildar Singh v. State of U. P., 1959 S. C. J. 1042: A. I. R. 1959 S. C. 1012: (1959) 2 Andh. W. R. S. C. 201: 1959 2 M. L. J. S.C. 201: 1959 Cr. L. J. 1231: 1959 All

C. R. 447.

Duncan v. Dixon, 44 Ch. D. 211:
 Chellamal v. Vallamal, (1971) 1 M.

L. J. 439. 14. Ram Narain & Sons, Ltd. v. Assis-14. Ram Narain & Sons, Ltd. v. Assistant Commissioner, S. T., (1955) 2
S. C. R. 483; A. I. R. 1955 S. C.
765; (1955) 2 Mad. L. J. S. C.
302; 1955 S. C. J. 808; (1955) 6 S.
T. C. 627; Income-tax Commissioner v. I. M. Bank, Ltd., (1960)
I S. C. A. 12; 1959 S. C. J. 655;
A. I. R. 1959 S.C. 713; 1959 Ker.
L. J. 477; (1959) 36 I. T. R. 1.
15. Oudh Sugar Mills Ltd. v. State of M. P., A. I. R. 1975 M. P. 125; (1974) M. P. L. J. 877; (1975)
Jab. L. J. 537.

A proviso to a section should be interpreted with reference to the preceding parts of the clause to which it is appended and as a subordinate to the main clause. Where a proviso is directly repugnant to the purview of it, the proviso shall stand and shall be deemed to be a repeal of the purview as it speaks the last intention of the makers. If a substantial enactment is repealed, that which comes by way of a proviso is impliedly repealed.

A proviso is generally used to indicate that the general provision to which the proviso is added is not applicable to instances set out in the proviso which are in effect cut out of the general provision. A proviso is sometimes added to remove a misapprehension that might be caused as the effect of rights referred to in the proviso by the general provisions enacted. If a provision is ambiguous, a proviso may sometimes be used to resolve the doubt. But a proviso cannot be so interpreted as to extend its application to the provision to which it relates.16

- 4. General Construction. General observations on this matter are contained in the Introduction to which the reader is referred. The modern general rule is that statutes must be construed according to their plain meaning, neither adding to, nor substracting from, them,17 when the terms of an Act are clear and plain, it is the duty of the Court to give effect to it, as it stands,18 but many cases may be quoted in which, in order to avoid injustice or absurdity, words of general import have been restricted to particular meaning.19
- (a) Reasonable construction. The Courts will put a reasonable construction upon an Act and will not allow the strict language of a section to prevent their giving it such a construction.20 Courts are inclined in favour of an interpretation which has the effect of promoting a remedy and advancing the cause of justice.21 The Court must interpret an Act with reference to context and other provisions of the Act.22 In considering the rules of evidence, it is necessary to look to the reason of the matter.23 All rules must be construed with reference to their object.24 A construction, effecting a most important depar-
 - 16. Beal: Cardinal Principles of Legal Interpretation, 3rd Ed., pp. 302—305; M. S. M. Ry. Co., Ltd. v. Bezwada Municipality, 71 I. A. 113; A. I. R. 1944 P. C. 71 at 73; Mahadeb v. Chairman, Howrah Municipality, I. L. R. 37 Cal. 697 at 702; Bajrang v. Crown, A. I. R. 1951 Nag. 124: I. L. R. (1950) Nag.

17. Gureebullah v. Mohun Lall, (1881)

7 C. 127.

- Philpott v. St. George's Hospital, 6
 H. L. Cas. 338; Buzloor v. Shumsoonissa, (1867) 11
 M. I. A. 551, 604; R. v. Balkishen, (1893) 17
- 19. R. v. Bal Kishan, supra; Bama-soonderee v. Verner, (1874) 13 B. L. R. 189: 22 W. R. 136; Wells v. L. T. & S. Ry. Co., etc., (1877) 5 Ch. D. 126, 130; Eastern Counties v. Marriage, (1860) 9 H. L. C. 32.

20. Gureebullah v. Mohun, supra. 130: as to "latent propositions of law." see Leman v. Damodaraya, (1876) l M. 158.

21. Shitla Prasad v. Bane Bahore, 1974

All L. J. 181; 1974 A. W. R. 48 (F.B.); A. I. R. 1974 All. 197. M|s. Gammom India Ltd., v. Union of India, (1974) 1 S.C.C. 596; (1974) 1 S. C. W. R. 713; A. I. R. 1974 S. C. 960; (1974) 1 Lab. L. J. 489.

23. Gujja Lal w, Fatteh, (1880) 6 C.

171, 182 (F.B.).
24. Per Erle, J. in Phelps v. Prew, (1854) 3 E and B. 430, 441. So also Couch, C. J., in Beharee Lall v. Kaminee Soonduree, (1870) · 14 W. R. 319, 320; in dealing with the subject-matter of S. 92, post, said, "in applying the rule we must always consider what is the reason of it." ture from the English rule of evidence, was considered in the undermentioned cases,24-1

- (b) Meaning of words. Whatever be the meaning of a word in one portion of a section, the meaning of the same word in another portion must, according to the principles of construction, be the same.25 So also, the same word should be given the same meaning wherever it occurs in the Act unless the context excludes the application of that principle.1 The meaning of a word may be ascertained by reference to the words with which it is associated, and its use in particular sense in subsequent parts of the Act2 and to its allocation in a section with other conditions of a certain character.⁸ A construction making surplusage should be avoided.4 It is well settled rule of interpretation hallowed by time and sanctioned by authority that the meaning of an ordinary word is to be found not so much in strict etymological propriety of language, not even in popular use, as in the object which is intended to be achieved.⁵ It is the duty of the Court to take an Act as a whole and to look to the purpose of legislation to find the meaning of words not defined in the Act.6 Words should be given their plain and natural meaning.7 A word of every day use must be construed in its popular sense.8 If the meaning is not clear and some words are necessary to be added to make the meaning clear that is permissible to make obvious what is latent,9 If language is plain and unambiguous, hardship or inconvenience cannot alter meaning.10 In order to arrive at a conclusion on a question of construction, it is relevant that the Indian Evidence Act was passed by the Legislature under the direction of a skilled lawyer; that the construction of the Act is marked by careful and methodical arrangement; and that many of the more important expressions used in it are plainly interpreted. It would be wholly inconsistent with the plan of such an enactment that a specific rule contained in one part of it should, at the same time, be con-
 - 24-1. Ranchoddas v. Bapu Narhar, (1886) 10 B. 439; Gujja Lal v. Fatteh, (1880) 6 C. 171, 189 (intention to depart entirely from English rule); Prabhakarbhat v. Vishambhar Pan-dit, (1884) 8 B. 313, 321 (F.B.); R. v. Gopal Doss, (1881) 3 M. 271, 279, 283 (F.B.) (construction from consideration of alteration called for in English Law of Evidence, ib., 279). See remarks of Lord Herschell as to the interpretation of codes in Bank of England v. Vagliano Brothers, (1891) L. R. App. Cas. 107 at pp. 144, 145, cited ante, in Introduction:
 - 25. Collector of Gorakhpur v. Palakdhari, (1889) 12 A. 1, 14 (F.B.): so with reference to Ss. 26 and 80 of this Act the Court in R. v. Nagla Kala, (1896) 22 B. 235, 238, observed that it would be unreasonable to hold that the Legislature used the same word in different senses in the same Act; Lal Chand v. Radha Kishan, (1977) 2 S. C. C. 88: A. I. R. 1977 S.C. 789.
 - 1. Per Das, J., in Aswini Kumar Ghose v. Arabinda Bose, 1952 S.C. 369 at 392; 1952 S. C. A. 683; 1952 S. C. J. 568: 1953 S. C. R. 1.

2. Gujju Lall v. Fatteh Lall, (1880) L. R. 6 C. 171 at p. 186, 187.
 In re Pyari Lall, (1879) 4 C. L. R.

504, 506.

4. Gujja Lall v. Fatteh, supra, 183; In re Pyari Lal supra, 506-508: Alangamonjori v. Sonamoni, (1882) 8 C. 637, 640, 642 (no clause, sentence or word shall be superfluous,

tence or word shall be superfluous, void or insignificant); Moher Sheikh v. R., (1893) 21 C. 392, 399, 400.

5. Santa Singh v. The State of Punjab, (1977) 1 S. C. J. 45: 1976 S. C. C. (Cr.) 546: (1976) 4 S. C. C. 190; A. I. R. 1976 S.C. 2386: 1976 Cr. L. J. 1975: 1977 M. L. J. (Cr.) 41.

6. Chitan J. Vaswani v. State of West Bengal, (1976) 1 S. C. J.

7. Singheshwar Singh v. State of Bihar,

1976 Pat. L. J. R. 243. 8. Ramabai v. Dinesh, 1976 Mah. L.

9. Fakhruddin v. State, 1976 All. Cr.

C. 116 (F.B.); 1976 All. L. J. 245.

10. Babu Singh Ram Singh v. Additional Collector, Indore, 1977 M. P. L. J. 550.

tained in, or deducible from, one or more other rules relating apparently to topics quite distinct, which rules should be at the same time so expressed as to include not merely the specific rule in question but also matters which that rule, taken by itself, would specifically exclude.11 A construction may be adopted by reference to the entirety of a section and also to other sections.12

- (c) "May". The word "may" in a Statute is sometimes used for the purpose of giving effect to the intention of the Legislature, interpreted as equivalent to "must" or "shall", but, in the absence of proof of such intention, it is construed in its natural and therefore in a permissive and not in an obligatory sense.13 In construing a power, the Court will read the word 'may' as 'must' when the exercise of the power will be in furtherance of the interest of a third person for securing which the power was given. Enabling words are always potential and never in themselves significant of any obligation. They are read as compulsory where they are words to effectuate a legal right.¹⁴ It is. not for a Civil Court to speculate upon what was in the mind of the Legislature in passing a law: but the Gourt must be bound by the words of the law judicially construed.15 The intention of the Legislature must be ascertained from the words of a statute and not from any general inferences to be drawn from the nature of the object dealt with by the statute.16 The Court knows nothing of the intention of an act except from the words in which it is expressed, applied to the facts existing at the time.17 In case of doubt or difficulty over the interpretation of any of the sections of the Evidence Act, reference for help should be made both to the case-law of the land which existed before the passing of the Act, and also juristic principles, which only represent the common consensus of juristic reasoning.18
- (d) Exceptions. The exceptions are mere saleguards, which are inserted in a main provision itself to secure against infringement of an individual right which would otherwise have been infringed on account of the construction of the main provision in the enactment. Where in the same section express ex-

Gujju Lal v. Fatteh Lall, (1880)
 I. L. R. 6 C. 171 at p. 183, 184.

12. In re Asgar, (1880) 8 C. L. R. 124,

13. Delhi and London Bank v. Orchard, (1877) 3 C. 47 (P.C.); 4 I.A. 127; see also R. v. Samuel S. Aloo, (1847) 3 M. I. A. 488, 492, 493; Anno Chandar v. Punchoo Lali (1870) 14 W. R. (F.B.) 33, 36: Julius v. (Bishop of) Oxford, L.R. 5 App. Cas. 214; Ram Dayal v. Madan Mohan, (1899) 21 A. 425, 432 (F.B.); Mohamedmiya Md. Sadik v. State of Gujarat, (1975) 16 G. L. R. 583.

14. Province of Bombay v. Khusnal 14. Province of Bombay v. Khusnal Das, 1950 S.C. 222 at 262 (1950) 2 M. L. J. 703: 53 Bom. L. R. 1; 1950 S. C. J. 451: 1950 M. W. N. 802: 86 C. L. J. 330; 1950 S. C. R. 621 per Das, J.

15. Mohesh v. Madhub, (1870) 13 W. R. 85; Crawford v. Spooner, (1846) 4 M. I. A. 179, 187; Bazloor v. Shumsoonnisa, (1867) 11 M. I. A.

551, 604: Eastern Counties, etc. v. Marriage, 9 H. L. C. 32, 40 (Judicature trespassing on province of Legislature); Sahdeo Choudhry v. State of Bihar, 1976 Pat. L. J. R.

 Nanak v. Mehin, 1 A. 487, 496;
 Fordyce v. Bridges, (1847) 1 H. L. Cas. 1, 4.

17. Ib. Logan v. Courtown, 13 Beav. 22 and see Crawford v. Spooner, (1846) 4 M. I. A. 179, 187, 188, per Lord Brougham; as to cases dealing with the intention under this Act see, e.g., Gujja Lall v. Fatteh, (1880) 6 C. 179, 181; In re Pyare Lall, (1879) 4 C. L. R. 504, 508; Framji v. Mohansingh, (1893) 18 B. 263, 278, 279 (identity of language used in section with that employed in Taylor on Evidence. employed in Taylor on Evidence; R. v. Gopal, (1881) 3 M. 271, 279, 283 (F.B.). 18. Gollector of Gorakhpur v. Palak-

dhari, (1889) 12 A. 1, 37, 38.

ceptions from the operating part of the section are found, it may be assumed, unless it otherwise appears from the language employed, that these exceptions were necessary, as otherwise the subject-matter of the exceptions would have come within the operative provisions of the section.19

The exceptions operate to affirm the operation of the provision to all cases, except those expressly excluded by the exceptions and they must be construed strictly and must be confined within their own limits and the subject-matter embraced within them. They have to be taken very strongly against the party for whose benefit they are attached to the main provision. The enactment of exceptions to a provision excludes, by implication, all other cases, not expressly covered by those exceptions.

When the rules of exclusion and the exception to them are definitely laid down, the exception is not extended to cases not properly falling within it.20

(e) Some rules of interpretation. Where a clause in an Act which has received a judicial interpretation is re-enacted in the same terms, the Legislature is to be deemed to have adopted that interpretation.21

It is an elementary rule of construction that a thing which is within the letter of a statute is not within the statute unless it be also within the meaning of the Legislature.22

In the undermentioned case,23 Lord Esher, M. R. said:

"To my mind, however, it is perfectly clear that in an Act of Parliament there are no such things as brackets any more than there are such things as stops."

No Act should be construed as having a greater retrospective action than its language plainly indicates.24

- 5. Interpretation of the Act with reference to English Law. Since the Evidence Act is a complete Code it is not permissible to import principles of English common law contrary to the specific provisions of the Act.25 It
 - Government v. Hormusji, L. R. 74
 I. A. 103; I. L. R. 1947 Kar.
 377 (P.C.); A. I. R. 1947 P. C. 200.

R. v. Jora, (1874) 11 Bom. H. C.
 R. 242.

- 21. Re Campbell, 5 Ch. App. 703; cf. following sections of this Act with those of Act II of 1855: 18, 32, 37, 57, 81, 83, 84, 118, 120, 123 124 126 129, 131, 162, 167 and 25, 26, 27. with Ss. 148-150. Act XXV of
- R. v. Bal Krishna, (1893) 17 B. 573, 577.
- 23. Duke of Devonshire v. O'Connor,

- L. R. (1890) 24 Q. B. D. 478. Gadgil, S. S. v. Lal and Co., (1964) 55 I. T. R. 231; (1964) 2 T. J. 301; (1964) 2 S. C. J. 499; (1964) 8 S. C. R. 72; A. I. R. 1965 S. G. 171 at 177; see Bindra's Interpreta-24. tion of Statutes, p. 655.
- 25. Hira H. Adrani v. State of Maharashtra, A. I. R. 1971 S.C. 44: (1970) 2 S. C. A. 10; (1969) 2 S. C. C. 262; (1970) 1 S. C. R. 821: (1970) 2 S. C. J. 192; 1971 Cr. L. J. 5: 1970 M. L. J. (Cr.) 490; 73

 Bom. L. R. 112: (1970) 2 Um. N. P. 890; (1971) Mah. L. J. 359.

may, however be taken as settled that in case of doubt or ambiguity over the interpretation of any of the provisions of this Act, the Court can with profit look to the relevant English common law for ascertaining their meaning.¹ It is part of judicial prudence to decide an issue arising under a specific statute by confining the focus to that statutory compass as far as possible. Diffusion into wider jurisprudential areas is fraught with unwitting conflict or confusion.²

State of Punjab v. S. S. Singh, (1961 2 S. C. R. 371; (1961) 2 S. C. J. 691; (1961) 1 S. C. A. 434; A. I. R. 1961 S. C. 493; 1961 Mad, L. J. (Cri.) 731; (1961) 2 A. N.

W. R. S. C. 203.
 State of M. P. v. Orient Paper Mills, A. I. R. 1977 S. C. 687 at 690: (1977) 2 S. C. C. 77.

PART I

RELEVANCE OF FACTS

CHAPTER I

PRELIMINARY

Short title. This Act may be called the Indian Evidence Act, 1872.

Extent. It extends to3 [the whole of India, except the State of Jammu and Kashmir]4 and applies to all judicial proceedings in or before any Court, including court-martial other than court-martial convened under the Army Act,]6, the Navy (Discipline) Act or7 * * the Indian Navy (Discipline) Act, 1934^s [or the Air Force Act] but not to affidavits9 presented to any Court or officer, nor to proceedings before an arbitrator.

Commencement of the Act. And it shall come into force on the first day of September, 1872.

3. Subs. by the A. O., 1950, for "all the Provinces of India" which had been subs. by the A. O., 1948, for "the whole of British India" and

amended by Act III of 1951. This Act has been extended to

bhum, see Gazette of India, 1881, Pt. I, p, 504 (the Lohardaga or Ranchi District included at this time the Palamau District, separated in 1894); and the Tarai of the Pro-vince of Agra, 1876, Pt. I, p. 505; Ganjan and Vishakhapatnam, 1899,

Pt. I, p. 720.

5. Ins. by the Repealing and Amending Act, 1919 (18 of 1919), S. 2 and Sch. I, see S. 127 of the Army Act (44 and 45 Vict., c. 58).

6. Ins. by the Amending Act, 1934 (35 of 1934), S. 2 and Sch.

7. The words "that Act as modified by" rep. by the A. O. 1950.

8. Ins. by the Repealing and Amending Act, 1927 (10 of 1927), S. 2 and Sch. Ins.

 As to practice relating to affidavits, see the Code of Civil Procedure, 1908 (Act 5 of 1908), S. 30 (c) and Sch. I, Order XIX, see also the Code of Criminal Procedure, 1973, (Act 2 of 1974), Ss. 295, 296 and 297.

^{4.} This Act has been extended to Berar by the Berar Laws Act, 1941 (4 of 1941) and has been declared to be in force in the Sonthal Parganas Settlement Regulation (3 of 1872), S. 3: in Panth Piploda by the Panth Piploda Laws Regulation, 1929; (1 of 1929); in the Khondmals District, by the Khondmals Laws Regulation, 1936 (4 of 1936), S. 3 and Sch.; and in the Angul District, by the Angul Laws Regulation, 1936 (5 of 1936), S. 3 and Sch.: also by notification under S. 3 (a) of the Scheduled Districts Act, 1874 (14 of 1874); in the following Scheduled Districts, namely, the Districts of Hazaribagh, Lohardaga (now the Ranchi District; see Calcutta Gazette, 1899, Pt. I, p. 44); and Man-bhum and Pargana Dhalbhum and the Kolhan in the District of Singh-

SYNOPSIS

- Short title.
 Extent of Act

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(b) (Territory of India.

- (c) Adaptation by Pakistan, Burma and Ceylon.
- 3. Retrospective operation.
 - "Judicial proceedings."
 "Judicial", meaning of:
 (a) Land Acquisition Act, enquiry under.
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- 6. Quasi-judicial Tribunals-
- (i) Departmental enquiries.(ii) Domestic Tribunals.7. Departmental proceedings.
- 8. Proceedings under different Acts:
 - (a) Commissions of Inquiry Act.(b) Income tax authorities, proceedings before.
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- (f) Industrial Tribunals, proceedings
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- 10. Court.
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- 12. Affidavits:
 - (a) Interlocutory motions.
 - (b) Statements on information and belief.
 - (c) Contempt proceedings.
- 13. Arbitration.
- 14. Opportunity to give evidence.
- 1. Short title. "While it is admissible to use the full title of an Act to throw light upon the progress and scope, it is not legitimate to give any weight in this respect to the short title which is chosen merely for convenience, its object being identification and not description.¹⁰ The full title, however, must not be neglected or disregarded and it might be some guide to the meaning.11
- 2. Extent of Act. The Act originally extended to the whole of "British India"12 which meant the territories vested in Her Majesty by the first section of 21 and 22 Vict., c. 106, with the exception of the Straits Settlements, which under the provisions of 29 and 30 Vict., c. 115, ceased to form portion of British India.13 The Act, therefore, applied to the Scheduled Districts14 and had been declared to be in force by notification under the Scheduled Districts Act in the districts of Hazaribagh, Lohardaga, Manbhoom and Pargana Dhalbhoom and the Kolhan in the district of Singhbhoom15 and the Tarai of the Province of Agra (now in U.P.) .16 The Act had also been declared to be in force in Upper Burma generally except the Shan States,17 in the Hill
 - Per Lord Moulton in National Telephone Co. Ltd. v. Postmaster-General, (1913) A. C. 546: 82 L. J. K. B. 1197; 109 L. T. 562; 57 S. J. 661: 29 L. T. R. 637.
 Debendra Narain Roy v. Jogendra Narain Deb, A. I. R. 1936 Cal. 593; 64 C. L. J. 212.
 For definition of "British India", see S. 3 (5) of the General Clauses

 - see S. 3 (5) of the General Clauses Act, X of 1897.
 - See Act X of 1897, Act I of 1903, and Act X of 1914.
 Vide Acts XIV and XV of 1874. As
- to Act XIV of 1874 (Scheduled Districts: see Act XXXVIII of 1920, Act II of 1893, and earlier amending Acts. As to Act XV of 1874 (Laws Local Extent), see Act I of Acts. 1903 and earlier amending Bengal Act II of 1913, B. & O. 1 of
- 15. Gazette of India, Oct. 22, 1881, Pt.
- I, p. 504.
- 16. Ibid., Sept. 23, 1876, Pt. I, p. 505.
 17. Act XIII of 1898, S. 4 (Burma Code, Ed., 1898, p. 364), and Act IV of 1909.

District of Arakan,18 in British Baluchistan,19 in the Baluchistan Agency territories,20 in the Sonthal Parganas,21 and in the Angul District,32 and had been applied to certain Native States in India or places therein. The Act had been made applicable by Her Majesty in Council in certain places beyond the limits of India for the purposes of cases in which Her Majesty had jurisdiction and had been adopted by certain Native States of India as their law.

By the Indian Independence Act28 which came into force on the 15th of August, 1947, what was "British India" was split up into two separate Dominions: (1) Pakistan. comprising the former British Indian Provinces of Sind. Baluchistan, West Punjab, the North-West Frontier Province and East Bengal, and (2) India, comprising the rest of the former British India.

- (a) "India." Now under Section 3 (28) of the General Clauses Act,24 "India" means-
- (a) "As respects any period before the establishment of the Dominion of India, British India together with all territories of Indian Rulers then under the suzerainty of His Majesty, all territories under the suzerainty of such an Indian Ruler, and the tribal areas:
- (b) "As respects any period after the establishment of the Dominion of India and before the commencement of the Constitution, all territories for the time being included in that Dominion; and
- (c) As respects any period after the commencement of the Constitution, all territories for the time being comprised in the territory of India."
- (b) Territory of India. In Section 3 of the Evidence Act itself, as amended by the Part B States (Law) Act, III of 1951. India is defined as meaning "the territory of India excluding the State of Jammu and Kashmir."

Under Article I (3) of the Constitution, the territory of India shall comprise:

- (a) the territories of the States,
- (b) the territories specified in the First Schedule, and
- (c) such other territories as may be acquired.
- (c) Adaptation by Pakistan, Burma and Ceylon. The Act has, with suitable amendments, been adapted by Pakistan, Burma and Ceylon.25

 Reg. I of 1916, S. 2.
 Reg. II of 1913, S. 3; Regs. VIII and IX of 1896; Reg. II of 1919 (Baluchistan).

20. Baluchistan Agency Laws, 1890, S.

47 ibid., p. 137.

Reg. III of 1872. as amended by Reg. III of 1899, S. 3.

Reg. III of 1913, S. 3.

23. 10 and 11 Geo. 6, c. 30.

24. X of 1897.

Pakistan — In para. 1 "Indian" omitted by Pak. A. O. 1949. Para. 2 of the section reads: It extends to all the Provinces and the capital of the Federation, and applies to all judicial proceedings in Pakistan and....of 1934....an arbitrator," Burma-In para. 1 "Indian" and "1872" omitted by A.O. 1937: Para.

3. Retrospective operation. The Law of Evidence is an adjective law and, as such, has retrospective effect. The Act came into force in the territory of Goa, Daman and Dieu on 1st June, 1964 and applied to pending proceedings in that territory.1

An inquest proceeding before the Coroner under the Coroner's Act, 1871, is not a judicial proceeding for the purpose of the section. To such a proceeding the provisions of the Evidence Act do not apply.2

- 4. "Judicial proceedings.". The Act applies to all judicial proceedings in or before a Court. The expression "judicial proceeding" is not defined in the Act. Under Section 2 (i) of the Criminal Procedure Code,3 it "includes any proceeding in the course of which evidence is or may be legally taken on oath." In the earliest case in which the question of the meaning of a 'judicial proceeding' arose, Scotland, C. J., said: "It is nothing more nor less than a step taken by the Court in the course of the administration of justice, in connection with a case pending."4 The question there arose in a civil suit. Extending the definition to meet the case of criminal proceedings, Mayne defined a judicial proceeding as "any step in the lawful administration of justice, in which evidence may be legally recorded for the decision of the matter in issue in the case, or of any question necessary for the decision or final disposal of such matter." In Queen v. Golam Ismail, Spankie, J. defined it as "any proceeding in the course of which evidence is or may be taken, or in which any judgment, sentence, or final order is passed on recorded evidence."
- 5. "Judicial," meaning of. Courts have two distinct and separate duties to discharge, namely, judicial and administrative duties, in both of which it is necessary to bring to bear a judicial mind. As observed by Lopes, L. J., in Dawkins v. Lord Rokeby,7 "the word 'judicial' has two meanings. It may refer to the discharge of duties exercisable by a judge, by justices in Court, or to administrative duties which need not be performed in Court, but in respect of which it is necessary to bring to bear a judicial mind-that is, a mind to determine what is fair and just in respect of the matters under consideration. Justices, for instance, act judicially when administering the law in Court, and they also act judicially when determining in their private room what is right and fair in some administrative matter brought before them, for instance, levying a rate." But a proceeding in which only administrative duties are discharged is not a judicial proceeding within the meaning of this section.

2 of the section reads; "It applies to all judicial proceedings in or before any court, including Courts-martial other than Courts-martial convened under any Act relating to the Army, Navy or Air Force, but not to affidavits presented to any court or officer, nor to proceedings before an arbitrator" (A. O. 1937 and A. O. 1948).
Ceylon-"1, This Ordinance may
be cited as the Evidence Ordinance, 2(1). This Ordinance shall apply to all judicial proceedings in or before any Court other than Courts-martial, but not to proceedings be-

- fore an arbitrator." fore an arbitrator."

 1. Ministerio Publico v. Filomeno, 1967 Cr. L. J. 478: A. I. R. 1967 Goa 51 (F.B.), 57; Data v. The State, 1967 Cr. L. J. 52: A. I. R. 1967 Goa 4 (F.B.).

 2. Tanaji Rao v. H. J. Chinoy, 71 Bom. L. R. 732.

 3. Act 2 of 1974.

 4. Reg. v. Venkatachellum Pillai, 2 Mad. H. C. R. 43 at pp. 55, 56.

 5. Mayne's Criminal Law of India,

- 5. Mayne's Criminal Law of India, 2nd Ed., p. 565. 6. 1 All. 1 (F.B.) at p. 13. 7. 8 Q. B. 255.

Again, in R. v. Price,8 Mr. Justice Blackburn made a distinction between an enquiry as to certain matters of fact in a case in which the Commissioners had no discretion to exercise and no judgment to form, but were enjoined to do a certain thing in a certain event as a matter of duty, and an enquiry in a case in which the Legislature authorised them to form a judgment and to grant or withhold a certificate on that judgment. In the latter case the enquiry was regarded as judicial.

- (a) Land Acquisition Act, enquiry under. An enquiry by the Land Acquisition Collector under the Land Acquisition Act,9 as to the value of the land and the compensation to be paid for its acquisition, has been held to be an administrative and not a judicial proceeding.10
- (b) Proceedings of other Tribunals, etc. A Sub-Divisional Officer hearing an Election Petition under Rule 25 of U. P. Panchayat Raj Rules (1947), is merely a Tribunal, and hence the provisions of this Act are not applicable.11 An Industrial Tribunal should not be astute to discover technicalities of the Evidence and apply them.12 The Evidence Act does not apply to departmental proceedings which are neither civil nor criminal proceedings. But ordinary principles of proof and the rules of natural justice must be applied. The decision cannot rest on speculation or surmises or be rendered without witnesses being called.13 Though the proceedings in contempt in Section 3 of the Contempt of Courts Act (1952), are judicial proceedings, the enquiry is of a summary nature and hence the provisions of the Evidence Act do not apply to reception of materials against the contemner in a contempt proceeding.14 A commission appointed under the Commissions of Enquiry Act, LX of 1952, is a fact finding body to instruct the Government and is not a Civil Court. Neither are its proceedings judicial nor even quasi-judicial. The provisions of the Evidence Act do not apply to its proceedings. A Commissioner appointed under Act XXXVII of 1850 is not a Court. 16

It is the object to which an enquiry is pointed that determines the nature of it. A policeman before he arrests a person often, has to make an enquiry, but is not therefore a judge.17

- (c) Enquiry, when Judicial. An enquiry is judicial if the object of it is to determine a jural relation between one person and another, or a group of
 - 8. L. R. 6 Q. B. 418, cited with approval in Atchayya v. Gangayya, 15 Mad. 138 at 143 (F.B.).

9. I of 1894.

- 10. Ezra v. Secretary of State, 32 I. A. 93: 32 Cal. 605 (P.C.).
- 11. Mahadeo v. Sub-Divisional Officer,
- A, I, R, 1959 All, 43.

 12. Harchura Tea Estate v. Labour Appellate Tribunal, A. I. R, 1959 Cal. 650.
- 13. N. Maigur v. Divisional Operating Superintendent, 68 C. W. N. 702; State of Andhra Pradesh v. Kam-

- eshwara, I. L. R. 1957 Andhra 80; A. I. R. 1957 A. P. 794. 14. In the matter of Basanta Chandra Ghosh, A. I. R. 1960 Pat. 430
- 15. Allen Berry v. Vivian Bose, I. L. R. (1960) 1 Punj. 416: A. I. R. 1960 Punj. 86.
- Brajanandan Sinha v. Jyoti, A. I. R. 1956 S. C. 66: 1956 Cr. L. J. 156: 1956 S. C. J. 155: 1956 S. C. A. 52: 1956 All. L. J. 164: 1956 B. L. J. R. 155. 17. R. v. Ismail, I. L. R. 11 B. 659.

persons, or between him and the community generally; but, even a judge, acting without such an object in view, is not acting judicially.18

6. Quasi-judicial Tribunals. The extent to which administrative quasi-judicial tribunals are bound by rules of evidence is a matter, assuming great importance in forcing countries on account of the growth of administrative tribunals. The law is the same in India, England and America.

The consensus of opinion is that administrative quasi-judicial tribunals are fact-finding bodies, and the method of fact-finding varies from that sanctioned by law in courts. They collect, in an expert way, much of the evidence on which they act instead of depending on the testimony brought to them. If the Act applies, the strict rules of exclusion and the rules requiring proof of documents, etc., would make 'unavailable this gathering of evidence in an expert manner, and it is the essence of the fact-finding bodies that they must keep open the channels for the reception of all relevant evidence which will contribute to an informed result. At the same time, it does not mean that these tribunals can be arbitrary and capricious. On the other hand, they have to follow the substantial rules of evidence which are the essential principles of natural justice. The Supreme Court has held, in a series of decisions, that administrative and quasi-judicial proceedings are no doubt not fettered by technical rules of evidence, and that the tribunals conducting them are entitled to act on materials which may not be accepted as evidence in a court of law. But, at the same time, as pointed out by Justice Venkatarama Aiyar in The Union of India v. T. R. Varma, 19 rules of natural justice require that a party should have an opportunity of adducing all relevant evidence on which he relies, that evidence of the opponent should be taken in his presence and that he should be given an opportunity of cross-examining witnesses examined by the opposite party, and that no materials should be relied upon against him without his being given an opportunity of explaining them. If these rules are satisfied, an inquiry is not open to attack on the ground that the procedure laid down in this Act was not strictly followed. These principles have been laid down in the other decisions of the Supreme Court.20

1963 S. C. 375; C. L. Subramaniam v. Collector of Madras, (1969) 1 Lab. L. J. 67, 73; 1969 Lab. I. C. 1269 (Ker.), see also R. v. Dy. Industrial Injuries Commissioner, (1965) 2 W. L. R. 89; (1965) 1 All. E. R. 81, 95 (per Diplock, L. J.) and K. Mahir v. Collector of Customs and Central Excise, 1967 Ker. L. T. 539.
For England see Report of the
Committee on Administrative Tribunal and Enquiries—The Summary of Recommendations, p. 22, para. 90. For America see Wigmore Evidence, 3rd Edn., (1940) 4 a-b, pp. 25-43; Dakis Administrative Law, pp. 447-473; Report of the Attorney-General's Committee on Administrative Procedure (1941), p. 70. See also critical note on Burrakar Coal Co., Ltd. v. Labour Appellate Tribunal of India and another in Journal of Indian Law Institute, Vol. I. No. 2, p. 293.

^{18.} R. v Tulja, I. L. R. 12 B. 36

A. I. R. 1957 S. C. 882 at p. 885;
 Inwangiao Kabir v. Union of India, 1968 Lab. I. C. 1145 (Mani-

^{20.} Dhakeswari Cotton Mills v. Commissioner of Income-tax, West Bengal, A. I. R. 1955 S.C. 65: 1955 S. C. R. 941: 1955 S. C. J. 122: (1955) 1 Mad. L. J. (S.C.) 60; Mehta Parikh and Co. v. The Mehta Parikh and Go. v. The Commissioner of Income-tax, A. I. R. 1956 S. C. 544; 1956 S. C. R. 626: 1956 S. C. J. 678: 58 Bom. L. R. 1015; Pannalal v. Union of India, A. I. R. 1957 S. C. 397: 1957 S. C. R. 233; Raghubar Mandal v. State of Bihar, A. I. R. 1957 S. C. 810: 1958 S. C. 522; Mehnga Ram v. Labour Appellate Tribunal of India, A. I. R. 1956 All. 644; State of Mysore v. Shivabasappa, (1964) 1 Lab. L. J. 24: A. I. R.

Departmental Enquiry. In a departmental enquiry, the delinquent concerned is entitled to:

- (a) an opportunity to deny his guilt and establish his innocence which he can only do if he is told what the charges levelled against him are and the allegations on which such charges are based;
- (b) an opportunity to defend himself by cross-examining the witnesses produced against him and by examining himself or any other witnesses in support of his defence; and
- (c) an opportunity to make his representation as to why the proposed punishment should not be inflicted against him, which he can only do, if the competent authority, after the enquiry is over and after applying his mind to the gravity or otherwise of the charges proved against him, tentatively proposes to inflict, and communicates the same to the delinquent.21

In case these rules of natural justice are satisfied, the enquiry is not open to attack on the ground that the procedure laid down in this Act for taking evidence was not strictly followed. This was reiterated in State of M. P. v. Chintaman,22

In a departmental proceeding the principle that an accomplice is unworthy of credit, has no application.28

Domestic Tribunals. A domestic enquiry before domestic tribunals, is not a trial before a Court of law and rules of evidence do not strictly apply to such an enquiry24 but substantive rules which form part of principles of natural justice cannot be ignored by the domestic tribunals.25 In the course of a domestic enquiry leading questions may be put to a delinquent. Too much legalism cannot be expected of a domestic enquiry.1

7. Departmental proceedings. Departmental proceedings are not in the same category as criminal porsecutions or even civil proceedings in court. The provisions of this Act are not applicable to these departmental inquiries.

21. Khem Chand v. Union of India, 1958 S. C. R. 1930: A. I. R. 1958 S. C. 300: (1958) 1 Andh. W. R. (S.C.) 169: (1958) 1 Mad. L. J. (S.C.) 169: 1958 All. W. R. (H.C.) 418: I. L. R. 1958 Punj. 1062: 1958 S. C. A. 222: 1958 S. C. J.

22. A. I. R. 1961 S. C. 1623: 1961 Jab. L. J. 702: see also State of Orissa v. Sailabehari, I. L. R. 1962 Pat. 125: A. I. R. 1963 Orissa 73.

23. Jasodar Misra v. State, 1966 B. L. J. R. 825, 834.

24. Vaidyanath v. M. P. State Road Transport Corporation, 1974 Lab.
I. C. 1447 at 1454 (M.P.).
25. Central Bank of India v. Prakash
Chand, 19 Fac. L. R. 191; 1969

Lab. I. C. 1380: (1969) 2 Lab. L. J. 377; A. I. R. 1969 S. C. 983; Khardah and Co., Ltd. v. Their Workmen, A. I. R. 1964 S. G. 719 at p. 722; M|s. Kesoram Cotton Mills, Ltd. v. Gangadhar, A. I. R. 1964 S. C. 708; Adam Hassan v. Chief Commissioner, Manipur, A. I. R. 1966 Manipur 18, 21; R. D. Sequaira v. Govt. of A. P., 1975 Lab. I. C. 170 at 175 (A.P.).

1. Employees of Firestone Tyre and Rubber Go. (P). Ltd. v. The Workmen, (1968) 1 S. C. R. 307: (1968) 2 S. C. J. 83: (1968) 1 S. C. W. R. 58: (1968) 2 Andh. W. R. (S.C.) 29: (1967) 2 Lab. L. J. 715: 1968 Lab. I. C. 212: 14 Law Rep. 435: (1968) 2 M. L. J. (S.C.) 29: A. I. R. 1968 S. C. 236, 239.

The reason is, apart from what has been stated above in regard to administrative tribunals, the officers conducting departmental inquiries are not expected like trained lawyers to decide whether the evidence adduced is in strict conformity with the rules laid down in this Act or sift the same in a strictly legal manner. But, at the same time, ordinary principles of proof and also rules of natural justice must be applied. It is the duty of the prosecution to prove charges, and a delinquent need not prove any part of it. Tht delinquent must be given an opportunity to test the evidence and prove his own case. The officers conducting departmental inquiries should not base their decision upon statements made by witnesses behind the back of persons against whom inquiries are made.2 Mere conjectures and surmises cannot take the place of legal proof in such proceedings.8

- 8. Proceedings under different Acts. (a) Commission of Enquiry Act. Section 4 of the Commission of Enquiry Act, 1952, gives certain powers to the committees to call for certain documents as provided for by the Code of Civil Procedure. Really, it merely applies certain provisions of that Code only for certain purposes. By the application of those provisions, the commission neither becomes a Court nor do the proceedings before it become judicial proceedings, as defined in this section. Therefore, the provisions of this Act do not, in terms, apply to proceedings before the Commission.4
- (b) Income-tax authorities, proceedings before. It is only in respect of certain specified matter that under Section 37, Income Tax Act, 1922 [now Section 131 of Income Tax Act, 1961 (43 of 1961)] that the Income tax authorities are invested with the powers exercisable by a Civil Court; and it is only for a limited purpose that a proceeding before them is declared to be deemed to be a judicial proceeding. It naturally follows that in all other matters, not covered by this section, the Income-tax authorities cannot exercise the powers of a Civil Court, nor can the proceedings before them be deemed to be judicial.5 Hence this Act does not apply to such proceedings.6

Income-tax authorities are not strictly bound by the rules of evidence. But the report of an Investigating Commission cannot be ignored. It has evidentiary value and can be taken into account.7

(c) Election petition, proceedings on. Under Section 90(3) of the Representation of the People Act,8 subject only to the provisions of that Act, the provisions of this Act have been made applicable in all respects to the trial of an election petition.

^{2.} State of Andhra Pradesh v. Kameshwara Rao, A. I. R. 1957 Andh. Pra. 794; I. L. R. 1957 Andh. Pra. 80.

^{3.} Harmandar Singh v. G. M. Northern Rly., 1974 Lab. I. C. 755 (Punj.).

^{4.} State of Jammu and Kashmir v. Anwar Ahmed Aftab, A. I. R. 1965 J. & K. 75. 5. Gurmukh Singh v. Commissioner of

Income-tax, 1944 L. 353 (2): (1944)

¹⁸ R. Lah. 81: I.L.R. 1945 L. 175; 220 I. C. 359 (F.B.).
6. Anraj Narain Dass v. Commissioner of Income-tax, Delhi, - 1952 Punj. 46: (1951) 20 I. T. R. 562.
7. C. I. T., W. Bengal v. East Coast Commercial Co., Ltd., (1967) 1 S. C. R. 821; (1967) 1 S. C. J. 433; (1967) 1 I. T. J. 240: 63 I. T. R. 449; 11 Law Rep. 580: A. I. R. 1967 S. C. 768, 772.
8. XLIII of 1951.

^{8.} XLIII of 1951.

- (d) Administration of Evacuee Property Act, proceedings under. Proceedings held by the Custodian under the Administration of Evacuee Property Act9 have been held to be of a quasi-judicial nature.10
- (e) Railway Rates Tribunal, proceedings before. Under Rule 51, Railway Rates Tribunal Rules, 1949, this Act is applicable to proceedings before the Railway Rates Tribunal, provided that in the discretion of the Tribunal any of its provisions may be relaxed.
- (f) Proceedings before Industrial Tribunal. Under this section, the Act of its own force applies to all judicial proceedings in or before any Court. Under Section 11 (8) of the Industrial Disputes Act, 1947, every Board, Court, Labour Court, Tribunal and National Tribunal have the same powers as are vested in a Civil Court under the Code of Civil Procedure when trying a suit, in respect of certain matters, and every enquiry or investigation by a Board, Court, Labour Court, Tribunal, or National Tribunal is deemed to be a judicial proceeding within the meaning of Sections 193 and 228 of the Indian Penal Code. Section 11 (a) of the Industrial Disputes Act further provides that every Labour Court, Tribunal or National Tribunal shall be deemed to be a Givil Court for the purposes of Sections 480 and 482 of the Code of Criminal Procedure. The above sections show that Industrial Tribunals are authorised to take evidence and may be treated as Court within the meaning of Section 3 of this Act. But proceedings before such tribunals are to be deemed as judicial proceedings only within the meaning of Sections 193 and 228 of the Penal Code, and such tribunals are to be deemed as Civil Courts only for the purposes of Sections 480 and 482 of the Code of Criminal Procedure. For all other purposes, the tribunals are not deemed to be Civil Courts and the proceedings before them are not treated as judicial proceedings in the sense that they call for a decision on a question of legal rights in dispute between the parties, involving either a finding of fact or application of a fixed rule or principle of law or involving both. Since the proceeding before an Industrial Tribunal is not wholly a judicial proceeding but merely a quasi-judicial proceeding, this section does not make the Act applicable of its own force to such a proceeding. An Industrial Tribunal is entitled to proceed on the basis of oral and documentary evidence which may not be strictly admissible in evidence under this Act. 11 In G. M. Parry v. Industrial Tribunal 12 the Madras High Court held that the tribunal exceeded its jurisdiction when it rejected the evidence which had been acted upon by the enquiry officer.

Strict rules of evidence do not apply to industrial adjudication and so long as the rules of natural justice are observed and documents on which the workmen rely are put in evidence in the presence of the employer, it is the

XXXI of 1950.

9. XXXI of 1950.
 10. Ebrahim Aboobaker v. Tek Chand Dolwani, 1953 S. C. 298: 1953 S. C. J. 411: 1953 S. C. R. 691: 1954 S. C. A. 1121: 56 Bom. L. R. 6.
 11. Harchura Tea Estate v. Labour Appellate Tribunal, A. I. R. 1959 C. 650; (1961) 1 Lab. L. J. 174;

L. B. Leonard B. Workers' Union v. Second Industrial Tribunal, A. I. R. 1962 C. 375: 65 C. W. N.

12. (1974) 1 Lab. L. J. 422; 1975 Lab. I. C. 1001; 45 F. J. R. 329; 29 Fac. L. R. 231.

duty of the latter to rebut any inference reasonably arising on a perusal of the contents of the documents.18

- (g) Rent Acts. The Evidence Act does not apply to proceedings under the East Punjab Rent Restriction Act 3 of 1949.14
- (h) Proceedings before Arbitrator. In arbitration proceeding the rules of evidence under the Act are not binding on the arbitrators.15 In an ir.dustrial adjudication an arbitrator is not restricted to the pleadings of the parties and the evidence that may be adduced. He is not hampered by any strict rules of evidence, or pleadings or technicalities of procedure.18
- (i) Inquiries before Claims Officer or Settlement Officer. Having regard to Section 1 of the Act, it does not strictly apply to inquiries before a Claims Officer or a Settlement Officer under the Displaced Persons (Claims) Act, 1950 and the Displaced Persons (Claims) Supplementary Act, 1954. Hence, if copies of revenue records are exchanged between the Governments of India and Pakistan, copies of the Pakistani record, even if not authenticated as required by the Evidence Act, is not such evidence as he would not be entitled to consider. Though strict rules of evidence do not apply to the enquiries before the officers aforementioned, they are bound to decide cases on the wellsettled principles of appreciating evidence, any departure from which cannot be justified by the contention that the matter is within their jurisdiction and their decision is final.17
- (1) Proceedings under other Acts. Enquiry under Section 15 (1) of the A. P. (Andhra Area) Estates (Abolition and Conversion into Ryotwari) Act (26 of 1948) being not a judicial proceeding will not be governed by the Evidence Act. 18 Proceedings under Section 15 of Orissa Land Reforms Act, 1965 are judicial, as such Evidence Act applies.19

For instances of judicial proceedings, see Commentary under Sections 33 and 80 post.

- 9. No compulsion to give sample of blood for test. There is no provision of law in the Civil Procedure Code, Evidence Act or elsewhere under which an application for directing a person to appear before a Civil Surgeon for a blood group test can be made or granted, or which compels a person to give a sample of his blood for analysis or for blood grouping test, or even
 - Employers, Messrs, Hind Strip Mining Corporation, Ltd., Bermo v. Raj Kishore Prasad, 31 F. J. R. Strip 186: (1967) 1 Lab. L. J. 108: 1967
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 Pat. 12, 14.

 14. Dwarka Das v. Ram Labhai, (1969)
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Industrial Court, Nagpur, 68 Bom. L. R. 731: 1966 Mah. L. J. 1060. (1971) 1 Lab. L. J. 168: A. I. R. 1967 Bom. 174, 186.

17. Hashomal Mulchand v. J. S. Bajaj,

- 68 Bom. L. R. 375, at pp. 377, 378. Yejjipurapu Appadu v. Samhara Laxminarayana, (1972) 2 Andh. L.
- 19. Laxmidhar Panigrahi v. Orissa, A. I. R. 1974 Orissa 127.

Code.10 Subject to the limitations contained in Order XIX, C. P. C., the Court, may at any time order any fact to be proved by affidavit.11

An affidavit does not, per se, become evidence in a suit but it could become evidence only by consent of the party or where it is specially authorised by a provision of law.12

It is open to a deponent of an affidavit in verification of a petition under Section 398 of the Companies Act, 1956, to verify it on information received by him and believed to be true since Order XIX, C. P. C., has no application to such an affidavir.13

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10. See Firm Rajkumar v. Bharat Oil

Mills, A. I. R. 1964 Bom. 38.

11. M/s. Parekh Brothers v. Kartick Chandra Saha, A. I. R. 1968 Cal. 532, 537.

12. Dominion of India v. Rupchand, A. I. R. 1953 Nag. 169; M. Sat-yam v. Venkataswami, A. I. R. 1949 Mad. 689, at p. 690; Kamakshya Prasad Dalal v. Emperor, A. I. R. 1939 Cal. 657 at p. 658; M/s, Parekh B tothers v. Kartick Chan-dra Saha, A. I. R. 1968 Cal. 532,

13. Shanti Prasad Jain v. The Union of India, (1965) 68 Bom. L. R. 431,

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18. Gilbert v. Endcan, L. R. (1878) 9
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19. Civ. Pr. Code, O. XIX, rr. 1, 2. 20. Civ. Pr. Code, O. XIX, rr. 1, 2. 21. O. XIX.

duty of the latter to rebut any inference reasonably arising on a perusal of the contents of the documents.13

- (g) Rent Acts. The Evidence Act does not apply to proceedings under the East Punjab Rent Restriction Act 3 of 1949.14
- (h) Proceedings before Arbitrator. In arbitration proceeding the rules of evidence under the Act are not binding on the arbitrators.15 In an ir.dustrial adjudication an arbitrator is not restricted to the pleadings of the parties and the evidence that may be adduced. He is not hampered by any strict rules of evidence, or pleadings or technicalities of procedure.18
- (i) Inquiries before Claims Officer or Settlement Officer. Having regard to Section 1 of the Act, it does not strictly apply to inquiries before a Claims Officer or a Settlement Officer under the Displaced Persons (Claims) Act, 1950 and the Displaced Persons (Claims) Supplementary Act, 1954. Hence, if copies of revenue records are exchanged between the Governments of India and Pakistan, copies of the Pakistani record, even if not authenticated as required by the Evidence Act, is not such evidence as he would not be entitled to consider. Though strict rules of evidence do not apply to the enquiries before the officers aforementioned, they are bound to decide cases on the wellsettled principles of appreciating evidence, any departure from which cannot be justified by the contention that the matter is within their jurisdiction and their decision is final.17
- (1) Proceedings under other Acts. Enquiry under Section 15(1) of the A. P. (Andhra Area) Estates (Abolition and Conversion into Ryotwari) Act (26 of 1948) being not a judicial proceeding will not be governed by the Evidence Act. 18 Proceedings under Section 15 of Orissa Land Reforms Act, 1965 are judicial, as such Evidence Act applies.19

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- 9. No compulsion to give sample of blood for test. There is no provision of law in the Civil Procedure Code, Evidence Act or elsewhere under which an application for directing a person to appear before a Civil Surgeon for a blood group test can be made or granted, or which compels a person to give a sample of his blood for analysis or for blood grouping test, or even
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giving of false evidence.22 Affidavits are also specifically excluded. Though they are sworn statements and received as evidence of the truth of the statements contained therein, they are not governed by the Act. In an affidavit, there can be statements not merely based on knowledge, but also on information and belief, which would be strictly hearsay. Such statements are however allowed, because reliance is placed upon affidavits only in interlocutory matters and not in the final disposal of the litigation before courts. For example, an application for stay of execution of a decree pending disposal of an appeal. The orders passed on application supported by affidavits, are to be effective, only during the pendency of the main proceeding-a suit or appeal, and do not operate as a final disposal of the matters agitated. A famous English Judge, is reported to have said "Truth will leak out-even in an affidavit": and in Charles Reade's Cloister and the Hearth we get the statement "He had spoken the truth! And in an affidavit!"

- (c) Contempt proceedings. Even if contempt proceedings are judicial proceedings within the meaning of this section, they are outside the scope of it and have always been treated as such. Contempt proceedings are usually decided on the basis of affidavits and it is not illegal to find a person guilty on the strength of affidavits alone.23 But a statement on information and belief is not legal evidence in a case of contempt.24 An alleged contemner is not a person accused of an offence within the meaning of Article 20(3) of the Constitution and, if he has voluntarily filed an affidavit, he can be crossexamined on it.25
- 13. Arbitration. Proceedings before arbitrators are now regulated by the Arbitration Act1, which has repealed2 the Indian Arbitration Act, 1899, and Section 89, Section 104(1), clauses (a) to (f) and Schedule II of the Code of Civil Procedure, 1908, by which they were formerly regulated. This Act purports to be a complete codification of the Law of Evidence, and, by the present section, it is expressly said not to apply to arbitrations. This can only mean that the arbitrators are not bound by those strict rules of evidence which are applicable to Courts of law. But they must observe the principle if not the letter of these rules. They should not adopt any means of deciding the case which is contrary to natural justice. The rule of "natural justice" has been interpreted to mean that a tribunal which is to apply "natural justice" must act honestly and impartially.8 But an arbitrator may be a most respectable and honest man and yet he may be guilty of legal misconduct vitiating his award, if his conduct cannot be reconciled to general principles.4

 Penal Code, Ch. XI.
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4. Payyavula Vengamma v. Payyavula Kesanna, 1953 S. C. 21, 1952 S. C. J. 630; 1953 S. C. A. 16; (1953) 1 Mad. L. J. 97: 1953 All. L. J. 73; see also the observations of Lord Langdale, M. R. in Harvey v. Shelton, (1844) 7 Beav. 455 at 462 and of Lord Justice Knight Bruce in and of Lord Justice Knight Bruce in Haigh v. Haigh, 31 L. J. Ch. (New Series) 420 at 423.

fees and however late the proposed evidence, it should be allowed if that can be done without injustice to the other side. There is no injustice if the other side can be compensated by costs.23

2. Repeal of enactment. [Repealed by the Repealing Act, 1938 (1 of 1938), Section 2 and Schedule.]

SYNOPSIS

- 1. Repeal of enactments.
- 2. Rep al of section,
- 3. Scope of repealed section.

- 4. Rules left unaffected.
- 5. Effect of repeal
- 1. Repeal of enactments. The repealed section ran as follows:
- "2. On and from that day the following laws shall be repealed:
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But nothing herein contained shall be deemed to affect any provision of any Statute, Act or Regulation in force in any part of British India and not hereby expressly repealed."25

- 2. Repeal of section. As the provisions of this section were spent or otherwise became unnecessary, the section and the Schedule of the enactments repealed by it, were repealed by the Repealing Act I of 1938.
- 3. Scope of repealed section. Sub-section (1) of the repealed section repealed all rules of evidence which were not contained in any Statute, Act or Regulation then in force. Such were the rules of English common laws1 and of the Hindu2 and Mohammadan3 laws, which were then in force. Such were also rules which had origin in principles of equity, justice and good conscience.4 All such rules ceased to have any force on this Act coming into force.

Sub-section (2) repealed all those rules, laws and regulations which acquired the force of law in the non-regulated provinces under the 25th section of the Indian Councils Act, 1861,8 but only in so far as they related to any matter provided for in this Act.

23. Rupendra Deb v., Ashrumati Debi, 34 C, L. J. 313; A. I. R. 1951 Cal. 286; Balwant Singh v. Firm Raj Singh, A. I. R. 1969 Punj. 197, 24. 24 and 25 Vict. c 67, Clause (2) re-

peals rules relating to evidence enacted in "Non-Regulated Pro-vinces" prior to the statute and which acquired the force of law

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Sec. 2 (2) of the Ceylon Evidence
Ordinance runs thus: "All rules of
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1. Srish Chandra Nandy v, Rakhalananda Thakur, 41 C. W. N. 1103;
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2. Dhondo Bhikaji v. Ganesh Bhikaji, 11 Bom. 433.

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SYNOPSIS

- 1. Repeal of enactments.
- 2. Reptal of section.
- 3. Scope of repealed section.
- 4. Rules left unaffected.
- 5. Effect of repeal
- 1. Repeal of enactments. The repealed section ran as follows:
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 - (2) All such rules, laws and regulations as have acquired the force of law under the 25th section of the Indian Councils Act, 1861²⁴ in so far as they relate to any matter herein provided for; and
 - (3) The enactments mentioned in the schedule hereto, to the extent specified in the third column of the said schedule.

But nothing herein contained shall be deemed to affect any provision of any Statute, Act or Regulation in force in any part of British India and not hereby expressly repealed."25

- 2. Repeal of section. As the provisions of this section were spent or otherwise became unnecessary, the section and the Schedule of the enactments repealed by it, were repealed by the Repealing Act I of 1938.
- 3. Scope of repealed section. Sub-section (1) of the repealed section repealed all rules of evidence which were not contained in any Statute, Act or Regulation then in force. Such were the rules of English common laws and of the Hindu² and Mohammadan³ laws, which were then in force. Such were also rules which had origin in principles of equity, justice and good conscience. All such rules ceased to have any force on this Act coming into force.

Sub-section (2) repealed all those rules, laws and regulations which acquired the force of law in the non-regulated provinces under the 25th section of the Indian Councils Act, 1861,8 but only in so far as they related to any matter provided for in this Act.

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24. 24 and 25 Vict. c 67. Clause (2) repeals rules relating to evidence enacted in "Non-Regulated Provinces" prior to the statute and which acquired the force of law under the 26th section thereof.

9.5. Sec. 2 (2) of the Ceylon Evidence Ordinance runs thus: "All rules of evidence not contained in any written law so far as such rules are inconsistent with any of the provisions of this Ordinance, are hereby repealed."

1. Srish Chandra Nandy v. Rakhalananda Thakur, 41 C. W. N. 1103: 65 C. L. J. 520 s. c. on appeal 1941

P. C. 16: 68 I. A. 34: I. L. R. (1941) 1 Cal. 468: 193 I. C. 220 (P. C.): King v. Nga Myo., 1938

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- Mairaj Fatima v. Abdul Waheed, 1921 A. 175; 43 All. 673; 63 I.G. 286.
- Meer Jangoo v. Chottey Saheb, 8
 I. C. 1124: 6 N. L. R. 161.
 24 and 25 Vict. c, 67.

Sub-section (3) repealed previous enactments relating to evidence.6

- 4. Rules left unaffected. The proviso to the repealed section left unaffected all rules of evidence contained in any Statute, Act and Regulation not expressly repealed by the Act. There are also several laws relating to the subject of evidence which supply the omissions in the Act and supplement its provisions. For instance, see-
 - (1) Bankers' Books Evidence Act, XVIII of 1891.
 - (2) Civil Procedure Code, 1908, Order XXVI.
 - (3) Commercial Documents Evidence Act, XXX of 1939.
 - (4) Criminal Procedure Code, 1898, Sections 509, 510. (See now Cr. P. C., 1973, Sections 291, 292 et seq.).
 - (5) Divorce Act, 1869, Sections 7, 12, 14.
 - (6) Limitation Act, 1908, Sections 19, 20. (See now Limitation Act, 1963, Sections 18, 19).
 - (7) Patni Regulation, VIII of 1819, Section 8.
 - (8) Registration Act, 1908, Sections 17, 49, 50.
 - (9) Stamp Act, 1899, Section 35.
 - (10) Succession Act, 1925, Section 63.
 - (11) Transfer of Property Act, 1882, Sections 59, 123.7

This shows that the Act, though intended to be a Code8 is exhaustive only in respect of matters expressly provided for in the Act. It does not, however, contain the whole Law of Evidence.

But the Act deals with the particular subject of evidence including ad-missibility of evidence, and is a "special law" within the meaning of the Code of Criminal Procedure. Hence, no rule about the relevancy of evidence in the Act is affected by any provision in the Criminal Procedure Code unless it is so specifically stated in the Codeo or it has been repealed or altered by another statute.10 Even the parties cannot contract themselves out of the provisions of the Act. If evidence is tendered, what the Court is to see is whether it is admissible under the Act and not whether in tendering it some breach of contract has been committed.11

^{6.} For a list of the enactments repealed see the schedule which has also been repealed by the Repealing Act I of 1938.

^{7.} For a complete list of provisions, see Whitley Stoke's Anglo-Indian Codes, Vol. II, pp. 822-827.
The Collector v. Palakdhari, 12 All.,

^{35;} King v. Nga Mye., 1933 Rang.

^{177: 175} I. C. 465 (F.B.). 9. Ram Naresh v. Emperor, 1939 All. 242: I. L. R. 1939 All. 377: 181

I. G. 646. 10. Rannun v. King-Emperor, 1926 L.

^{88;} I. L. R. 7 Lah. 84: 94 I.C. 901. 11. Sago Rai v. Ramjee Singh, 1942 Pat. 105; 196 I.C. 645.

- 5. Effect of repeal. The repeal of this section does not have the effect of re-enacting the rules which it repealed.12
- 3. Interpretation clause. In this Act the following words and expressions are used in the following senses, unless a contrary intention appears from the context:
- "Court". "Court" includes all Judges,13 and Magistrates,14 and all persons, except arbitrators, legally authorised to take evidence.

"Fact". "Fact" means and includes-

- (1) anything, state of things, or relation of things, capable of being perceived by the senses;
- (2) any mental condition of which any person is conscious.

Illustrations

- (a) That there are certain objects arranged in a certain order in a certain place, is a fact.
 - (b) That a man heard or saw something, is a fact.
 - (c) That a man said certain words, is a fact.
- (d) That a man holds a certain opinion, has a certain intention, acts in good faith or fraudulently, or uses a particular word in a particular sense, or is or was at a specified time conscious of a particular sensation, is a fact.
 - (e) That a man has a certain reputation, is a fact.

"Relevant". One fact is said to be relevant to another when the one is connected with the other in any of the ways referred to in the provisions of this Act relating to the relevancy of facts.

"Facts in issue". The espression "facts in issue" means and includes any fact from which, either by itself or in connection with other facts the existence, non-existence, nature or extent of any right, liability, or disability, asserted or denied in any suit or proceeding, necessarily follows.

King v. King, 1945 A. 190; I. L.
 R. 1945 A. 620: See also S. 7.
 General Glauses Act (Act X of

13. Cf. the Code of Civil Procedure, 1908 (Act 5 of 1908), S. 2, the Indian Penal Gode (45 of 1800), S.

19 and for a definition of "District

Judge", the General Clauses Act, 1897 (10 of 1897), S. 3 (17). 14. Cf. the General Clauses Act, 1897 (10 of 1897), S. 3 (32) and Code of Criminal Procedure, 1978 (Act 2 of 1974).

Explanation. Whenever, under the provisions of the law for the time being in force relating to Civil Procedure, 15 any court records an issue of fact, to be asserted or denied in the answer to such issue, is a fact in issue.

Illustrations

A is accused of the murder of B.

At his trial the following facts may be in issue:

that A caused B's death;

that A intended to cause B's death;

that A had received grave and sudden provocation from B;

that A, at the time of doing the act which caused B's death, was by reason of unsoundness of mind, incapable of knowing its nature.

"Document". "Document" means any matter expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means, intended to be used, or which may be used for the purpose of recording that matter.

Illustrations

A writing17 is a document;

18Words printed, lithographed or photographed are documents;

A map or plan is a document;

An inscription on a metal-plate or stone is a document;

A caricature is a document.

"Evidence". "Evidence" means and includes-

- all statements which the court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry;
 such statements are called oral evidence;
- (2) all documents produced for the inspection of the court; such documents are called documentary evidence.

"Proved". A fact is said to be proved when, after considering the matters before it, the court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.

^{15.} See now the Code of Civil Procedure, 1908 (5 of 1908); as to the settlement of issues, see Sch. I, Order XIV.

Cf. the Indian Penal Code (Act 45 of 1860), S. 29 and the General Clauses Act, 1897 (10 of 1897) S. 3

^{17.} Cf. definition of "writing" in the General Clauses Act, 1897 (10 of 1897), S. 3 (65).

^{18.} Cf. definition of "writing" in the General Glauses Act, 1897 (10 of 1897), S. 3 (65)

"Disproved". A fact is said to be disproved when, after considering the matters before it, the court either believes that it does not exist, or considers its non-existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist.

"Not proved". A fact is said not to be proved when it is neither proved nor disproved.

19"India" means the territory of India excluding the "State of Jammu and Kashmir."

1. s. 1 (Proceedings before Arbitra-

s. 3 ("Evidence"). 2. s. 3 (Relevant fact) s. 3 (Fact in issue).

3. s. 3 ("Fact").

4. s. 3 (Document produced for inspection of Court).

5. Ch. IV (Oral Evidence) Ch. V (Documentary Evidtnce) s, 60 (Direct Evidence) ss. 62, 64, 165 (Primary Evidence) ss. 63, 65, 66 (Secondary Evidence).

6. Part II (On Proof)
Ch. VII (of the Burden of Proof)
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SYNOPSIS

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- (a) External and internal facts.(b) Physical and Psychological facts.
- (c) Theory, opinion and feeling.(d) Events and states of things. (e) Positive or affirmative and nega-
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- of direct (n) Value and cogency and circumstantial evidence.

(o) Positive evidence.

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 (q) Accused, if witness.
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- (a) Proof and evidence, distinction between.
- (b) Proof how effected,

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- (i) Guilt-conscious conduct of the accused.
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reasonable (p) Evidence creating doubt-Accused entitled acquittal.

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(y) Standard of proof in matrimonial

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General.

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General.

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(3) Rule in India.

(4) Rule in criminal cases.

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(w) Party should put his case in crossexamination of witnesses.

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Appreciation of evidence by appel-10. late Court.

(a) General.

(b) Civil appeals.

(c) Criminal appeals.

(d) Appeals against acquittals, (e) Supreme Court appeals. 11.

Additional evidence in appeals. Review. "Strict proof". 12.

"Proved". 13.

"Disprqved" and "not proved".

Miscellaneous,

1. Unless a contrary intention appears from the context. Where the Legislature defines particular words used in a particular statute these words must be given the meaning given to them by the Legislature unless, by doing so, any repugnancy would be created in the subject or context.²⁰ But, an interpretation clause is not to be taken as substituting one set of words for another, or as strictly defining what the meaning of a term must be under all circumstances, but rather as declaring what may be comprehended within the term, where the circumstances require that it should be so comprehended.31 It is not to be understood that the interpretation clause must necessarily apply wherever the word "interpreted" is used in the statute, and, in spite of the fact that there are indications in the statute and in the section, where it occurs, to control and modify and explain the meaning of the word in a different sense than what is borne out by the interpretation clause.22 That is why

 Pr Iqbal Ahmad, C. J., in Pratap Singh v. Gulzari Lal, 1942 All. 50 at 54; I. L. R. 1942 All. 185; 199 I. C. 57 (F.B.).

Caries on Statute Law, 4th Ed. (1936), p. 195.
 Partap Singh v. Gulzari Lal, supra,

per Dar J. at p. 65.

words like "unless there is anything repugnant in the subject or context" or "unless a contrary intention appears from the context," are usually inserted in the interpretation clause. But, even if no such words are inserted, little weight attaches to the omission, for some such words are to be implied in all statutes where expressions, which are interpreted by a definition clause, are used in a number of sections with meaning sometimes of a wide and sometimes of an obviously limited character.23 The definition given is, therefore, normally to be taken to apply wherever that word occurs in the statute. But, it will not apply, if the word appears in a subject or context which makes the application of the definition impossible and repugnant to the meaning of the context in which the word is found.24 It is not permissible in interpreting one Act to travel beyond it and to apply definitions (except in the General Clauses Act) of other Acts.25

- 2. "Court". The word "court" originally meant the King's Palace, but it has also acquired the meaning of-
 - (1) a place where justice is administered, and
 - (2) the person or persons who administer justice.1

It is in the latter sense, that the word is used in this section. The definition of "Court" is framed only for the purposes of the Act itself and should not be extended beyond its legitimate scope. Special laws must be confined in their operation to their special object.² The definition is not meant to be exhaustive.³ It is inclusive definition.⁴ The word means not only the Judge in a trial by a Judge with a jury but includes both Judge and jury.5 A Commissioner is a person legally authorized to take evidence, and therefore the provisions of the Act will apply to Commissioners to take evidence under the Civil or Criminal Procedure Codes.6 A Deputy Collector holding an enquiry under the Bengal Land Registration Act, for the purpose of registering the names of rival claimants, is a Court within the meaning of this Act and the enquiry held by him is a judicial enquiry.7 Commissioner appointed to hold

23. Knightbridge Estates Trust, Ltd. v. Knightbridge Estates Trust, Ltd. v. Byrne, 1940 A. C. 613 at 621: 109 L. J. Ch. 200: 162 L. T. 388; (1940) 2 All E. R. 401, per Viscount Maugham. See also Kartick Chandra Mullick v. Rani Harshmukhi Dasi, 1943 Cal. 345; 208 I.C. 461: 77 G. L. J. 232; 47 C. W. N. 582 (F.B.); Mohammad Manjural Haque v. Bissesswar Bantrjee, 1943 Cal. 361; 210 I. C. 479; 47 C. W. N. 408: 77 C. L. J. 32

N. 408: 77 C. L. J. 32. 24. Rambandhu Misra v. Brahmananda Laik, 1950 Cal. 524: 54 C. W. N.

Jai Narain Ramkisan v. Motiram Gangaram, 1949 N. 34: I. L. R. 1948 N. 327: 1948 N. L. J. 195.
 Mst. Dirji v. Shrimati Goalin, 1941 Pat. 65: I. L. R. 20 Pat. 373: 192

I. G. 217 (F.B.).

2. Haricharan Kundu v. Kaushi Charan Dey, I. L. R. (1940) 2 Cal. 14;

188 I.C. 686; A.I.R. 1940 Cal. 286; R. v. Tulja, (1887) 12 B. 36; Attorney General v. Moore, L. R. (1878) 3 Ex. Div. 276: R. v. Ram Lal, (1893) 15 A. 141; but see Atchayya v. Gangayya, (1891) 15 M. 138, 144, 147, 148: and In re Sardhari Lal, (1874) 13 B. L. R. App. 40; 22 W. R. Cr. 10.

R. v. Ashootosh, (1878) 4 C. 483
 (F.B.) 493; Mst. Dirji v. Sm.

Goalin, supra.

4. The Public Prosecutor (A. P.) v. Legisetty Ramayya, (1974) An. L. T. 372: (1974) 2 A. P. L. J. 305: (1975) 1 An. W. R. 183: 1975 M. L. J. (Gri.) 155: 1975 Cri. L. J. 144 (F.B.).

 R. v. Ashootosh, supra at p. 490.
 Civ. Pr. Code, O. XXVI, rr. 1-10. Cr. Pr. Code, Ss. 284-288. See also Atchayya v. Gangayya, supra. 7. Rama v. Harakdhari, 47 I. C. 710.

an inquiry under the Public Servants Inquiries Act, XXXVII of 1850, is a Court within the meaning of this section, as he is given all the powers of a court regarding the summoning of witnesses and other matters. The fact, that he can give no final decision but has merely to draw up a report giving his findings, is not sufficient to make the Commissioner anything other than a

Election Tribunals under the U. P. Municipalities Act, 1916, are courts and the provisions of the Evidence Act are applicable to them. They cannot, therefore, admit hearsay evidence.9 It is not open to a court or tribunal determining a matter judicially to insist on a particular mode of proof whatever the probative value unless the law requires it, particularly when the persons concerned cannot obtain the proof insisted upon.10 Inasmuch as the Presiding Officer of the Motor Accidents Claims Tribunal has to be a person, that Tribunal falls within the definition of 'court'.11

An Industrial Tribunal, though not falling within the hierarchy of ordinary courts, is vested with the judicial power of the State and it discharges judicial functions,12 Such a Tribunal set up under Section 7 of the Industrial Disputes Act, 1947, is a 'court' in the wider connotation of that term as defined in this section and the Act applies to judicial proceedings before a tribunal.18 Section 3 of the Evidence Act defines a Court by excluding arbitrators from the definition of this term. An arbitrator may be required to act upon the rules of natural justice but he has no jurisdiction to force any party to produce any documents or books before it.14

Rent Controller under Andhra Pradesh Buildings (Rent and Eviction) Control Act is legally authorised to take evidence of the parties in view of Rule 8 (2) is a "Court". 15

When by a statute a judicial officer is appointed to perform a function not otherwise than in a judicial capacity and nothing is mentioned about the finality or otherwise of the decision, he is intended to act as a Court and not as a "persona designata", unless there is a clear indication to the contrary in the statute.16

"Legalby authorised to take evidence". The words "legally authorised" contemplate a positive authorisation. The right to receive evidence is not an

Kapur Singh v. Jagatnarain, 1951
 Punj. 49: 52 Cr. L. J. 950: 53 P.
 L. R. 178.

 R. 178.
 Prem Chand v. Sri O. P. Trivedi, 1967 A. L. J. 5, 7.
 A. N. Saxena v. Dy. Registrar, Cooperative Societies, U. P., 1969 A. L. J. 652, 656.
 The Municipal Committe, Jullundur v. Shri Romesh Saggi, 71 P. L. R. 452, 456 (see Motor Vehicles Act IV of 1939, section 110).
 Bharat Bank, Ltd. v. Employees, 1950 S. C. R. 188: 86 C. L. J. 280; A. I. R. 1950 S.C. 188; Associated Cement Companies, Ltd. v. ciated Cement Companies, Ltd. v. P. N. Sharma, (1965) 1 S. C. A. 728: (1965) 11 Fac. L. R. 77: (1964-65) 27 F. J. R. 204: (1965) 1 Lab. L. J. 433: A. I. R. 1965 S.

C. 1595.

13. Bharat Bank, Ltd. v. Employees, supra: Raghu Singh v. The Burrakur Coal Co., Ltd. (1966-67) 30 F. J. R. 134; A. I. R. 1966 Cal. 504 at pp. 507, 508. Harbans Singh Ghai v. B. D. Khanna, 1975 Chand L. R. (Cri.) 274 at 277: 1974 Punj. L. J. (Cr.)

15. G. Bulliswamy v. Smt. C. Annapurnama, A. I. R. 1976 A. P. 270

16. The Public Prosecutor (A, P.) v. Legisetty, 1975 Cr. L. J. 144 at 149 (F.B.); (1974) An. L. T. 372; (1974) 2 A. P. L. J. 305; (1975) 1 An. W. R. 133; 1975 M. L. J. (Cri.) 155.

incident of an appellate court; wherever an appellate court possesses the right to receive the evidence, it is by virtue of express enactments, such as those contained in Section 428, Criminal Procedure Code and Order 41, Rule 27, Civil Procedure Code. A District Magistrate, hearing an appeal under Section 160 of the U. P. Municipalities Act, is not legally authorised to take evidence, and is not, therefore, a "court" within the meaning of this section.17 As under the Coroner's Act, the Coroner is "legally authorised to take evidence" during the course of an inquest held by him, a Coroner is a "court".18

- "All rights and liabilities are dependent upon and arise out of facts, and facts fall into two classes, those which can, and those which cannot, be perceived by the senses. Of facts, which can be perceived by the senses it is superfluous to give examples. Of facts, which cannot be perceived by the senses; intention, fraud, good faith, and knowledge may be given as examples. But each class of facts has, in common, one element, which entitles them to the name of facts-they.can be directly perceived either with or without the intervention of senses."19
- (a) External and internal facts. The first clause refers to external facts the subject of perception by the five "best marked" senses, and the second to internal facts the subject of consciousness; 20 (a), (b) and (c) are illustrations of the first clause; (d) and (e) of the second.
- (b) Physical and psychological facts. Facts are thus (adopting the classification of Bentham),21 either physical, e.g., the existence of visible objects, or psychological, e.g., the intention or animus of a particular individual in doing a particular act. The state of a man's mind is as much a fact as the state of his digestion.22

As is clear, the latter class of facts are incapable of direct proof by the testimony of witnesses; their existence can only be ascertained either by the confession of the party whose mind is their seat, or by presumptive inference from physical facts.23 This constitutes their only difference. When it is affirmed that a man has a given intention, the matter affirmed is one which he and only he can perceive; when it is affirmed that a man is sitting or standing, the matter affirmed is one which may be perceived not only by the man himself but by any other person able to see and favourably situated for the purpose. But the circumstance that either event is regarded as being, or as having been, capable of being perceived by someone or other, is what we mean, and all that we mean, when we say that it exists or existed, or when we denote the same thing by calling it a fact.

- (c) Theory, opinion and feeling. The word 'fact' is sometimes opposed to theory; sometimes to opinion, sometimes to feeling, but all these modes of using it are more or less rhetorical.24 In Ram Bharose v. Rameshwar Prasad Singh,28 it was held, that a statement is a 'fact', as defined in Section 3, and
 - 17. State of Uttar Pradesh v. Ratan Shukla, 1956 All. 258; I. L. R. 1956 A. 656.

Tanajirao v. H. J. Chinoy, 71
 Bom. L. R. 732.
 See Draft Report of Select Com-

mittee, dated 31st March, 1871; Gazette of India, July 1, 1871, Part

V, p. 273. Steph. Introd., 19-21; Norton, Ev., 93, Steph. Dig., Art. 1. Fact is

anything that is the subject of testi-

mony; Ram on Facts. 3.
21. 1 Benth, Jud. Ev., 45.
22. Sabhapati v. Huntley, 1938 P. C.
91; 173 1. C. 19: 47 L. W. 409; see also Emperor v. Ramanuja Ayyangar, 1935 M. 528; I. L. R. 58 M. 642; 158 I. C. 764 (F.B.). Best., Ev., 6, 7.

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24. Steph, Introd. 20, 21, 25, 1938 Oudh 26: 171 I. C. 481.

could be relevant under clause (1) of Section 11 and reliance was placed on illustration (a) of Section 6. The illustration however, deals only with statements which are parts of res gestae. The fact, that a statement was made, is no doubt a fact and it can be proved as such whenever it may be relevant under any provision of the Act.

- (d) Events and states of things. Facts may also be either events or states of things. By an "event" is meant "some motion or change considered as having come about either in the course of nature or through the agency of human will: in which latter case, it is called an "act" or "action." The fall of a tree is an "event"; the existence of the tree is a "state of things" both are alike facts.1
- (e) Positive or affirmative and negative facts. The remaining division of facts is into positive or affirmative and negative. The existence of a certain state of things is a positive or affirmative fact,—the non-existence of it is a negative fact. "This distinction, unlike both the former, does not belong to the nature of facts themselves, but to that of the discourse which we employ in speaking of them."2 A negative fact is generally proved by placing the relevant circumstances before the Court and leaving it to the Court to draw the necessary inference from the proved fact, as it may not ordinarily be possible to prove those facts by evidence aliunde.3
- (f) Matter of fact and matter of law. "Matter of fact" has been defined to be anything which is the subject of testimony; "matter of law" is the general law of the land of which Courts take judicial cognisance.4 Questions of law and of fact are sometimes difficult to disentangle. The proper legal effect of a proved fact is essentially a question of law, so also is the question of admissibility of evidence, and the question whether any evidence has been offered on one side or the other; but the question whether the fact has been proved, when evidence for and against, has been properly admitted is necessarily a pure question of fact. In British Launderers R. Association v. Borough Hendon Rating Authority,6 Denning, L. J., stated the distinction between law and fact in these words:

"Primary facts are facts which are observed by witnesses and proved by oral testimony or facts proved by the production of the thing itself, such as original documents. Their determination is essentially a question of fact for the tribunal and the only question of law that can arise on them is whether there was any evidence to support the

^{1.} Best, Ev., 7: 1 Benth. Jud. Ev., 47,

 ¹ Benth., Jud. Ev., 49; Best, Ev. 7.
 Anjaneya Reddy v. Gangi Reddy, I. L. R. 1959 Mys. 777, followed in Devaiah v. Nagappa, A. I. R. 1965 Mys. 102.

^{4.} Best, Ev., 19.

^{5.} Nafar Chandra Pal Chowdhury v.

Shukur Sheikh, 1918 P. C. 92. 45 A. 183; 46 Cal. 189; 51 I. C.
 760; see also Suwalal Chhogalal v. Commissioner of Income-tax, 1949 N. 249: I. L. R. 1948 Nag. 837 (F.B.). 6. (1949) 1 K. B. 434 at pp. 471-2:

^{(1949) 1} All E.R. 21,

finding. The conclusions from primary facts are, however, inferences deduced by a process of reasoning from them. If and so far as these conclusions can as well be drawn by a layman (properly instructed on the law) as by a lawyer, they are conclusions of fact for the tribunal of fact; and the only questions of law that can arise on them are whether there was a proper direction in point of law and whether the conclusion is one that could reasonably be drawn from the primary facts. If and so far, however, as the correct conclusion to be drawn from the primary facts requires, for its correctness, determination by a trained lawyer.....the conclusion is a conclusion of law."

- (g) Principal and evidentiary facts. The fact sought to be proved or factum probandum, is termed the "principal fact"; the means of proof or the facts which tend to establish it "evidentiary facts".
- 4. "Relevant". The word "relevant" has two meanings. In one sense it means 'connected', and in another sense 'admissible.'s
- (a) Logical and legal relevancy. In the one the relevancy is logical, in the other it is legal. In his introduction to the Evidence Act, Sir James Fitz-james Stephen explained that relevancy means connection of events as cause and effect, with the caution that, "when an inference is to be founded upon the existence of such a connection, every step by which the connection is made out must either be proved, or be so probable under the circumstances of the case that it may be presumed without proof. What is thus meant by a relevant fact is a fact that has a certain degree of probative force. 11
- (b) Relevancy and admissibility. All relevant facts are not admissible. They may be excluded under rules of Evidence other than those which treat of relevancy. "The legal admissibility of facts is for the most part determined by their logical relevancy to the issue, or that connection between the two which, in the ordinary course of events, renders the latter probable from the existence of the former. But relevancy being founded on logic and human experience, and admissibility on law, which may change in different jurisdictions and periods, the two theories do not wholly coincide. Thus, many facts, which in ordinary life are relied on as rendering other facts probable, the law, on grounds of policy or precedent, rejects, e.g., as being too remotely connected or too slight in probative force, to form the basis of judicial decisions; or as tending to confuse the jury by a multiplicity of issues, or as creating unfair surprise and prejudice to the parties; or as infringing some safeguard of public policy or personal privilege." 12

"Admissibility signifies that the particular fact is relevant and something more,—that it has also satisfied all the auxiliary tests and extrinsic policies laid down by Faw." 18

 Chamberlayn's Trial Evidence, S. 130.

I Benth., Jud. Ev., 18; cf. Steph. Dig., Art. 1; Steph. Intro. 19-21; Best. Ev., 6, 7, 19; Norton, Ev., 93; Goodeve, Ev., 4-16.

Lala Lakshmichand v. Syed Shah,
 G. W. N. cclxviii.

See Sir J. F. Stephen's Introduction to Evidence Act, 1895 Ed., p. 70.

Whitworth: Theory of Relevancy cited in Introduction at p. 97.

Phipson on Evidence, 11th Ed., p. 65.

^{13.} Wigmore, S. 12.

In practice, therefore, it is preferable to use the terms "relevant" and "admissible" simply, meaning by the former that which is logically probative, and by the latter that which is legally receivable, whether logically probative or not. "The true principle appears to be that, in the absence of statutory provisions, nothing that is not logically relevant is admissible, but that many facts that are logically relevant are excluded for various reasons based on practical considerations as to the reasonable and fair way of administering justice."14

Irrespective of the means or the manner by which evidence is secured,15 admissibility is dependent on the question of relevancy and such evidence cannot be ruled out on the ground that it had been procured by improper means or illegally.16 The fact that a document was produced by improper or even illegal means will not be a bar to its admissibility if it is relevant and its genuineness proved. But examining the proof given as to its genuineness, the circumstances under which it came to be produced into court have to be taken into consideration,17

- (c) Meaning of "relevant" in the Act. Under this section itself "relevant" means "connected in any of the ways referred to in the provisions of this Act relating to the relevancy of facts, that is, in Sections 5 to 55." The scheme of the Act seems to be to make all relevant facts admissible, and the dictumof Lord Hobhouse18 that "relevant in this Act means admissible" seems to express the effect rather than a definition of the word.
- 5. Facts in issue. Facts may be related to rights and liabilities in any one of the two ways:
 - (a) They may by themselves or in connection with other facts, constitute such a state of things that the existence of the disputed right or liability would be a legal inference from them. From the fact, that A is the eldest son of B, there arises, of necessity, the inference that A is by the law of England the heir-at-law of B and that he has such rights as that status involves. From the fact, that A caused the death of B under certain circumstances, and with a certain intention or knowledge, there arises, of necessity, the inference that A murdered B. and is liable to the punishment provided by law for murder. Facts, thus related to a proceeding, may be called facts in issue, unless their existence is undisputed.

per Lord Goddard, C. J., at p. 239 of (1955) 1 All E. R., supra, M. K. Annamalai Chettiar & Co. v.

Magraj Patodia v. R. K. Birla, A. I. R. 1971 S. C. 1295, 1303.
 Lala Lakshmi Chand v. Syed Shah,

(1889) 3 G. W. N. cclxviii.

^{14.} Phipson, 11th Ed., p. 69.
15. See Kuruma v. The Queen, 1955
A. C. 197 (P.C.): (1955) 1 All E.
R. 236 at p. 50, quoting with approval Rex v. Leatham, (1861) 8 Cox C.C. 498; where Crompton, J., said, "It matters not how you get it; if you steal it even it would be admissible"; "If evidence is relevant, it is admissible and the court is not concerned with how it is obtained",

Dy. Commercial Tax Officer, (1965) 2 M. L. J. 406; 78 M. L. W. 702; 1966 M. W. N. 46: (1965) 16 S. T. C. 687.

(b) Facts which are not themselves in issue in the sense above explained, may affect the probability of the existence of facts in issue and be used as the foundation of inferences respecting them; such facts are described in the Evidence Act as relevant facts. 19

All the facts with which it can, in any event, be necessary for Courts of Justice to concern themselves are included in these two classes. What facts are in issue, in particular cases, is a question to be determined by the substantive law, or in some instances by that branch of the law of procedure which regulates the forms of pleading, civil or criminal.20 A judgment must be based upon facts declared by this Act to be relevant and duly proved.21

Facts which tend to render more probable the truth of witness's testimony on any material point are admissible in corroboration thereof, although otherwise irrelevant to the issue.22

Explanation. The Explanation refers to Order XIV of the Code of Civil Procedure,28 under Rule 1 of which:

"Issues arise when a material proposition of fact or law is affirmed by the one party and denied by the other."

"Material propositions are those propositions of law or fact which a plaintiff must allege in order to show a right to sue, or a defendant must allege in order to constitute his defence."

"Each material proposition affirmed by one party and denied by the other shall form the subject of a distinct issue."

"Issues are of two kinds: (a) issues of fact, (b) issues of law."

- 6. "Document." The term "document" has been defined in two other Acts of the Indian Legislature also.24 There is practically no difference in the definition given in these Acts except that, in the definition given in the Penal Code, the words "as evidence of that matter" occur in place of the words "for the purpose of recording that matter" used in this section.
- (a) Difference between English and Indian law. The definition of "document" in the Indian Acts differs from the definition of the word in English law. In R v. Daye,25 Darling, J., defined a document as "any writing or printing capable of being made evidence, no matter on what material it

^{19.} For example of a fact in issue and a relevant fact, see Kaung v. San,

³ L. B. R. 90. 20. Steph. Introd. 12, 13; ct. Goodeve, Ev., 316, et seq., Best. 20; Steph.

^{21.} S. 165, post.

^{22.} Roscoe's Cr. Evidence, 16th Ed., p.

^{23.} V of 1908.

S. 29, Indian Penal Code, Act XLV of 1860, and S. 3 (18) of the General Clauses Act, X of 1897.
 (1908) 2 K. B. 333.

may be inscribed" Citing this case, Best says that under the term "are properly included all material substance on which the thoughts of men are represented by writing, or any other species of convictional marks or symbol."1 Section 6(1) of the English Evidence Act enacts that "document includes books, maps, plans, drawings and photographs." Thus, in English law, the word "document" applies to the material, on which the writing is written, whereas in Indian law it applies not to the material but to the matter written.2 A document need not necessarily be something which is signed, sealed or executed.3

- (b) Matter described upon any substance, letters, figures or marks. "Matter described" means matter delineated, e.g., as map or plan, or a picture "upon any substance," e.g., stone, tree4 or clay by means of letters, figures, or marks, i.e., whether in language, numbers, pictures or symbols.5
- (c, "For the purpose of recording that matter". In the definition in Section 29 of the Indian Penal Code the words used in the place of these words are "as evidence of that matter." But the term 'evidence' is not there used in the sense of admissible or legal evidence. It is rather used in its larger sense as denoting matter which is a written memorial of certain ideas to which reference might be made to recall them. It implies evidence not of the truth of the matter expressed or described, but merely of its existence.6 This, it is submitted, is exactly what is meant by "for the purpose of recording that matter." Perhaps these words have been used in this section only to avoid confusion that might arise by using the word "evidence", which has been given special meaning in this Act as will be presently seen.
- (d) "Writing". Under Section 3 (65) of the General Clauses Act7 "expression referring to 'writing' shall be constitued as including references to printing, lithography, photography and other modes of representing or reproducing words in a visible form" and, as the first illustration to this section shows, a writing is a document.
- 7. Evidence. (a) Meaning of evidence. The word 'evidence' signifies in its original sense, the state of being evident, i.e., plain, apparent, or notorious.8 The meaning of the term is not confined to proof before a judicial tribunal.9 Best says:

"But by an almost peculiar inflection of our language, it is applied to that which tends to render evidence or to generate proof. This is

1. Best, Ev., s. 215.

A. L. J. 183.
3. Emperor v. Krishtappa Khandappa, 1925 B. 327: 87 I. C. 838.

4. Emperor v. Krishtappa Khandappa,

A. V. Joseph v. K. E., I. L. R. 3 Rang. 11: A. I. R. 1925 Rang.

6. Dharmendra Nath Shastri v. Rex, supra; see also Madapusi Brinivasa

v. R., (1881) 4 Mad. 393, 7. X of 1897, 8. Johns Dict. cited in Best, Ev., s. 11; see also Dharmendra Nath Shastri v. Rex, 1949 All, 353 at 355: 50 Cr. L. I. 550.

9. Madapusi Srinivasa v. R., (1881) 4

Mad. 393.

^{2.} Law Commissioner's 1st Report on Indian Penal Code, S. 88; see also Dharmendra Nath Shastri v. Rex, 1949 A. 353; 50 Cr. L. J. 550; 1949

the sense in which it is commonly used in our law books Evidence, thus understood, has been well defined as,-any matter of fact, the effect, tendency, or design of which is to produce in the mind a per-uasion, affirmative or disaffirmative, of the evidence of some other matter of fact.10

According to Stephen, the word "evidence" as generally employed is ambiguous. (a) It sometimes means the words uttered and things exhibited by witnesses before a Court of Justice; (b) at other times, it means the facts proved to exist by those words or things, and regarded as the groundwork of inferences as to other facts not so proved; (c) again it is sometimes used as meaning to assert that a particular fact is relevant to the matter under enquiry.11 The word in this Act is used in the sense of the first clause. As thus used, it signifies only the instruments by means of which relevant facts are brought before the Court (viz., witnesses and documents), and by means of which the Court is convinced of these facts. 12.18

If a witness deposes to a fact of which he has no personal knowledge (possession in the instant case) or any means of knowledge about the fact deposed to by him, his testmony would not be evidence under any principle of law.14 If a witness says that accident would not have occurred had any one of the drivers moved the vehicle to his left, it is not evidence but a mere expression of opinion.15 Conclusion of witnesses including police are not legal evidence in a case.18_17 Report of medical officer is not evidence unless the medical officer is examined as a witness. 18-19

- (b) Technical terms. Evidence to explain meaning of. Evidence adduced to explain meaning of technical terms would be evidence within the meaning of this section, if it consists of statements permitted or required to be made before the Court by witnesses in relation to matters of fact under enquiry.20
- (c) Instruments of evidence. Instruments of evidence, or the media through which the evidence of facts, either disputed or required to be proved, is conveyed to the mind of a judicial tribunal have been divided into-

^{10.} Best, Ev., s. 11, citing 1 Benth. Jud. Ev., 17.

^{11.} Steph. Introd., 3, 4. See also Gobarya v. Emperor, 1930 Nag. 242; 125 I. C. 673; 26 N. L. R. 229

⁽F.B.),

12-13. Norton, Ev., 95; as to instruments of evidence, see Best, Ev., 123.

14. Dwarka Das v. D. P. Kannayya, (1969) 71 Punj. L. R. 68, 71.

^{15.} T. Subba Rao v. State, (1972) 1

An. L. T. 205 at 207.

^{16-17.} F. Hussainsab v. State of Karnataka,

¹⁹⁷⁵ Mad. L. J. (Cri.) 399 at 402. 18-19. Reshma v. Jai Singh, 1975 Hindu L. R. 22 at 28 (Punj.); Udhab Charan v. State, 1975 (39) Cut. L.

T. 303. 20. See Baldwin & Francis, Ltd. v. Patents Appeal Tribunal, (1959) 2 All E. R. 433.

- (i) witnesses;
- (ii) documents;
- (iii) real evidence; including evidence furnished by things as distinguished from persons, as well as evidence furnished by persons considered as things, e.g., in respect of such properties as belong to them in common with things.21
- (d) Oral evidence. The expression "oral evidence" has been used in Sections 59, 60, 91, Explanation 3 and Section 144, Explanation, post.
- (e) "Personal evidence". Personal evidence is that which is reported by witnesses.
- (f) Documentary evidence. The expression "documentary evidence" occurs only in the headings to Chapters V and VI.22
- (g) "Original" and "hearsay" evidence. Another division of evidence is that into "original" or "immediate", and "hearsay" or "mediate". The former is that which a witness reports himself to have seen or heard through the medium of his own senses; the latter that which is not arrived at by the personal knowledge of the witnesses.23
- (h) Real evidence. Real evidence may be (a) reported, or (b) immediate.24 Clause (a) properly falls under the first class of instruments (witnesses). Clause (b) describes that limited portion of real evidence of which the tribunal is the original percipient witness, e.g., where an offence of contempt is committed in the presence of a tribunal, it has direct real evidence of the fact.25

The demeanour of witnesses,1 the demeanour, conduct and statement of parties,2 local investigation by the Judge,3 a view by jury or assessor4 are all instances of real evidence. Clause (b) thus also includes material things other than documents produced for the inspection of the Court (called in the Draft Bill "material evidence"), e.g., the property stolen, models, weapons or other

21. Best, Ev., s. 195; Goodeve, Ev., 11. 22. Whitley Stokes, 852.

31. 24. Best, Ev., s. 197 : Goodeve, Ev., 11, 12, 14, 16.

formed by the Judge in whose presence the witnesses gave their evidence as to the degree of credit to be given to it; Woomesh v. Rash-mohini, (1893) 21 C. 279; Shunmugaroya v. Manikka, (1909) 32 M. 400 (P.G.); Imdad v. Pateshri, (1909) 32 A. 241 (P.C.).

2. Whitley Stokes, 852.
3. Giv. Pr. Code, O. XXVI, r. 9; Cr. P. Code, S. 310, Joy v. Bundhoolal, (1882) 9 C. 363; Oommut Fatima v. Bhujo, (1870) 13 W.R. 50; Harikishore v. Abdul, (1894) 21 C. 920; Lakmidas v. Bhaiji, (1911) 35 B. 317: 10 I. C. 914; 13 Bom. L. R. 313.

4. Cr. Pr. Code, 1898, S. 293, See R. v. Chutterdharee, (1866) 5 W. R. Cr. 59; Oudh Behari Narain Singh, In re, (1877) 1 C. L. R. 143; Kailash v. Ram, (1899) 26 C. 869.

^{23.} See Norton, Ev. 28, 29, Best, s. 27,

Best Ev., s. 197.
 Civ. Pr. Code, O. XVIII, r. 12;
 Cr. Pr. Code, S. 280. As to the importance of observation of demeanour, see R. v. Madhub Chunder, (1874)
21 W. R. (Cr.) 13, 14; Starkie, Ev., 818; Best, Ev., s. 21; R. v. Bertrand, 1867 L. R. 1 P. G. 520; Bombay Cotton Manufacturing Co. v. R. B. Motilal, 1915 P.C. 1: 42 I.A. 110; 39 Bom. 386; Kyi Oh v. Ma Thet Pon., 1926 P. C. 29: 94 I. C. 916: I. L. R. 4 Rang. 513; In all cases in which the evidence is conflicting it is the duty of a Court of Appeal to have great regard to the opinion

things to be produced in evidence and which are required to be transmitted to the Court of Session or High Court.⁵ This "real evidence" does not form part of the definition of "evidence" given in the Act, inasmuch as the Court is, in all cases the original percipient witness, and further, in the case of "material evidence", in so far as it is spoken to by witness,6 it falls properly under the first class of instruments. The things so produced are relevant facts to be proved by "evidence", i.e., by oral testimony of those who know of them.7 The Court may require the production of such material things for its inspection.8

- (i) Autoptic preserence. Professor Wigmore9 discards the phrase "real evidence" as misleading, and substitutes "autoptic preference", explaining that a fact is evidence autoptically when it is offered for direct perception by the senses of the tribunal.
- (j) Justification of definition. The definition has been objected to10 for incompleteness, in so far as, by its terms it does not include the whole material on which the decision of the Judge may rest. Thus in so far as a statement by a witness only is "evidence"-
 - (a) the verbal statements of parties and accused in Court by way of admission or confession or in answer to questions by the Judge,11
 - (b) a confession by an accused person affecting himself and his coaccused,12
 - (c) the real evidence abovementioned, and
 - (d) the presumptions to be drawn from the absence of producible witnesses or evidence,13

are not "evidence" according to the definition given.

The answer to this objection, however, is that this clause is an interpretation clause, and the Legislature only explains by it what it intended to denote whenever the word "evidence" is used in the Act.14 This definition must be considered together with the following definition of "proved."15 "It seems to follow, therefore, that if a relevant fact is proved and the law expressly authorises its being taken into consideration, that is, considered for a certain purpose or against persons, in a certain situation, the fact in question is 'evidence' for that purpose, or against such persons although the result has not been expressed in these words by the Legislature: and being evidence it must be used

^{5.} Cr. Pr. Code, S. 209 (c). See Whitley Stokes, 834; s. 60 Prov. (2), 65 (d), post,

^{6.} Steph., Introd., 15.

^{7.} v. Norton, Ev., 95. 8. v. s. 60, proviso (2), post.

Wigmore, Ev., s. 24. v. Thaver's Preliminary on Evidence, (1898) 263; Treatise Whitley Stokes, 852.

v. s. 165, post.

^{12.} v., s. 30, post. 13. v. s. 114 ill (g), post.

v. Ashootosh, 4 C. 483, 492 (F.B.).

Joy v. Bundhoolal, 9 C. 363; R. v. Ashootosh, 4 C. 483, 492 supra, and Bhairon Prasad v. Ma-hant Laxmi Narayan, 1924 Nag. 385; 79 I. C. 609.

in the same way as everything else that is evidence."16 Thus, an oral admission in Court and the result of a local enquiry instituted by a Munsiff is matter before the Court which may be taken into consideration17 and the confession of a prisoner affecting himself and another person, charged with the same offence, is, when duly proved, admissible as evidence against both. (See next section).18

(k) Direct and circumstantial evidence. Evidence has been further divided into direct evidence and circumstantial evidence. 19 Direct evidence is the testimony of a witness to the existence or non-existence of a fact or facts in issue. This meaning of the word "direct" must not be confounded with that in which it is used in Section 60, post, which does not exclude circumstantial evidence20 but is opposed to hearsay evidence. In the latter sense, circumstantial evidence must always be "direct", i.e., the facts from which the exist-ence of the fact in issue to be inferred must be proved by direct evidence.²¹ By circumstantial evidence is meant the testimony of a witness to other facts (relevant facts) from which the fact in issue may be inferred.22 Thus, "A is indicated for the murder of B, the apparent cause of death being a wound given with a sword. If C saw A kill B with a sword, his evidence of the fact would be direct. If, on the other hand, a short time before the murder, D saw A walking with a drawn sword towards the spot where the body was found, and after the lapse of a time long enough to allow the murder to be committed, saw him returning with the bloody sword, these circumstances are wholly independent of the evidence of C (they derive no force whatever from it) and, coupled with others of a like nature, might generate quite as strong a persuasion of guilt,"23

So, although it is generally difficult to adduce direct evidence to prove that a woman is leading an adulterous life, yet it may be proved that she has been absenting herself from her house for a number of days at a stretch and that she has been seen more than once with a total stranger to her husband's family, when no explanation is given by her for having been seen in the company of

Per Jackson, J., in R. v. Ashootesh, 4 C. 483, 492.
 Joy v. Bundheelall, 9 C. 363.
 R. v. Ashootesh, 4 C. 483, referred to in R. v. Krishna Bhat, (1885) 10 B. 519 at p. 326; R. v. Dada Ana, (1889) 15 B. 452, 459; v. s. 30, post; see also generally as to "evidence" the following sections: Ss. 5 (evidence of fact in issue and relevant facts) 59, 60 (oral), (60 must be direct), 61-100 (documenmust be direct), 61-100 (documentary), 91-100 (exclusion of oral by documentary), 114 (g) (producible but not produced), 101-166 (probut not produced), 101–166 (production and effect of), 118–166 (witnesses), 167 (improper admission and rejection of evidence), as to the meaning of "evidence to go to the jury," see Parrat v. Blunt and Cornfoot, (1847) 2 Cox C. C. 242; Jewell v. Parr. (1853) 13 C. B. 909,

^{916:} Ryder v. Wombwell, (1866) L. R. 4 Ex. 32, 38; Steward v. Young, (1870) L. R. 5 C. P. 122; R. v. Vajiram, (1892) 16 B. 414; as to verdict against evidence, R. v. Dada

Ana, supra. 19. See Willam Wills' Essay on Circumstantial Evidence, 4th Ed. (1862); A. M. Burrill's Treatise on Circumstantial Evidence, 1868, Phillip's Famous Cases of Circumstantial Evidence cumstantial tial Evidence 4th edition (1879): also a treatise on circumstantial evidence by Arthur P. Wills (1896). 20. Neel v. Juggobundhu, (1874) 12 B.

L. R. App. 18.
21. See Steph. Introd., s. 51; Best, Ev., 31, 1293, 295; Wills' Circumstantial Ev., 6th Ed., 19, 20.

^{22.} v. post, Introduction to Chap. II. 23. Best, Ev. s. 294; Nibaran v. R. (1907) 11 C. W. N. 1085.

that person at different places. These facts may lead to an irresistible conclusion that she had contracted illicit connection with that man and had been living in adultery with him.24

Where the proof rests only upon circumstantial evidence, the several pieces of testimony which have to be regarded as links in the chain of this evidence have to be considered in their cumulative effect. The completed chain of the several links of circumstantial evidence has to be scrutinised in order to see whether the only conclusion possible upon this is that the accused is guilty, or whether there is any reasonable ground for a conclusion consistent with the innocence of the accused.25 In Hanumant Govind v. State of Madhya Pradesh1 it was said "that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should, in the first instance, be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words there must be a chain so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused." This does not mean that any extravagant hypothesis would be sufficient to sustain the principle, but that the hypothesis suggested must be reasonable.2 Circumstantial evidence means a combination of facts creating a network through which there is no escape for the accused because the facts taken as a whole do not admit of any inference but of his guilt.8 It can be reasonably made the basis of an accused person's conviction if it is of such a character that it is wholly inconsistent with the innocence of the accused and is consistent only with his guilt. If the circumstances proved in the case are consistent either with the innocence of the accused or with his guilt, then the accused is entitled to the benefit of doubt.4 Where the circumstantial evidence in the case is not of the kind from which the only inference that could reasonably be drawn is that the accused is guilty, it is not possible to convict him.5

The circumstantial evidence to prove a fact should be closely scrutinised, and there should be no weak links, every weak link being a ground of reason-

^{24.} Tribat Singh v. Bimla Devi, A. I.

^{24.} Tribat Singh v. Bimla Devi, A. I. R. 1959 J. & K. 72.

25. Deonandan v. State of Bihar, 1955 Gr. L. J. 1674: A. I. R. 1955 S.C. 801: (1955) 1 Mad. L. J. (S. C.) \$1: 58 Punj. L. R. 171: (1955) 2 S. C. R. 570: 1956 All L. J. 97: 1956 All W. R. (Sup) 17: 1955 B. L. T. R. 77; (1955) 2 S. C. R. 570; In re Naina Mohamed, A. I. R. 1960 M. 218: I. L. R. 1960 M. 157: 73 L. W. 210.

1. A. I. R. 1952 S. C. \$43: 1953 Cr. L. J. 129: (1952) 2 Mad. L. J. 631: 1952 All W. R. (Sup.) 109: 1952 B. L. R. (S.C.) 366: 1962 S. C. R. 1091, 1952 S. C. J. 509: 1952 S. C. A. 623,

Govinda Reddy v. State of Mysore,
 A. I. R. 1960 S. C. 29; 1960 Cr.
 L. J. 137,

^{3.} Anant Chintaman Lagu v. State of Bombay, (1960) 2 S. C. R. 460; (1960) 2 S. C. A. 62: 1960 S. C. J. 779; 62 Bom. L. R. 371: 1960 M. L. J. (Cr.) 493: A. I. R. 1960 S. C. 500, 523.

C. 500, 523.

4. M. G. Agarwal v. State of Maharashtra, (1963) 2 S. C. R. 405: 1963 S. C. D 441: 64 Bom. L. R. 773: (1963) 1 Cr. L. J. 235: A. I. R. 1963 J. C. 200, 206; Kandia Jani v. State, 30 Cut. L. T. 478, 480: (1964) 6 O. J. D. 231. See also Bhulakiram Koiri v. State, 73 C. W. N. 467: 1970 Cr. L. J. 403 at pp. 414, 415 (relevant Supreme Court decisions referred to).

5. See Prithyl Singhii v. State of Bom-

See Prithvi Singhji v. State of Bom-bay, A. I. R. 1960 S. C. 483: 1960 Cr. L. J. 672.

able suspicion, always calling for an acquittal. But with circumstantial evidence, as with evidence of any other kind, the real test is quality and not quantity. The chain need not be long and complicated, and may consist of two or three links, only, but the links should fit in and should be strong.6

The term "presumptive" is frequently used as synonymous with "circumstantial" evidence.7 But they differ as genus and species.8

- (1) Presumptive and conclusive evidence. Circumstantial evidence is of two kinds, conclusive and presumptive: "Conclusive," when the connection between the principal and evidentiary facts-the factum probandum and factum probans-is a necessary consequence of the laws of nature; as where, if necessary, the accused shows that, at the moment of crime, he was at another place, etc., "presumptive", when the inference of the principal fact from the evidentiary fact is only probable, whatever be the degree of persuasion which it may generate.9
- (m) Exclusion of circumstantial evidence by direct evidence. As regards admissibility, direct and circumstantial evidence stand, generally speaking, on the same footing,10 and testimony, whether to the factum, probandum or the facta probantia, is equally as original and direct. It has been said that evidence of circumstantial nature can never be justifiably resorted to except where evidence of a direct and, therefore, of a superior nature is unattainable.11 But, in the present day it is not true that the best evidence must, or even may, always be given, though its non-production may be matter for comment or affect the weight of that which is produced. All admissible evidence is in general equally accepted. Thus, circumstantial evidence is no longer excluded by direct, and even in criminal cases the corpus delicti may generally be established by either species, or, indeed, by the defendant's mere admissions out of court.12

In a far-flung place where much of experience and efficiency is not expected, the lacuna of not getting the knife and clothes recovered from the accused examined by the Chemical Examiner is of no consequence in view of the overwhelming direct and circumstantial evidence (case of murder).18

(n) Value and cogency of direct and circumstantial evidence. As to the several values and cogency of direct and circumstantial evidence much has been both written and said, but both forms admit of every degree of probability. Abstractedly considered, however, the former is of superior cogency,

^{6.} Mojiya Ratna v. State, A.I.R. 1961 M. P. 10: 1960 M. P. L. J.

^{7.} See Phipson Ev., 9th Ed., p. 2.
8. Wills' Circ. Ev. 6th Ed., 22.
9. Best, Ev., s. 293.
10. Best, Ev., s. 294.
11. Wills' Circ. Ev., 6th Ed., 39, 40, 303
12. Phipson Ev., 11th Ed., 61; see also

Archibold's Criminal Pleading 21st Ed., 865; R. v. Bhagirath, 3 All. E.
R. 383; and (In re) Maya Basuva,
1950 M. 452 (1950) 1 M.L.J. 428;
1950 M. W. N. 260.

13 Akbar Shah v. State, (1965) 2 Cr.
L. J. 711: A. I. R. 1965 J. and
K. 126, 127.

in so far as it contains only one source of error, fallibility of testimony, while the latter has, in addition, fallibility of inference.14 But "when circumstances connect themselves closely with each other, when they form a large and strong body, so as to carry conviction to the minds of a jury, it may be proof of a more satisfactory sort than that which is direct. When the proof arises from the irresistible force of a number of circumstances, which we cannot conceive to be fraudulently brought together to bear upon one point, that is less fallible than, under some circumstances, direct evidence may be."15 It may be noted here that in the definition of the term "proved" in this section no distinction is drawn between circumstantial evidence and other evidence.16 It has been said, that "facts cannot lie"17 but men can. And as we only know facts through the medium of witnesses, the truth of the fact depends upon the truth of witness.18 "If men have been convicted erroneously on circumstantial evidence, so have they on direct testimony, but is that a reason for refusing to act on such testimony?"18

Circumstantial evidence is merely direct evidence indirectly applied, When the direct evidence to prove a fact is found to be unreliable, the circumstantial evidence bearing upon the fact may be looked into.20

In this connection, it may be borne in mind, as pointed out by Dr. Kenny, that the circumstantial element often plays a large part in what would pass at first sight as excellent direct evidence. Thus, a witness may depose that he saw A point a rifle at B and fire it, saw a smoke, heard the crack and saw B fall; and then, when going to him, he saw a bullet hole in his leg; but still he did not see A's bullet strike B; so, this fact (the really essential one) depends entirely on circumstantial evidence, that is, it has to be merely inferred from these other facts which he actually saw. An amusing and vivid illustration is given by Dr. Kenny in an old case under unpopular

R. v. Patch and R. v. Smith, cited

by Mofussil juries, see remarks in R. v. Elahi Bux, (1886) B. L. R. Sup., Vols. 481, 482.

20. Gulabchand v. Kudilal, 1959 Jab. L. J. 78: A. I. R. 1959 Madh. Pra. 151 (F.B.); Madhu Sudan v. Mst. Ghandrabati, A. I. R. 1917 P.C. 30, distinguished.

^{14.} Phipson, Ev., 11th Ed., 3 Norton, Ev., pp. 14, 18, et seq., 71; Phillips Famous Cases of Circumstantial Evidence, 4th Ed., Introduction; Best, Ev., s. 295; Taylor's Ev., ss. 65-69; Wills' Cire, Ev., 6th Ed., 43; see remarks of Alderson, B., in R. v. Hodges, 2 Lewin, C. C. 227. "Probatio per evidentiam rei omnibus est potention et inter omnes bus est potentior et inter omnes ejus generis major est illa, guae fit, per testis devisu," (Mascardus De peobationibus, v. 1, q. 3 n. 8). So also Menochius who displays a partiality for that circumstantial proof, which is the subject of his travelier. which is the subject of his treatise, yet says "probatio seu fides guae testibus fit, cortiris excellet" (De proesumptionibus, L. 1, q. 1): Phillips, op. cit. Burrill, op. cit.

15. Per Lord Chief Baron Macdonald in R. y. Patch and P. y. Smith sind

in Wills' Circ. Ev., 6th Ed., 46, 47, 439-52; Norton, Ev., 18, et seq: Cunningham, Ev., 16, and Surrendra v. R., (1911) 39 C. 522; see also charge of Bullen, J., in the trial of Captain Donnellan, cited and criticised in Phillips' Circ. Ev., xv.

16. Miran Baksh v. Emperor, 1931 L. 529; 133 I. C. 446.

17. Per Baron Legge in the trial of Mary Blandy, State Trial, (1752).

18. Phillips' Circ. Ev., xiv, xvii.

19. Greenleaf, Ev., 1 C. 4. As to the disregard of circumstantial evidence by Mofussil juries, see remarks in R.

game laws. A friendly jury accepted the hypothesis of the poacher's counsel that the gun fired by his client was not loaded with shot and that the peasant died of fright; and the superior court did not set aside this court's verdict, though it had full jurisdiction to do so.21 Direct and circumstantial evidence arise from the fact that, in addition to common factors between incidental and all testimonial evidence, whether circumstantial or direct, viz., that their acceptance depends upon the accuracy of the witness's original observation and the events he describes, the correctness of his memory and his veracity; in the case of circumstantial evidence, we have to depend further on the cohesion of each circumstance in the evidence with the rest of the chain of circumstances of which it forms a part and logical accuracy in adducing inferences from this chain of facts. In the oft-repeated language of Baron Alderson, "the more ingenious the juryman, the more likely is he to strain his facts to fit his theory", for every fact has two faces; though circumstances cannot lie, they can mislead.

No distrust of circumstantial evidence has been shown either by English law or by the Indian Courts, High Courts and Supreme Court.22 It is settled law that in a case, dependent on circumstantial evidence, in order to justify inference of guilt, the incriminating facts must be incompatible with the innocence of the accused or guilt of any other person, and incapable of explanation upon any other reasonable hypothesis than that of his guilt. The circumstances from which inferences are sought to be drawn against the accused must be proved beyond reasonable doubt and must be closely connected with the facts sought to be inferred from them. No link in the chain forged should be missing.

(o) Positive evidence. Sometimes the expression "Positive Evidence" is used in contradiction to circumstantial evidence, and is defined as meaning

^{21.} R. v. Payne, (1791) 4 T. R. 468.
22. Govinda Reddy v. State of Mysore,
A. I. R. 1960 S. C. 29; 1960 Cr.
L. J. 137; Pershadi v. U. P. State,
A. I. R. 1957 S.C. 211: 1957 Cr.
L. J. 328; Manak Lal v. Dr. Premchand, A. I. R. 1957 S. C. 425:
1957 S. C. R. 575: 1957 S. C. A.
719; 1957 S. C. J. 359; (1957) 1 Mad.
L. J. S.C. Cr. 254: Eradu v. State of Hyderabad, A. I. R. 1956 S. C.
316; 1956 Cr. L. J. 559; Wasim Khan v. State of U. P., 1956 S. C.
R. 191: 1956 S. C. J. 437; 1956 S. C. A. 549; I. L. R. (1956) 2
A. 127: A. I. R. 1956 S. C. 400; 1956 Cr. L. J. 590; 1956 All. L.
T. 543: 1956 All W. R. 371; 1956 21. R. v. Payne, (1791) 4 T. R. 468.

B. L. J. R. 431; (1956) 2 Mad. L. J. S. C. 9: 1956 All L. J. 457; 69 Mad L. W. 849; Deonandan v. State of Bihar, A. I. R. 1955 S.C. 801; 1955 Cr. L. J. 1647; 58 Punj. L. R. 171; (1955) 1 Mad. L. J. S.C. 31; 1955 B. L. J. R. 77; 1956 All L. J. 97; 1956 All W. R. (Sup.) 17; 1956 S. C. J. 41; 1956 S. C. A. 336; 1956 Mad. W. N. 385; Kedar Nath v. State of West Bengal, A. I. R. 1964 S.C. 660; 1964 Cr. L. J. 1679; Mangaleshwari Prasad v. State of Bihar, A. I. R. 1954 S.C. 715; of Bihar, A. I. R. 1954 S.C. 715; 1954 Cr. L. J. 1797; Narayani Am-ma v. State of Kerala, A. I. R. 1961 Kerala 250.

evidence "which goes expressly to the very point in question, and that which, if believed, proves the point without aid from inference or reasoning, as the testimony of an eye-witness to an occurrence, as distinguished from indirect or circumstantial evidence."28

(b) Primary and secondary evidence. Primary evidence is that which from its own production, shows to admit of no higher or superior source of evidence. Secondary evidence is that which from its production, implies the existence of evidence superior to itself.24 As commonly used, these terms apply to the kinds of proof that may be given of the contents of a document, irrespective of the purpose for which such contents, when proved, may be received.25 'Primary Evidence' is defined in Section 62 and 'secondary evidence' in Section 63, post. In Lucas v. Williams, Lord Esher remarked:

"Primary evidence is evidence which the law requires to be given first; secondary evidence is evidence which may be given in the absence of that better evidence, which the law requires to be given first when a proper explanation is given of the absence of that better evidence. This, however, is only approximately true, for the law, in some cases, allows the production of the primary evidence to be optional."2-5

- (q) Accused, if witness. An accused, making a false confession, is not a witness for purposes of the definition of "evidence" in this section.6
- (r) Affidavits as evidence. Affidavits are not included in the definition of "evidence" in this section. On the contrary, they are expressly excluded by Section 1 of the Act. Therefore, affidavits cannot be used as evidence under any of the provisions of this Act, though they can be used as evidence unless by consent of parties or they are specially authorised by a particular provision of law, for instance, Order XIX of the Code of Civil Procedure.7 They should not be considered if they contain large proportion of inadmissible material.8

Governor of Bengal v. Motilal, 1914
 Cal. 69 at 109; 41 Cal. 173; 20 I.C.

^{81 (}S.B.), per Jenkins, C. J.

24. Best, Ev., ss. 70, 416.

25. Stephen, Arts. 67, 74.

1. (1892) 2 Q. B. 113, 116.

2-5. See Ss. 65 and 77, post.

6. Public Prosecutor v. Kuraba Sanjee-

vamma, A. I. R. 1959 A. P. 567: (1959) 2 Andh. W. R. 326: 1959 Cr. L. J. 1279. 7. Shamsunder Rajkumar v. Bharat

Oil Mills, I. L. R. 1963 B. 436: A. I. R. 1964 B. 38: 65 Bom, L. R. 584; Dominion of India v. Rupchand, A. I. R. 1953 Nag. 169; M. Satyam v. Venkatasami, A. I. R. 1949 Mad. 689, 690; Kamakshya Prosad Dalal v. Emperor, A. I. R. 1939 Cal. 657, 658; Ms. Parekh Bros. v. Kartick Chandra Saha, A. I. R. 1968 Cal. 532, 537.

Rossage v. Rossage, (1960) 1 All E.
 R. 600; (1972) 1 Cut. W. R. 318.

The affidavit of a person not produced is not admissible in evidence.9 An affidavit required to be filed in verification of a petition under Section 398 of the Companies Act, 1956, is not an affidavit directed by court to be filed under Order XIX, C. P. C. Such an affidavit can be therefore on personal knowledge as well as on information received and believed to be true.10 Where a special power under Order XXIX, Rule 1, C. P. C. is vested in the court to decide interlecutory applications on affidavit and the power has been expressly given to it, the conditions and limitations prescribed under Order XIX, C. P. C., for the exercise of a general power will not be attached to the exercise of the special power. Either party, therefore, cannot claim or urge that it has a right to cross-examine the deponent of an affidavit.11

- 8. "Proved." The following cognate expressions occur in the Act: 'Proving', Sections 68, 104-111; 'to prove', Sections 22, 50-101; 'must prove', Section 101; 'proof', Sections 4, 101, 102, 165; 'produced in proof,' Section 77; 'given in proof,' Section 91; 'admissible in proofs', Section 82. The expression 'disproved' occurs only in Sections 3 and 4; the expression 'not to be proved,' or 'not proved' does not occur at all.12
- (a) Proof and evidence, distinction between. Whether an alleged fact is a fact in issue or a relevant fact, the Court can draw no inference from its existence till it believes it to exist; and it is obvious that the belief of the Court in the existence of a given fact ought to proceed upon grounds altogether independent of the relation of the fact to the object and nature of the proceedings in which its existence is to be determined. Evidence of a fact and proof of a fact are not synonymous terms. Proof in strictness marks merely the effect of evidence.18
- (b) Proof how effected. Proof considered, as the establishment of material facts in issue in each particular case by proper and legal means to the satisfaction of the court, is effected by-
 - (a) evidence or statements of witnesses, admissions or confessions of parties, and production of documents,14
 - (b) presumption,15

9. Niranjan Lal Ratankumar v. River Steam Navigation Co., Ltd., I. L.

R. (1964) 16 Assam 395; A. I. R. 1967 Assam 74, 77.

10. Shanti Prasad Jain v. Union of India, (1965) 68 Bom. L. R. 431,

 Kanbi Manji Khimji v. Kanbi Manji Bhai, 9 Guj. L. R. 907; A. I. R. 1968 Guj. 198, 201 distinguishing Shamsunder Rajkumar, a firm v. Bharat Oil Mills, Nagpur, A. I. R. 1964 Bom. 38: B. N. Munibasappa v. G. D. Swamigal, A. I. R. 1953 Mys. 139, 142.

Whitley Stokes, 853. Steph. Introd., 13; id., Dig., 65, Art. 58; Goodeve, Ev., 3, 4; judg-ment is to be based on facts duly proved, v. s. 165, post, burden of proof, v. ss. 101–114.

14. See ss. 3, 5, 58, 59, 60 (oral

proof), 61-100 (documentary proof): 157 (former statement); 158 (statements under ss. 32, 33); R. v. Ashootosh, (1878) 4 G. 483, 492; v. ante "Evidence".

15. Ss. 4, 79-90, 112-114, post.

- (c) judicial notice,16
- (d) inspection-which has been defined as the substitution of the eye for the ear in the reception of evidence17 as in the case of observation of the demeanour of witnesses,18 loval investigation,19 or in the inspection of the instruments used for the commission of a crime.20

The extent to which any individual material of evidence aids in the establishment of the general truth is called its probative force. This force must be sufficient to induce the Court either-

- (i) to believe in the existence of the fact sought to be proved or
- (ii) to consider its existence so probable that a prudent man ought to act upon the supposition that it exists.21 The proof must rest on evidence. The Court must not base its conclusion on mere conjectures and surmises.22 It must take all facts into consideration. To attempt to isolate a particular fact from the surrounding circumstances to discuss its logical inference is wholly out of place in judicial decisions. The judge's experience of life is undoubtedly an important factor in evaluating the evidence placed before him, but he must judge the action and reactions of the characters before him from their standard.28
- (c) Test of proof. The test is of probabilities upon which a prudent man may base his opinion.24 in other words, it is the estimate which a prudent man makes of the probabilities, having regard to what must be his duty as a result of his estimate.25 Thus, it has been held that, in this country, the proof necessary to establish a will is not an absolute or conclusive one; but such a proof as would satisfy a reasonable man.1 So, if, after examining a fair number of samples taken from different portions of a bulk, it is found that the samples are all of inferior quality, the probability that the bulk is of the same quality is so great that every prudent man would act upon the

^{16.} Ss. 56, 57, post.

Wharton, Ev., s. 345; Phipson, Ev., 5th Ed., 3; Best E., 5; v. ante; v.

Civ. Pr. Code, O. XVIII, r. 12; Cr. Pr. Code, s. 280 (v. ante); as to demeanour of witnesses and crepancies, see remarks of Lord Langdale in Johnston v. Todd, 5 Beav. 601.

v. Civil Procedure Code, O. XXVI,
 r. 9; Joy v. Bundhoolal, 9 C. 363,
 supra; remarks in Leech v. Schwedor, 43 L. J. Ch. 487; Cr. Pr. Code, S. 310 (v. ante).

20. v. s. 60, proviso 2 post; Cr. Pr. Code, s. 209 (c).

See Bhairon Prasad v. Mahant Lakshmi Narayan, 1924 Nag. 385: 79 I. C. 609 (wsere this passage has been relied upon); I. L. R. 1974 Cal. 410.

State of Orissa v. Khetra Mohan Singh, A. I. R. 1955 Orissa 126.
 State of Mysore v. Dyavegowda, A. I. R. 1962 Mys, 124: 1963 M. I.

J. (Cri.) 5. 24. Pershadi v. State, 1955 A. 448: 56 Cr. L. J. 1125.

Government of Bombay v. Sakur, 1947 Bom. 38; 228 I. G. 251; 48 Cr. L. J. 168; 48 Bom. L. R. 746 (S.B.).

^{1.} Jarat v. Bissessur, (1911) 39 C. 245.

supposition that it is of such quality, and, if that is so, the Court ought to hold that the fact that the goods are of inferior quality is proved in such a case.2

"The true question, in trials of fact, is not, whether it is possible that the testimony may be false, but whether there is sufficient probability of its truth; that is, whether the facts are shown by competent and satisfactory evidence."8 When there is sufficient evidence of a fact it is no objection to the proof of it that more evidence might have been adduced.4

(d) Proof not affected by incidence of burden of proof. The incidence of the burden of a fact means that the person on whom it lies must prove the same. But the meaning of "proved" in this section is not affected by the incidence of the burden of proof.5

It is open to an accused to say that his defence may be false but that cannot make the case true or rather such as, if accepted, would constitute an offence for which he is sought to be made liable.6

- (e) Prima facie case. A prima facie case is not the same thing as "proof" which is nothing but belief according to the conditions laid down in the Act. It is a fallacy to say that because a magistrate has found a prima facie case to issue process, therefore he believes the case to be true in the sense that the case is proved.7
- (f) "Matters before the court." The expression "matters before it" includes matters which do not fall within the definition of "evidence" in the third section. Therefore, in determining what is evidence other than "evidence" in the phraseology of the Act, the definition of "evidence" must be read with that of "proved." "It would appear, therefore, that the Legislature intentionally refrained from using the word 'evident' in this definition, but used instead the words 'matters before it.' For instance, a fact may be orally admitted in Court. The admission would not come within the definition of the word 'evidence' as given in this Act, but still it is a matter which the Court before whom the admission was made would have to take into consideration in order to determine whether the particular fact was proved or not.8"

Boisogomoff v. Nahapiet, (1902) 6
 C. W. N. 495 at p. 505; 39 Cal.

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see also Wills' Circ. Ev., 6th Ed., 7; Steph. Introd., 46; Glassford's Essay on the Principles of Evidence

4. Ramalinga v. Sadasiva, 9 M. I. A. 506, 510.

Mahommed v. Emp., 50 C. 318: 1923 Gal. 517, 519.

6. Ravishankar v. State of Gujarat, (1966) 1 Lab. L. J. 71: 1966 Cr. L. J. 429; A. I. R. 1966 Guj. 293, 300.

7. Sher Singh v. Jitendranath Sen, 1931 Cal. 607: 134 I. C. 1045; 33 Cr. L. J. 3: 36 C. W. N. 16: 54 C. L. J. 253.

Per Mitter, J., Joy v. Bundhoelal (1882) 9 C. 363; see R. v. Asnoo-tosh, 4 C. 483, 492, supra.

^{3.} Greenleaf on Ev., 5th Ed., p. 4, cited in Goodeve, Ev., 6. Probability in the words of Locke, is likeliness to be true-see Ram on Facts, Ch. VIII. As to the probabilities of a case, see Bunwaree v. Hetnarain, 7 M. I. A. 148; 4 W. R. 128; Raghunadha v. Brojo, 3 I. A. 154; 1 M. 69; Mudhoo v. Suroop, 4 M. I. A. 431 s. c., 7 W. R. 37; Lallah Jha v. Tullebmatool, 21 W. R. 436; Meer v. Imaman 1 M. I. A. 19 Meer v. Imaman, J M. I. A. 19 s.c. 5 W. R. 26; Edun v. Bechun, 11 W. R. 345; Uman v. Gandharp, 15 C. 20. 23; Best Ev., ss. 24, 100;

- (g) Local investigation. So, the result of a local investigation under the Civil Procedure Code must be taken into consideration by the Court though not "evidence" within the definition given by the Act.9 But the Judge cannot base his judgment solely on the impressions formed by him at the time of his local inspection and come to a conclusion contrary to the evidence in the case. 10
- (h) Statement of accused. The statements of the accused recorded by the committing Magistrate and the Sessions Judge¹¹ are intended in India to take the place of what in England and in America he would be free to state in his own way in the witness-box. They have to be received in evidence and treated as evidence and be duly considered at the trial.12

A statement of the accused under Section 313 (old Section 342), Cr. P. C., though not evidence as defined in this section can be used against him in aid of the prosecution case relying on that definition but it cannot be used against the accused under Section 30, post, assuming a statement at the trial can be regarded as a confession.13

- (i) Guilt-conscious conduct of the accused. In a criminal trial, suspicion or conjecture cannot take the place of legal proof. Apparently guilt-conscious conduct should be heavily weighed against an accused. When rumours are affeat connecting a man with a grave offence, a quite innocent person may behave very foolishly, quite like a guilty man. He may even attempt to fabricate evidence in order to see that he is not made to undergo the torture and, suspense of a trial.14
- (j) Evidence to be considered as a whole. The judgment must be based on facts before the court relevant and duly proved15 upon a consideration of the whole of the evidence and the probabilities of the case.16 The evidence should not be considered merely as a number of bits of evidence, but the whole of it together and the cumulative effect of it must be weighed.17 No distinction should be made between circumstantial evidence and direct evidence.18
- (k) Personal knowledge of Judge. The judgment must not be based on the personal knowledge of the Judge, or on materials which are not in evidence or have been improperly admitted.¹⁹ The knowledge and belief of a judge is

11. See Ss. 208, 209 and 342, Cr. P. Code

Hatesingh v. State of M. B., 1953
 C. 468; 1953 Cr. L. J. 1938;

M. B. L. R. 1952 Cr. 1.

13. State v. Jodo Saldhana, 1968 Cr. L. J. 992, 995 (Goa).

14. In re Marudai, A. I. R. 1960 M. 370: 1960 Cr. L. J. 1102.

15. S. 165, post.
16. See remarks of Mitter, J., in Leelanund v. Basheeroonissa, (1871) 16 W. R. 102; see notes to s. 16, post.

17. Dukharam Nath v. Commercial Credit Corporation Ltd., 1940 Oudh

35; I. L. R. 15 Luck. 191; 184 I. G. 521; 1939 O. W. N. 1114. 18. Miran Baksh v. Emperor, 1931 Lah. 529; 133 I.C. 446; 32 P. L.

19. Durga v. Ram Doyal, (1910) 38 C. 153, per Woodroffe, J.

ib. For local inspection by Judge see Raikishori v. Kumudini, (1912) 15 G. L. J. 138; 14 I. C. 377.
 Padmasari Bai v. Sabapathi, (1939) 2 M. L. J. 284: 1939 M. W. N. 723; 50 L. W. 148; see also Amrathal v. Land Acquisition Officer. 123; 50 L. W. 148; see also Amrat-lal v. Land Acquisition Officer, 1945 B. 302; 47 Bom. L. R. 95; Lalo Mahto v. Emperor, 1942 P. 150; 199 I. C. 218; 43 Cr. L. J. 537; Akhil Kishore v. Emperor, 1938 P. 185; 174 I. C. 635; 39 Cr. L. J. 442; I. L. R. (1974) Him. Pra. 509.

not evidence.20 The Judge may not, without giving evidence as a witness, import into a case his own knowledge of particular facts21 and should decide the rights of the parties litigating secundum allegata et probata according to what is averred and proved.22 But a Judge is entitled to use his general knowledge and experience, in determining the value of evidence, and to apply them to the facts in dispute.23 The Court should abstain from looking at what is not strictly evidence. In this connection may be noted the dicta of two English Judges: "In this case I have found myself, upon two different occasions where it has come before me, in that difficulty into which a Judge will always bring himself when his curiosity or some better motive disposes him to know more of a cause than judicially he ought."24 Again, "I shall decline to look at what is not regularly in evidence before the Court. The proceedings before the Commissioners are, in my opinion, no evidence of an act of bankruptcy. I purposely abstain in all these cases from looking at the proceedings for my mind is so constituted that I cannot in forming my judgment on any matters before me separate the regular from the irregular evidence."25

(1) Proof in Civil and Criminal cases. Certain provisions of the Law of Evidence are peculiar to Criminal trials, e.g., the provisions relating to confessions1 and character,2 and the character of the prosecutrix in rape case2 and others are peculiar to Civil cases, e.g., the provisions relating to admission4 22 character23 and estoppel24 but apart from these, the rules of evidence are the same in Civil and Criminal cases.25 But there is a strong and marked difference as to the effect of evidence in Civil and Criminal proceedings,1 The Court is not entitled to require from any party conclusive proof of any fact; it cannot require a standard of proof higher than that required by this Act.2 "The circumstances of the particular case" must determine whether a prudent man ought to act upon the supposition that the facts exist from which liability is to be inferred. What circumstances will amount to proof can never be a matter

20. Abdul Malick v. The Collector of Dharmapuri, (1968) 1 M. L. J. 9, 14 (of a member, Board of Revenue dealing with an appeal on the question whether a loudspeaker is nuisance or not).

21. Hurpurshad v. Sheodyal, 3 I. A. 259; Meethun v. Busheer, 11 M. I. A. 213; s. c. 7 W. R. 27; Sooraj v. Khodee, 22 W. R. 9; Kanhye v. Ram, 24 W. R. 81 (arbitrator), R. v. Ram, 24 W. R. Cr. 28 (assessor jury) v. s 294, Cr. Pr. Code, 1898; Rousseau v. Pinto, 7 W. R. 190; see note to s 21 post

190; see note to s. 21, post.
22. Eshen v. Shama, 11 M. I. A. 7; 6
W. R. P. 57; see Raindoyal v. Ajoodhia, 2 C. 1; Joytara v. Mahomed,
8 C. 975; Rangacharya v. Yagna Dikshitur, 13 M. 524; Chova v. Isa Bin, I. B. 209; Mukhoda v. Ram, 8 C. 871; Ashghar v. Hyder, 16 C. 287; Thirthasami v. Gopala, 13 M. 32; Best. Ev., ss. 78, ct seq. notes to S. 165 post.

23. Lakshmayya v. Varadaraja, (1915)

36 M. 168. See Best on Ev., s. 107, p. 176.

24. Per The Chancellor in Rich v. Jackson, note to 6 Ves 334.

25. Per Sir John Cross, Foster, 3 Deacon, 18. 1. Ss. 24, 30, post. 2. Ss. 53, 54, post. 3. S. 155 (4), post. 4-22. Ss. 18 to 20. in ex parte.

23. Ss. 52 and 55.

24. Ss. 115-117.

25. R. v. Murphy, (1837) 8 C. & P. R. v. Burdett. (1820) 4 B. & A. 95, 112. per Best, J. Leach v. Simson (1839) 5 M. and W. 309, 312, per Parke, B.; Trial of William Stone, 25 How. St. Tr. 1314; Trial of Lord Melville, 29 Ed., 764; Best, Ev., s. 94.

1. Best, Ev., s. 95.

2. Edara Venkata Rao v. Edara Venkayya, 1943 M. 38 (2); 207 I. C. 163: (1942) 2 M. L. J. 427: 55 L. W. 772. of general definition.³ But with regard to the proof required in Civil and Criminal proceedings there is this difference: that in the former a mere preponderance of probability is sufficient;⁴ and the benefit of every reasonable doubt need not necessarily go to the defendant⁵ but in the latter (owing to the serious consequences of an erroneous condemnation both to the accused and society) the persuasion of guilt must amount to 'such a moral certainty as convinces the minds of the tribunal, as reasonable men, beyond all reasonable doubt.' These principles apply also in regard to the proof necessary to set aside elections under Section 116-A of the Representation of People Act, 1951. The test in weighing the evidence in such cases is similar to the one in criminal cases.⁷

- (m) Legal proof and moral conviction. One must keep the line clear between "legal proof" and "moral conviction". But once the evidence comes before the court and stands the test of severe legal scrutiny the effect of that evidence constitutes the legal proof. Then the dividing line vanishes.8
- (n) Test—"Beyond" reasonable doubt. Strictly speaking, the test of legal proof is not the absence of reasonable doubt, though that is often a convenient way of expressing what is meant by 'proof.' The test is really the estimate which a prudent man makes of the probabilities, having regard to what must be his duty as a result of his estimate. In each case whether proof of the case for the prosecution or proof of the defence set up by the accused, it is the estimate of probabilities arrived at from this practical standpoint by a prudent man.
- (o) English and Indian law, difference between. It has been laid down in England, in particular in the decision in Rex v. Carr-Briant, that even in cases where the law presumes some matter against an accused person "unless the contrary is proved", the jury should be directed that the burden on the accused is less than that required at the hands of the prosecution in proving the case beyond a reasonable doubt, and that this burden may be discharged by evidence satisfying the jury of the probability of that which the accused is

dence (1896), Ch. IV (quantity of evidence necessary to convict).

4. Cooper v. Slade, (1858) 6 H. L. Cas. 746, 772, per Willes, J; Starkie, Ev., 818.

 Edara Venkata Rao v. Edara Venkayya, supra.

kayya, supra.

6. Per Parke, B., in R. v. Sterne, cited in Best, Ev., 76; Starkie, Ev., 817, 865; Taylor, Ev., s. 112; Mancini v. D. P. P., 1942 A. C. 1 11; Woolmington v. D. P. P., 1935 A. C. 462 Cf. Thorne v. Motor Trades Association, 1937 A. C. 797, 808; R. v. White (1865) 4 Fost &

Fin, 383: see same principle laid down in R. v. Madhub, (1874) 21 W. R. Cr., 13, 19, 20; R. v. Hedger, (1852) pp. 132, 133, per Sir Lawrence Peel, C. J. quoting and adopting Starkie, Ev., 817, 818; R. v. Sorob, (1866) 5 W. R. Cr. 28, 31; R. v. Beharee, (1865) 3 W. R. 23, 25 (prisoner not to be convicted on surmise); Bhairon Prasad v. Mahant Lakshmi Narayan Dass, 1924 Nag. 385: 79 I. C. 609.

Rulia Ram v. Chaudri Multan Singh,
 I. L. R. 1959 Punj. 2084: A. I.
 R. 1960 Punj. 45; (1973) 52 E. L.
 R. 333 (Raj.).

 Kedar v. Emperor, 1944 All. 94, 95; 212 I. C. 309.

9. (1943) 1 K. B. 607; 112 L. J. K. B. 581; 169 L. T. 175; (1943) 2 All E. R. 156.

^{3.} Starkie, Ev., 865; differences in the proof required of the same fact in different cases very often arise out of the circumstances of the case; R. v. Madhub, (1874) 21 W. R. Cr. 13, 17; see Arthur P. Wills' Treatise on the Law of Circumstantial Evidence (1896), Ch. IV (quantity of evidence necessary to convict).

called on to establish. But, in India, Section 105 of this Act and the definition of the word 'proved' in Section 3 make it impossible to adopt the principle that the burden on the accused is less than that required at the hands of the prosecution. It may well be that, in practice, the standard of proof required to bring a case within one of the exceptions is lower than the standard of proof required of the prosecution to establish its own case. But that is not so, because the standard laid down in the Act itself is lower, for because the standard, in every case, is the requirements of the prudent man, and the prudent man might well consider it his duty to act upon circumstances in the one case which he might not consider to be a justification for action in the other case. The test, either way, is the estimate of probability by the prudent man and the result on the prudent man's mind as to what his duty really is in all the circumstances of the particular case; and that should be the nature of the Judge's direction on the point; he should not say either that the accused should prove his case beyond reasonable doubt, or that the burden on him is necessarily less than the burden on the prosecution.10

Whenever, therefore, an allegation of crime is made, it is the duty of Juryto quote Lord Kenyon's advice-"if the scales of evidence hang like even, to throw into them some grains of mercy; or as it is more commonly put, to give the prisoner the benefit of any reasonable doubt-not, be it noted, of every doubt, but only of a doubt for which reasons can be given; for everything relative to human affairs and dependent on human evidence is open to some possible imaginary doubts; it is a condition of mind which exists when the jurors can't say that they feel an abiding conviction, a moral certainty of the truth of the charge; for, it is sot sufficient for the prosecutor to establish a probability, even though a strong one according to the doctrine of chances; he must establish the fact to a moral certainty, a certainty that convinces the understanding, satisfies the reason and directs the judgment. But, were the law to go further than this, and require absolute certainty, it would exclude circumstantial evidence altogether. As was said by a great Irish judge, to warrant an acquittal, the doubt must not be light or capricious, such as timidity or passion prompt or weakness or corruption readily adopts. It must be such a doubt, as, upon a calm view of the whole evidence, a rational understanding will suggest to an honest heart; the conscientious hesitations of minds that are not influenced by party, preoccupied by prejudice or subdued by fear."11

Then, a reference is made in the latest edition of Kenny to the circumstance that, in recent years, there developed certain judicial antipathy to the hallowed expression "beyond reasonable doubt" from a feeling that it tended to lead juries into too great a hesitation to convict. In fact another formula was devised, that the jury should be told that their duty was to regard evidence and make sure that it satisfies them, so that they felt sure that it was the right one.12 But this new formula was severely criticised and was withdrawn in R. v. Hepworth and Fearnley13 and the hallowed expression "beyond reasonable doubt" remains as a standard of proof in criminal cases.

The burden of proof rests upon the State to establish the guilt of the accused beyond reasonable doubt and conviction is not warranted unless this

Government of Bombay v. Sakur, 1947 Bom. 38: 228 I. C. 251.
 Dr. Kenny's Outlines of Criminal Law, 17th F.d., p, 480.

^{12.} R. v. Summeers, (1952) 1 All E.

^{13. (1955) 2} All E. R. 918

burden is sustained. The conviction cannot be sustained on the basis of conjecture, suspicion, a mere belief in the defendant's guilt, or even a strong probability of guilt.14 It is difficult to define the phrase "reasonable doubt". Various definitions of "reasonable doubt" have been given. It has been said that it is doubt which makes you hesitate as to the correctness of the conclusion which you reach. If under your oaths and upon your conscience, after you have fully investigated the evidence and compared it in all its parts, you say to yourself, "I doubt, if he is guilty", then it is reasonable doubt. It is a doubt which settles in your judgment and finds a resting place there. It must be such a doubt as in the graver transactions of life, would cause a reasonable man to hesitate and pause in passing a final judgment on the question before him. A reasonable doubt must be a doubt arising from the evidence or from the want of evidence, and cannot be an imaginary doubt or conjecture unrelated to evidence.15

It has been held that 'reasonable doubt' is a real, substantial, serious, wellfounded actual doubt arising out of the evidence and existing after consideration of all the evidence. The negative definitions are more frequent and perhaps more helpful. Hence a mere whim or a surmise or suspicion furnishes an insufficient foundation upon which to raise a reasonable doubt, and so a vague conjecture, whimsical or vague doubt, a capricious and speculative doubt, an arbitrary, imaginary, fanciful, uncertain, chimerical, trivial, indefinite or a mere possible doubt is not a reasonable doubt. Neither is a desire for more evidence of guilt, a capricious doubt or misgiving suggested by an ingenious counsel or arising from a merciful disposition or kindly feeling towards a prisoner, or from sympathy for him or his family.16 The dedication to the doctrine of "benefit of doubt" should not be allowed to reign sodden and supreme. Justice is as much due to the accuser as to the accused. The balance must be maintained. Too frequent acquittals of the guilty may tend to bring criminal law itself into contempt.17

15. Wharton's Criminal Law Evidence, 12th Ed., Vol. I, p. 31.

16. Underhill's Criminal Evidence, 5th

Ed., Chapter III, p. 13. See also Miller v. Minister of Pensions, (1947) 2 All E. R. 372, 373-374 where Denning, J., said the phrase does not mean proof beyond a shadow of doubt; Phipson, 11th Ed., p. 57; The State of Rajasthan v. Bhagwan Das, 1973 W. L. N. 330

17. Public Prosecutor v. P. M. V. Khan, 1974 Cri, L. J. 1069 at 1074; (1974) 1 An. W. R. 407: 1974 Mad. L. J. (Cri.) 325; I. L. R. (1974) A. P. 520.

^{14.} Gian Mahtaun v. State of Maharashtra, 1971 Cri. L. J. 1417 at 1422; 1971 Cri. App. R. 388 (S.C.); (1971) 2 S. C. C. 611; (1971) 2 S. C. Cri. R. 464; 1971 U. J. (S. C.) 890; 1971 S. C. D. 1042; A. I. R. 1971 S. C. 1898; State of Punjab v. Bhajan Singh, 1974 Punj. L. J. (Cri.) 399; 1974 Cri. L. R. (S.C.) (Cri.) 399: 1974 Cri. L. R. (S.C.) (Cri.) 399: 1974 Cri. L. R. (S.C.) 595: 1974 Cri. App. R. (S. C.) 254: 1974 U. J. (S.C.) 597: 1974 S. C. Cri. R. 384: (1974) 2 S. C. W. R. 563: 1975 Cri. L. J. 282: 1975 Cur. L. J. 52: (1975) 2 Cri. L. J. 36: A. I. R. 1975 S. C. 258; Shesh Narain v. State, 1971 Cri. L. J. 1364 at 1365, 1366; Male Boroni v. State Assam J. R. (1971) Assam v. State, Assam I., R. (1971) Assam 59: 1971 Cri., L., J. 1263; Dilli Mukand Singh v. State of M. P. 1971 M. P. W. R. 435: 1971 M. P. L. J. 667: 1971 Jab. L. J. 513:

¹⁹⁷¹ Gri. L. J. 1632 at 1635; Nalini Ranjan v. Republic of India, 1974 Cut. L. R. (Cr.) 318 (charge against postmaster of collecting money order amount by forging payee's signature).

The benefit of doubt to which accused can claim consideration is a reasonable doubt and not the doubt of a vacillating mind,18-19

The scope of the explanation given by the accused in criminal cases is now really settled. The oft-quoted decision of Sankey, L. C., in Woolmington v. Director of Public prosecutions20 considered and explained in Mancini v. Director of Public Prosecutions21 and Kwaku Mensah v. The King22 is apposite:

"Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject to any statutory exceptions. If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner, as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge and where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."

Therefore, this burden on the prosecution cannot be shifted on to the accused when he furnishes an explanation either under Section 313, Cr. P. C., or under the newly amended Code gives evidence on his own behalf. The value to be attached to such an explanation has been set out in the well-known case of Rex v. Abramovitch28 which arose under the corresponding English Law falling under illustration (a) to Section 114 of the Indian Evidence Act. The Court observed:

"Upon the prosecution establishing that the accused were in possession of goods recently stolen, they may in the absence of any explanation by the accused of the way in which the goods came into their possession which might reasonably be true find them guilty; but if an explanation were given which the jury think might reasonably be true, and which is consistent with the innocence although they were not convinced of its truth, the prisoners are entitled to be acquitted inasmuch as the prosecution would have failed to discharge the duty cast upon it of satisfying the jury beyond reasonable doubt of the guilt of the accused. The Jury might think that the explanation given was one which could not reason-

^{18-19.} Babu Lal v. State of Rajas han, (1977) Cri. L. J. 59 at 67 (F.B.). 20. 1935 A. C. 462 21. 1942 A. C. 1.

^{22.} A. I. R. 1946 P. C. 20: 223 I.C. 153.

^{23. (1914) 84} L. J. K. B. 396; 112 L. T. 480; 11 Cr. App. R. 45.

ably be true, attributing a reticence or an incuriosity or a guiltlessness to the accused beyond anything that could fairly be supposed.24

In other words, the explanation of the accused may be so convincing as to falsify the prosecution case in which case the accused would be entitled to an acquittal, or the explanation may be held to be so reasonably true that it will pro tanto throw reasonable doubts on the prosecution version with the result that it would not have discharged the onus of proof, imposed on it, without satis ying the Court beyond reasonable doubt of the prisoner's guilt, and, in which case, also, the accused would be entitled to an acquittal. But if the explanation given by the accused is, on the face of it, improbable, inadequate or unconvincing, or contradictory, or a manifest after-thought, no Court would come to the conclusion that that explanation may reasonably be true. But, even then the failure of the accused's explanation getting no importance attached to it would not render the prosecution case stronger, and it must affirmatively and satisfactorily establish guilt of the accused, and it will not be for the accused to establish his innocence.

(p) Evidence creating reasonable doubt-Accused entitled to acquittal. Where the evidence fails to satisfy the Court affirmatively of the existence of circumstances entitling the accused to acquittal, the accused is entitled to be acquitted, if, upon a consideration of the evidence as a whole, a reasonable doubt is created in the mind of the Court whether the accused person is or is not entitled to acquittal.25 Thus, where it is doubtful whether the witnesses have spoken the truth, the accused has a right of benefit of doubt.1 And, where divergence in prosecution evidence raises a doubt as to the extent of the guilt of the two accused persons, the benefit of doubt must go to the accused.2 But the principle, that benefit of doubt must be given to the accused, does not apply, where after considering the entire evidence, the Court is convinced beyond all reasonable doubt that the prosecution case is acceptable.3

Where each of two accused, husband and wife, had at different stages been anxious to take the blame on himself or herself and spare the other, and each indicated that he or she was justified in shooting the deceased, and there was no other evidence to fix the crime on the one or the other, it was a fit case for giving the benefit of doubt to both the accused.4

^{24.} See also R. v. Aves. (1950) 2 All E. R. 330, explaining R. v. Schama and R. v. Abramovitch; See also R. v. Garth, (1949) 1 All E. R. 773; R. v. Hepworth and Fearly, (1955) 2 All E. R. 918; State v. Sidhnath Rai, A. I. R. 1959 All. 233; 1959 Cr. L. J. 413; 1959 All. 233; 1959 Cr. L. J. 413; Sarwan Singh v. State of Punjab, 1957 S. C. J. 699; 1957 Cr. L. J. 1014; A. I. R. 1957 S. C. 637; 1957 All W. R. (Sup.) 99; 1957 M. P. C. 781; (1957) I Mad. L. J. (Cr.) 672; I. I. R. 1957 Punj. 1602; Raja Khima v. State of Saurashtra. A. I. R. 1956 S. C. 217; 1956 Cr. L. J. 421; (1956) I Mad. L. J. S. C. 135; 1956 All.

W. R. (Sup.) 60: 1957 Andh. L. T. 92.

^{25.} Parbhoo v. Emperor, A. I. R. 1941
A. 402; 43 Cr. L. J. 177 (F.B.);
State v. Sidhnath Rai, A. I. R.
1959 A. 233; 1958 A. L. J. 511.
1. Ram Balak Singh v. The State, A.
I. R. 1964 Pat. 62; (1964) 1 Cr.
L. J. 214.

^{2.} Ramkrishnaiah v. State, A. I. R. 1965 A. P. 361: (1965) 2 Andh. W. R. 151: State of Haryana v. Gurdial Singh, 1974 Crl. L. J. 1286; A. I. R. 1974 S. C. 1871.

Parbhoo v. Emperor, supra: Bharosa v. State, A. I. R. 1965 A. 117.
 Chinna Maharaya v. State, 1969 Iab. L. J. 525: 1969 M. P. L. J. 1960 Co. J. J. 1991 524: 1969 Cr. L. J. 1291.

The non-examination of a material witness throws cloubt over the prosecution case.5 However the prosecution case is not adversely affected when no prejudice is caused to accused on account of non-examination of witnesses,6 or when there is evidence of other eye-witnesses though one witness mentioned as eye-witness in the F.I.R. has not been produced; or when sufficient explanation has been given for non-examination of one of the eye-witnesses;8 or by failure to produce informer as witness when information is recorded in general diary.9 The Supreme Court10 has observed that there is no duty on the prosecution to examine witnesses who have been won over by the accused and where the public prosecutor has given a statement that the witness concerned was either relative of the accused or had been gained over by the accused and was, therefore, not likely to speak the truth, in view of this explanation, it cannot be said that the witness was deliberately withheld or unfairly kept back and as such no adverse inference could be drawn against the prosecution for not examining such witness. Same view was taken in the undernoted case¹¹ for not producing a woman eye-witness who according to prosecution was close relation of accused and had been won over.

An accused person is entitled to the benefit of doubt if his version may reasonably be true though he might have failed to establish its truth. The reason is that the onus on the accused is not as heavy as it is on the prosecution.12 .

called by prosecution).

6. Food Inspector v. Karunakaran,
1973 Ker. L. T. 595 at 600; 1973
Mad. L. J. (Cri.) 412; 1973 F. A.

7. Arjun Ghusi v. State of Orissa, (1975) 41 Cut. L. T. 517 at 518, 519; Ugrasen Sahu v The State, 1976 Cut. L. T. 667.

 In Re. Thippanna, 1971 Cri. L. J. 1640 at 1645; 1971 Mad. L. J. (Cri.) 200; (1971) 1 Mys. L. J. 473.

9. State of U. P. v. Rajju, 1971 Cri. L. J. 642 at 645; 1971 U. J. (S.C.) 237: (1971) 2 S. C. Cri. R. 238; 1971 (Cri.) A. P. R. 93 (S.C.); (1971) 3 S. C. C. 174; A. I. R. 1971 S. C. 708.

Mst. Dalbir Kaur v. State of Pun-jab. A. I. R. 1977 S. C. 472 at 485; (1977) 1 S. C. J. 54; (1977) M.L.J. (Cri.) 50; (1976) 4 S. C. C. 158; (1976) S. C. C. (Cri.)

527.

11. Somabhai v. State of Gujarat, (1976)
1 S. C. J. 157.

12. Ram Krushna v. State, (1967) 33
Cut. L. T. 1088, 1091; Sukhdev v.
State. 1970 All Cri. R. 482; Gario
Singh v. State of Punjab, 1972 Cri.
App. R. 311: (1972) 3 Un. N. P.
1: (1972) 3 S. C. C. 418: 1972 S.
C. G. (Cri.) 568; (1972) 3 S.C. R.
978: 1972 Cri. L. J. 1286; A. J. R.
1973 S. C. 460; 1972 S. C. D. 837.

^{5.} Narain v. State of Punjab, 1959 Narain v. State of Punjab, 1959 S. C. J. 447: 1959 A. W. R. (H.C.) 292: 1959 Cr. L. J. 537: 1959 M. L. J. (Cr.) 285: 61 P. L. R. 509; A. I. R. 1959 S. C. 484; Sri Krishan Rathi v. Mondal Bros., A. I. R. 1967 Cal. 75; State Government of Manipur v. K. G. Sharma, 1968 Cr. L. J. 1390 (material witness, if ill, should have been examined on commission); been examined on commission); Sharif v. State, 1972 All. Cri. Reports 381 (All.); Ishwar Behera v. State, I. L. R. 1975 Cut. 1423: (1975) 41 Cut. L. J. 904; 1975 Cut. L. R. (Cri.) 295: 1976 Cri. L. J. 611 at 614 (Advers: inference can be drawn against prosecution on account of withholding best evidence); Dhaneswer v. State, 1978 Cri. L. J. 1430 at 1424 (keeping away evidence of independent witnesses in a case of free fight is ordinarily unpardonable); Sarwan Singh v. State of Punjab, (1976) 4 S. C. C. 369: 1976 Cri. L. R. (S.C.) 362: A. I. R. 1976 S.C. 2304 at 2311, 2312 (but omission to examine any and every witness even on minor points is of no consequence) Om Prakash v. State of H. P., 1974 Cri. L. J. 556 at 564; Rama Swami v. Mutthu and others, 1976 L. W. (Cri.) 110 (witnesses essential to unfolding of narrative on which prosecution case is based must be

Defective investigation by itself is not a ground for throwing out the prosecution case and giving benefit of doubt to the accused.13

In a case resting on circumstantial evidence, there should be no missing link which creates a reasonable doubt about the charge being brought home to the accused.14

In a prosecution for selling adulterated milk, as there was gross delay in filing the complaint which was not explained, the benefit of doubt given to the accused by the lower court was not interfered with by the High Court in appeal.15

If a Food Inspector who has transgressed Section 7 of the Prevention of Food Adulteration Act, 1954 and Rule 14 of the Prevention of Food Adulteration Rules, 1955, fails to examine a witness and that witness gives evidence for the defence, the benefit of doubt arising from the defence must go to the accused.16

Where the accused was charged and convicted, inter alia, under Section 379, I.P.C., for committing theft of a silver waist-cord from the possession of a child and the accused soon after surrendered himself to the police, and no waist-cord was recovered in pursuance of any statement made by the accused, he was given the benefit of doubt.17

If the dying declaration cannot be relied upon and the investigation of the Police was inadequate and purposeless so that the evidence produced did not establish the charges framed against the accused, he would be entitled to the benefit of reasonable doubt.18

If out of several accused persons some are acquitted by being given the benefit of doubt as their names were not in the First Information Report, this will not be a ground for acquitting others whose names were mentioned in that Report which furnished valuable corroboration to the evidence of the complainant and the witnesses.19 There is no rule of law that if the Court acquits certain accused on the evidence of a witness finding it to be open to some doubt with regard to these for definite reasons, any other accused against whom there is absolute certainty about his complicity in the crime based on the

State v. Ajati Padhan, (1966) 32
 Cut. L. T. 494, 499.
 Karam Singh v. State, I. L. R. 1967
 Cut. 883; 1969 Cr. L. J. 301; A. I.R. 1969 Orissa 23, 25.

^{15.} Public Prosecutor v. P. Venkateswara Rao, 1969 Cr. L. J. 1278 (Andh. Pra.) see the Prevention of Food Adulteration Act, 1954, section 2 (xiii).

^{16.} B. A. sawant v. State, I. L. R. 1968 Bom. 1305; 70 Bom. L. R.

^{1344:} A. I. R. 1969 Bom, 353, 359.

17. Chinnapaiyan, In re, 1969 M. L. W. (Cr.) 29; (1969) 1 M. L. J. 511: 1969 M. L. J. (Cr.) 385.

18. Priyalal Barman v. State, 1970 Cr. L. J. 1599; A. I. R. 1970 Assam 137, 141.

19. Jagdish Prasad v. State, I. L. R. 1969 Bom, 1191; 71 Bom, L. R. 536: 1969 Mah, L. J. 433; 1970 Cr. L. J. 660; A. I. R. 1970 Bom, 166, 169.

remaining credible part of the evidence of that witness, should also be acquitted.20

In an election petition a corrupt practice may be proved only by evidence beyond reasonable doubt. But in giving the benefit of doubt, the court in reaching a judicial conclusion should not vacillate.21

An accused person is entitled to the benefit of reasonable doubt in the matter of sentence as in the matter of conviction.22

If some part of the evidence leads to a conclusion that a man is guilty and if another part of the evidence in the same case indicates that the man may not be guilty, or if two possible views of a conflicting nature can be spelt out from the entire evidence, the accused gets the benefit of doubt.23

When, after considering the entire evidence and the probabilities of the case, it cannot be said that the prosecution has proved, beyond all reasonable doubt, the charge against the accused, he is entitled to the benefit of doubt and must be acquitted.24

When there is no evidence that a person either took away a married woman or enticed her, the case is not free from doubt and the person should be acquitted.25

Where Section 34, I.P.C., is not attracted to the case of an accused as far as hurt caused by him is concerned, he is entitled to the benefit of doubt and to acquittal of the offence under Section 324 read with Section 34, I. P. C.1

In the face of admission and confession by the accused and other evidence, there could be no question of raising any reasonable doubt against the prosecution case so as to entitle the accused to the benefit of doubt.2

If the prosecution fails to discharge its onus to show that the Khesari dal kept in the shop of the accused was for human consumption, the accused must get the benefit of doubt.3

 Sat Kumar v. State of Haryana, 1974 U. J. (S.C.) 92: 1974 Cri. L. J. 345 at 348: 1974 S. C. Cri. R. 126: (1974) 3 S. C. C. 643: 1974 S. C. C. (Cri.) 173: 1974 Cri. App. R. 66 (S.C.): 1974 Cri. L. R. (S. C.) 18: A. I. R. 1974 S. C.

294.
21. D. P. Mishra v. Kamal Narayan,
(1970) 2 S. C. J. 639: 1970 Jab.
L. J. 685: 1970 M. P. L. J. 872:
A. I. R. 1970 S.C. 1477, 1482; Abdul Husain v. Shamsul Huda, A. I. R. 1975 S.C. 1612.

22. Vaijanath Hanumanth v. State, 1970 Cr. L. J. 91 (Goa); Mi Shevi Yi v. Emperor, A. I. R. 1924 Rang, 179; Gorakh v. The Crown, (1939) 40 Punj. L. R. 542. 23. Bharat Commerce and Industries

Ltd. v. Surendra Nath; A. I. R.

1966 Cal. 388, 392,

24. In re Madivalappa, (1965) 1 Mys. L. J. 476: 1966 Cr. L. J. 672; A. I. R. 1966 Mys. 142, 147.

Gurdial Singh v. State, (1965) 67
 Punj. L. R. 628, 630.
 Sajjan Singh v. State, 67 Punj. L.

R. 1204; 1965 Gur. L. J. 730: 1966

Cr. L. J. 361, 364.

2. Madan Lal v. The State of Punjab, 1967 S. C. D. 1036: (1967) 2 S. C. W. R. 587; 1967 A. W. R. (H.C.) 817; 69 Punj. L. R. 846; 1967 Cr. L. J. 1401; A. I. R. 1967 S. C. 1590, 1592 and 1593.

3. Bhagwandas Khandelwal v. State, (1967) 33 Cut. L. T. 830, 831 (see the Provention of Food Adulteration Act, 1954, Section

16 (1) (a).

If two views are possible in a criminal case, the one favourable to the accused should be accepted.4

Where there is a reasonable doubt regarding the nature of the conditions in an import licence for the contravention of which the accused is being prosecuted, the benefit of that doubt must go to the accused.5

In a prosecution for rash and negligent driving (Section 279, I. P. C.) a person cited as a witness for the prosecution was examined for the defence. The case for the prosecution rested principally on one witness. In these circumstances, the accused was entitled to the benefit of doubt.6

In the case of an offence under Section 494, I. P. C., unless there is reliable evidence that the second marriage of the accused, a Hindu, was solemnised according to Hindu rites, the accused is entitled to the benefit of doubt.7

If, on considering the entire evidence and the probabilities of the case it cannot be said that the prosecution has proved, beyond all reasonable doubt, the charge against the accused, he is entitled to the benefit of doubt and must be acquitted.8 A proprietor of medical store and a Government servant were charged with conspiracy to defraud Government by fabricating false cash memos for medicines and obtaining reimbursement of money from Govern-ment. Proprietor admitted that he had fabricated the cash memos, but purpose of this fabrication could not be established beyond reasonable doubt. Benefit of doubt was given in this case. In cases of conspiracy better evidence

embellishments in the prosecution story and the task of sitting the residue of truth difficult); Jose Luis v. State, 1971 Cri. L. J. 312 at 313, 316, 317; A. I. R. 1971 Goa 11 (Injuries on accused not explained, eye witnesses not summoned during inquest, and their statements re-corded late); Hayath v. State of Mysore, (1972) Mad. L. J. (Cri.) 177 (Mys.) (Facts proved capable of two constructions one favourable to the accused; Baghel Singh v. State, (1975) W. L. N. 742 (Statements of key witnesses of prosecution being untrustworthy, testimony of corro borating witnesses does not improve prosecution case); 1975 Cut. L. R. 171: (According to prosecution two blows were given on the head of deceased by back side of axe, but the medical evidence was that injuries were not caused by axe but by lathi blows, and the likelihood was that lathi blows might have been given by the accused, the accused said to have given blows by back side of axe given benefit of doubt);

Titir Dusadh v. State of Bihar, 1966
 Cr. L. J. 1474: A. I. R. 1966 Pat, 453, 458; Himat Singh v. State of Gujarat, 1962 (2) Cr. L. J. 415.

 In re K. T. Kosalram, 1968 Cr. L. J. 329; A. I. R. 1968 Mad. 113, 116

Chelliah Nadar v. State, 1970 M. L. W. (Cr.) 130 (2).
 Ram Singh v. R. Susila Bai, (1970) 2 Mys. L. J. 138: 1970 M. L. J. (Cr.) 224: 1970 Cr. L. J. 1116: A. I. R. 1970 Mys. 201, 203.

^{8.} In re Madivalappa, (1965) 1 Mys. L. J. 476: 1966 Cr. L. J. 672; A. I. R. 1966 Mys. 142, 147; State of U.P. v. Hari Prasad, 1974 Cri. L. J. 1274 at 1277, 1279; A. I. R. 1974 S.C. 1740 (occurrence on dark night. Existence of lantern doubtful and that was said to be the only source of light) Mool Chand v. State, 1971 All. Cri. R. 179 (article recovered from accused was not sealed at the time of recovery but subsequently Kesavan v. State subsequently Kesavan v. State of Kerala, I. L. R. (1974) 1 Ker. 507: 1974 Mad. L. J. (Cri.) 471 (admixture of good deal of suspicious elements and

than acts and statements of co-conspirators in pursuance of the conspiracy is hardly ever available.9

(q) Presumption of innocence. It is often said that "it is a maxim of English law that it is better that ten guilty men should escape than that one innocent man should suffer."10 This maxim is often misunderstood. It means nothing more than this that the greatest possible care should be taken by the Court in convicting an accused. The presumption is that he is innocent till the contrary is clearly established. The burden of proof that the accused is guilty is always on the prosecution. If there is an element of reasonable doubt as to the guilt of the accused, the benefit of that doubt must go to him. The maxim merely emphasises these principles in a striking fashion. It does not mean that even an imaginary or unreal and improbable doubt is enough for holding the accused not guilty, if the evidence, on the whole, points to the only conclusion on which a prudent man can act, that the accused is guilty.11 "It is the business of the prosecution to bring home guilt of the accused to the satisfaction of the minds of the jury; but the doubt to the benefit of which the accused is entitled must be such as rational thinking, sensible men may fairly and reasonably, entertain, not the doubts of a vacillating mind that has not the moral courage to decide but shelters itself in a vain and idle scepticism. There must be doubt which men may honestly and conscientiously entertain,12 Failure of doctor to send dead bodies found in a decomposed state to an anatomy expert cannot be a ground for drawing an inference adverse to the accused.18 When the prosecution examines witnesses, it is presumed that it has absolute faith in such witnesses. If later on the witnesses do not support the prosecution or say something favourable to the defence, responsibility cannot be shirked by the prosecution. Unless the evidence given by a prosecution witness can be explained in a manner considered reasonable by the Court, the evidence given by such a witness would cause a serious dent in the prosecution story, leading to an inference favourable to the defence. The accused will get the benefit and there can be no getting away by saying that the prosecution witness was an accomplice or an associate of the accused to the extent he gave that statement.14 Goods having been stolen from a godown from back door, godown keeper cannot be said to be necessarily involved, where front doors were intact.15

S.C. 898.

10. Per Holroyd, J. in R. v. Hobson, (1823). 1 Lewin C. C. 261: see also Best. Fiv., s. 49, 440; Muhammad Yar v. Emperor, (1922) 25 Cr. L. J. 939; In re Tarit Kanti, 45 Cal. 169; 45 I. C. 338: A. I. R. 1918 C. 988.

11. Pershadi v. The State, 1955 All. 443 at p. 461: 56 Cr. L. J. 1125.

12. R. v. Gastor, Vol. II, 816, per Cockburn, C. J.; "If", said L. C. Baron Pollock to the jury in R. v. Manning and Wife, 30 cc. Sess, Pap. 654 1849 cited in Wills Circ. Ev.,

6th Ed., 319, "the conclusion to which you are conducted be that there is that degree of certainty in the case that you would act upon it in your own grave and important concerns, that is the degree of cer-tainty which the law requires, and tainty which the law requires, and which will justify you in returning a verdict of guilty." See also the other cases cited in Wills' ib., and R. v. Madhub, (1874) 21 W. R. Cr. 13, 20; R. v. Gokool, 25 W. R. Cr. 36 (1876); Weston v. Peary Mohan Dass, (1913) 40 C. 898.

13. State of Punjab v. Bhajan Singh, 1975 Cri. L. J. 282 at 284; A. I. R. 1975 S. C. 258.

14. O. P. Kumar v. State of H. P., 1974 Cri. L. J. 556 at 564; (1972) 2 Sim. L. J. (H.P.) 413.

15. K. Bahadur v. P. Gorwara, 1973 B. L. J. R. 284 at 297; 1972 Pat. L. J. R. 217.

^{9.} Bhagwan Das Keshwani v. State of Bhagwan Das Keshwani v, State of Rajasthan, 1974 Cri. L. J. 751 at 753: 1974 U. J. (S.C.) 356; 1974 S. C. D. 759; (1974) 4 S. C. C. 611: 1974 Punj. L. J. (Cri.) 266: 1974 Cri. L. R. (S.C.) 402: 1974 S. C. Cri. R. 186; 1974 Serv. L. C. 449; 1974 W. L. N. 532: 1974 S. C. C. (Gri.) 647; 1974 Cri. App. R. (S.C.) 188; A. I. R. 1974 S.C. 898. S.C. 898,

It cannot be stated as a universal rule that whenever injuries are found on the person of accused persons, a presumption is to be necessarily raised that the accused persons had caused injuries in exercise of the right of private defence. The defence has to further establish that the injuries so caused the members of the accused persons probabilise the version of the right of private defence.16-17 When death is caused by a weapon in a fit of epilepsy, the accused can get benefit of general exception under Section 84 of Penal Code provided he discharges the onus.18

(r) Adherence to formalities. The same principle which requires a greater degree of proof demands a strict adherence to the formalities prescribed by the law of procedure. For "in a criminal proceeding the question is not alone whether substantial justice has been done, but whether justice has been done according to law. All proceedings in poenam are, it need scarcely be observed, strictssimi juris." Criminal proceedings are bad unless they are conducted in the manner prescribed by law, and if they are substantially bad, the defect will not be cured by any waiver or consent of the prisoner.20 Sir Elijah Impey in his charge to the jury in Nuncomar's case said :

"You will consider on which side the weight of evidence lies, always remembering that, in criminal, and more specially in capital, cases you must not weigh the evidence in golden scales; there ought to be a great difference of weight in the opposite scale before, you find the prisoner guilty. In cases of property, the stake on each side is equal and the least preponderance of evidence ought to turn the scale; but in a capital case, as there can be nothing of equal value to life, you should be thoroughly convinced that there does not remain a possibility of innocence before you give a verdict against the prisoner."21

(s) Standard of proof in civil cases. The standard of proof is the same in all civil cases as is apparent from the definitions of the words, 'proved', 'disproved' and 'not proved' in this section. The Act makes no difference between cases in which charges of a fraudulent or criminal character are made and cases in which such charges are not made. But this is not to say that the court will not while striking the balance of probability keep in mind the presumption of innocence or the nature of the crime or fraud suggested. It is wrong

Ram Swarup v. State, 1972 Raj, L. W. 325; 1972 W. L. N. 507 at 515.
 Satwant Singh v. State of Punjab, 1975 Cri. L. J. 1605 (Punj.).
 Per Cockburn, C. J., in Martin v. Mackonochie, L. R. (1878) 3 Q. B. D. 730; 775; see R. v. Kola, (1881) 8 C. 214; R. v. Bhista, (1876) 1 B. 308 (F.B.); Jetha v. Ram, (1892) 16 B. 689; R. v. Bholanath, (1876) 2 C. 23-27; 25 W. R. Cr. 57; but see also Ss. 529-538, Cr. Pr. Code.

^{20.} R. v. Bholanath. (1876) 2 C. 23; R. v. Allen, (1880) 6 C. 83; Hossein v. R., 6 C. 96, 99; Pulukuri Kottaya v. Emperor, 1947 P. C. 67; 74 I. A. 65; I. L. R. 1948 Mad. 1; see also notes to Ss. 5, 121,

post. 21. The story of Nuncomar and the Impeachment of Sir Elijah Impey, by Sir James Fitzjames Stephen, Vol. 1, p. 168. See also Lord Cowper's speech on the Bishop of Rochester Trial, Phillip's Circ. Ev., xxvii.

to insist that such charges must be proved clearly and beyond doubt.22 The fact that a party is alleged to have taken bribe in a civil case does not convert it into a criminal case and the ordinary rules applicable to civil cases apply. Thus, where in a civil case fraud is to be inferred from circumstantial evidence, the criterion is not that applicable to circumstantial evidence in criminal cases.28 But contrary view has been taken in the following cases where it has been held that fraud like any charge of criminal offence whether made in civil or criminal letigation must be established beyond reasonable doubt.24-25

When the conduct of the parties subsequent to the partition shows that the arrangement effected under the guidance of the Panch was mutually accepted and acquiesced in, the absence of defendant's signature on the memorandum of partition will not invalidate the partition effected by the Panch.1 Allegation that polling agent of respondent, successful candidate, hired or procured trucks on behalf of respondent was not believed because such authority could be inferred only in the case of a general agent entrusted with the duty of doing all the election work for a candidate and not in the case of a polling agent.2 Burden is on appellant to prove that poster containing allegations against the character of appellant, a candidate at election, was distributed by respondent, successful candidate. One witness from each village for each separate meeting held could not be held to be reliable enough to discharge the burden of proof.3 The very fact that the only staircase leading upto the terrace is in the portion of the appellants would clearly show that the room on the terrace would be prima facie in the exclusive possession of the appellants, even though there was no wall on the terrace separating the two portions specially when there is nothing to show that the apparent is not the real state of affairs.4 When no rule could be shown that Government order could not be issued without being entered in a register, mere fact, therefore that the register did not contain an entry regarding the orders did not conclusively suggest that the Government did not issue such orders.5 Mere fact that the school was successively having a non-christian as Headmaster does not lead to the inference that it was not established and administered by the Christians.6 For establishment of the institute it is not necessary that the school must be constructed by the minority community. Even if a school previously run by some other organization is taken over or transferred to the Church and Church reorganises and manages the school to cater to and in conformity with the ideals of the Roman

^{22.} Gulabchand v, Kudilal, (1966) 3
S. C. R. 623; (1967) 1 S. C. A.
177; 1967 S. C. D. 75; (1967) 1
S. C. J. 580; (1966) 2 S. C. W.
R. 296; 1966 A. W. R. (H.C.) 765
(2); 1966 Jab. L. J. 1121; 1966
M. P. L. J. 1008; 1967 M. L. J.
(Cr.) 315; 1966 Mah. L. J. 982;
A. I. R. 1966 S.C. 1734, 1737 and
1738 overruling Weston v. Peary
Mohan Dass, (1913) I. L. R. 40
Cal. 898, at p. 916 (per Woodroff2, J.) and Raja Singh v. Chaichoo Singh, A. I. R. 1940 Pat. 201,
at p. 203.

^{23.} Gulabchand v. Kudilal, supra, over-ruling Raja Singh v. Chaichoo Singh, A. I. R. 1940 Pat. 201 at p. 203, per Meredith, J. 24-25. Kishandas v. Shrawan Kumar, 1976 Jab. L. J. 554 at 558: 1975 M. P.

L. J. 556; Sri Krishna v. Kurushetra University, A. I. R. 1976
 S.C. 376 at 381; (1976) 1 S. C. C. 311.

Munna Lal v. Suraj Bhan. A. I. R. 1975 S. G. 1119 at 1120: (1975) 1 S. C. G. 556: 1975 U. J. (S.C.) 287: (1975) 1 S. C. W. R. 691.
 Nihal Singh v. Rao Birendra Singh, (1970) 3 S. C. C. 239: 45 P. L. R. 207: 1970 U. J. S. C. 753.
 Nihal Singh v. Rao Birendra Singh, Supra

Supra.

4. Shyam Lal Sen v. State, 1972 Cri.
L. J. 942 at 944 (Cal.).

5. G. S. Baroca v. State of J. and K.,
1975 Serv. L. C. 535: 1975 Lab. I.

C. 774 at 780 (J. & K.).
6. A. M. Patroni v. Asstt. Educational Officer, A. I. R. 1974 Ker. 197 at 200.

Catholics it can be safely concluded that the school has been established by the Roman Catholics.7 When ceremony did not require presence of a priest, but there is evidence that he volunteered himself as a priest though uninvited, inference against validity of ceremony cannot be drawn.8 Person asserting a dedication to be waqf must prove initially that it was made by a Muslim.9 It cannot be laid down as a general rule that wherever a defendant chooses to deny his signatures, the plaintiff must examine a hand-writing expert to prove his case. Nor is the Court bound to accept the evidence of a hand-writing expert produced by the defendant as true. The Court has to apply its own mind to the evidence of the expert and it is open to it either to believe it or to disbelieve it.10

(t) Standard of proof varying with enormity of crime. If after everything that can legitimately be considered has been given its due weight, room still exists for taking the view that, however strong the suspicion raised against the accused, every resonable possibility of innocence has not been excluded, he is entitled to an acquittal. ii Even as between Criminal cases a distinction has been declared to exist. Thus "the fouler the crime is, the clearer and plainer ought the proof of it to be."12 "As the crime is enormous, and dreadfully enormous, indeed it is, so the proof ought to be clear."12 "But the more atrocious, the more flagrant the crime is, the more clearly and satisfactorily you will expect that it should be made out to you."14 "The greater the crime, the stronger is the proof required for the purpose of conviction."15

These and the like dicta, however, in so far as they may be said to imply that the rules of evidence may be modified according to the enormity of the crime, or the weightiness of the consequences which attach to conviction (for if they may be made more stringent in one direction, it is said they may be relaxed in another) have been severely criticised.16 To quote the language of L. C. J. Dallas in the earlier portion of a passage of which the latter part is the effect of the dicta already cited.

"Nothing will depend upon the comparative magnitude of the offence: for be it great or small, every man is entitled to have the charge against him clearly and satisfactorily proved."17

In Sarwan Singh v. State of Punjab,18 the Supreme Court observed that it is no doubt a matter of regret that a foul cold-blooded and cruel murder should go unpunished, and, considered as a whole, the prosecution story may

 A. M. Patroni v. Asstt. Educational Officer. A. I. R. 1974 Ker. 197 at 200, 201.

Sankara Warrier v. Sree Dovi, 1973
 Ker. L. R. 228; 1973 Ker. L. J. 332; 1973 Ker. L. T. 963; A. I. R. 1973 Ker. 250 at 252.

9. M. S. Waqf Board v. Kazi Mohideen, A. I. R. 1974 Mad, 225 at

10. Panchu Lal v. Ganeshi Lal Maheshwari, 1972 W. L. N. 658; 1973 Raj. L. W. 182; A. I. R. 1973 Raj. 12 at 13 dissented from Bhagwan Din v. Gouri Shankar, A. 1. R. 1957 All. 119; 1956 All L. J.

42. H. T. Huntley v. Emperor, 1944 F. C. 66; I. L. R. 23 P. 517; 214 I. C. 199.

12. Trial of Lord Cornwallis, 7 State

Trials 149.

Trial of R. C. Crossfield, 26 State

Trials 218. Trial of Mary Blandy, 18 State Trials 1186.

15. R. v. Hobson, per Holroyd, J. (1823) 1 Lewin's Crown Gases, 261. See also R. v. Ings. (1820) 33 St. Tr. 957 at 1135, and Madeleine Sm th case cited in Wills Circ. Ev., 6th Ed., 319—322.

16. Wills' Circ. Ev., 6th Ed., 319 322.

17. R. v. Ings. 33 St. Tr. 957 at 1135.

17. R. v. Ings, 33 St. Tr. 957 at 1155.

18. 1957 S. C. J. 699t. A. I. R. 1957 S. C. 637: 1957 All W. R. (Sup.)

99: 1957 M. P. C. 781: (1957) 1 Mad. L. J. (Cr.) 672: I. L. R. 1957 Punj. 1602; See also Braj Bandhu Naik v. State, 41 Cut. L. T. 496: I. L. R. (1975) Cut. 450; 1975 Cri. F. J. 1933 at 1937.

be true' yet between 'may be true' and 'must be true' there is inevitably a long distance to travel, and the whole of this distance must be covered by legal, reliable and unimpeachable evidence."

(u) Corpus delicti, proof of. Every criminal charge involves two things: first, that a crime has been committed; and secondly, that the accused is the author of it. If a criminal fact is ascertained—an actual corpus delicti established—presumptive proof is admissible to fix the criminal. A restriction has been said to exist against the use of circumstantial evidence in the case of the well-known rule that the corpus delicti (that is, the fact that a crime has been committed) should not in general be inferred from other facts, but should be proved independently. But it is not necessary (and indeed in the case of some crimes it would be impossible) to prove the corpus delicti by direct and positive evidence. If the circumstances are such as to make it morally certain that a crime has been committed, the inference that it was committed, is as safe as any other inference. More accurately stated, the rule is that no person shall be required to answer or be involved in the consequences of guilt without satisfactory proof of the corpus delicti either by direct evidence or by cogent and irresistible grounds of presumption. 21

The corpus delicti of a crime is the body or the substance of the crime charged. it involves two elements:—

- (1) injury to a specific person, property or right, or a violation of a statute; and
- (2) criminal agency of someone in producing that injury or violation.²²

Corpus delicti, which is the body of the substance of the crime normally contains two elements:

- (a) the end result of an act, such as, in homicide a death; and
- (b) the fact, that the end result so produced by a criminal act, such as in a homicide case, that death was caused by shooting.

22. Wharton's Criminal Evidence, 12th Ed., p. 48.

R. v. Ahmad Ally, (1865)
 R. Cr. 25, 29; R. v. Ram Ruchea, (1865)
 W. R. Cr. 29.

^{20.} See Phipson, Ev., 9th Ed., 53.
21. Steph. Introd., 66: Wills' Circ. Ev., 6th Ed., 323-411: Arthur Wills' Circ. Ev., (1896), Part V (Proof of the corpus delicti and cases there cited): Norton, Ev., 74; Cunningham, Ev., 17; Best. Ev., s. 441, et seq. Powell, Ev., 72. See Evans v. Evans, (1790) 1 Hagg. Con 35: 166 E. R. 968 (the Courts may act upon presumptions as well in criminals as in civil cases); R.v. Burdett's case 4 B. & Ald. 95. So in cases of adultery it is not necessary to prove the fact by direct evi-

dence; Loveden v. Loveden (1810) 2 Hagg., Con. 1; Williams v. Williams (1798) 1 Hag. Con. 299: 161 E. R. 550 followed in Allen v. Allen (1894) L.R.P.D. 248, 252, even in a criminal case; R. v. Madhub, (1874) 21 W.R. Cr. 13, 16, 17, See provisions of Cr. Pr. Code, S. 174; also Bengal Reg. XX of 1817, S. 14 and generally as to the corpus delicti; R. v. Petta, (1885) 4 W. R. Cr. 19; R. v. Ram Ruchea (1865) ib. 29; R. v. Pooroosullah, (1867) 7 W. R. Cr. 14: R. v. Budderuddeen, (1869) 11 W, R. Cr. 20.

The corpus delicti must be proved beyond reasonable doubt. The corpus delicti must generally be proved by circumstantial evidence as long as such evidence measures up to the standards laid down by the courts.

Homicide cases require special treatment. It is said that, in the Common Law, real death must be proved by direct evidence. Such proof is often difficult to produce, and, in the absence of statute, the weight of an authority supports the proposition that the fact of death may be proved by circumstantial evidence. Thus, where the body has been destroyed or thrown overboard and not recovered, circumstantial evidence may be received. If direct evidence exists, however, it must be produced. The criminal agency may always be proved by circumstantial evidence, where that is the best obtainable.

But, in every case of homicide, if a body or its remains are found, they must be identified as those of the victim, and, in this connection, evidence of scars, birth-marks, moles, tattooes, colour of hair, weight and measurements and condition of teeth, is always admissible.

Corpus delicti is not established by a mere showing of the absence or disappearance of the alleged victim.23

In law, conviction for the offence of murder, does not depend necessarily upon corpus delicti being found. There must, however, be reliable evidence, direct or circumstantial of the commission of the murder, though the corpus delicti is not traceable.24

(v) Proof in quasi-criminal cases. "... a fine constitutes a debt due to the Crown recoverable by proceedings in the High Court."25 In prosecutions launched for the recovery of taxes, tithes and other similar amounts due to the State, or public bodies, the standard of proof required of the prosecution is not so rigid and rigorous as in the case of an offence under the Indian Penal Code or other enactment of a similar kind.

The standard of proof in establishing charges of corrupt practice in election matters is as that for criminal offence.1

(w) Prima facie proof in such cases. "Prima facie proof", as distinguished from "proof beyond reasonable doubt," is sufficient to shift the onus to the assessee or accused.2

A.I.R. 1949 M. 116: I.L.R. 1949 M. 357: (1948) 2 M.L.J. 93: See

also cases cited therein.

^{23.} Underhill: Criminal Evidence, 5th Ed., p. 46.

Ramchandra v. U. P. State, A.I.R. 1957 S.C. 381: 1957 Cr. L. J. 559: I.L.R. 1974 Him. Pra. 509. Halsbury's Laws of England,

Halsbury's Laws of England, Simonds (Third Edition), Vol. 33,

Simonds (Third Edition), Vol. 33, p. 291, para, 513.

1. C. Subba Rao v. R. Brahmananda Reddy, (1966) 2 Andh. W. R. 401: 1967 Cr. L. J. 691: A. I. R. 1967 Andh. Pra. 155, 161; Harish Chandra Bajpai v. Trilok Singh, 12 Elec. L. R. 461: A.I. R. 1957 S.C. 444 (charges of corrupt practices are

quasi-criminal in character); Jagdev Singh v. Pratap Singh, A.I.R. 1965 S.C. 183; Ahmediya Sherumiya v. Chhippa Ibrahim Nuraji, (1959) 17 Ele. L.R. 218 (Bom.); D. Muralidhar Boddy v. Basa Bullet. Muralidhar Reddy Paga Pulla Reddy, A.I.R. 1964 Andh. Pra. 530, 535; Jayalakshmi Devamma v. Janardhan Reddy, 17 Ele. L.R., 302: A.I.R. 1959 Andh. Pra., 272.

2. In re Narasingamuthu Chettiar,

- (x) General rules with regard to proof in criminal cases. These may be stated as follows:-
 - (a) The onus of proving facts, essential to the establishment of the charge against the accused, lies upon the prosecutor. Every man is to be regarded as legally innocent until the contrary be proved. Criminality is, therefore, never to be presumed.3
 - (b) The evidence must be such as to exclude, to a moral certainty, every reasonable doubt of the guilt of the accused.4 If there be any reasonable doubt of the guilt of the accused, he is entitled, as of right, to be acquitted.5

The above hold universally; but there are two others peculiarly applicable when the proof is presumptive (v. ante):

- (c) There must be clear and unequivocal proof of the corpus delicti (v. ante).6
- (d) In order to justify the inference of guilt, the inculpating facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt.7

While the concurrence of several separate facts, all of which point to the same conclusion, may, though the probative force of each be slight, be quite sufficient in their cumulative effect to produce conviction, a mere aggregation of separate facts, all of which are inconclusive in the sense that they are quite as consistent with the innocence as with the guilt of an accused person, cannot have any probative force.

(y) Standard of proof in matrimonial cases. In awarding relief under Section 23 of the Hindu Marriage Act, 1955 (25 of 1955) the court must be

 Lawson's Presumptive Ev. 93, 432;
 Wharton, Cr. Ev., ss. 319, 717; Best, Ev., s. 440; Greenleaf, Ev., 1, 34; Wills' Cire. Ev., 6th Ed., 305; Powell, Ev., 9th Ed., 403; Best Treatise on Presumption of Law and Fact (1844). See ss. 101, 172, 103, 105, 106, 114, post. As to the meaning of the presumption of innocence in criminal cases, see Thayer's Preliminary Treatise on Evidence, (1898) 551, See also R. v. Ahmed Ali (1869) 11 W.R. Cr. 25–27; where facts are as consistent with a prisoner's innocence as with with a prisoner's innocence as with his guilt, innocence must be presumed, and criminal intent or knowledge is not necessarily imputable to every man who acts contrary to the provisions of the law; R. v. Nobokisto, (1867) 8 W.R. Cr. 87: R. v. Madhub, (1874) 21 W.R. Cr. 13, 20 (the accused is entitled to the benefit of the legal presumption in favour of innocence;

the burden of proof is undoubtedly upon the prosecutor); Deputy
Legal Remembrancer v. Karuna,
(1894) 22 C. 164; Panchu Das v.
R. (1907) 34 C. 698.
4. Best, Ev., ib., and v. ante.
5. Wills' Cire, Ev. 6th Ed., 315; Best,
Ev., s. 440 and v. ante; Lolit v. R.

Ev., s. 440 and v. ante; Lout v. R.

(1894) 22 C. 313; R. v. Madhub,
supra 20; R. v. Punchanun, (1866)
5 W.R. Cr. 97.
6. Best, Ev., ss. 440, 441; Wills' Cire.
Ev., 6th Ed., 323-411.
7. Wills Cire., Ev., 6th Ed., 311; Best,
Ev., s. 451; rule approved in Balmykund v. Ghansam (1894) 22 C.

mukund v. Ghansam, (1894) 22 C. mukund v. Ghansam, (1894) 22 C. 391; R. v. Ishri, (1907) 29 A. 46; Muhammad Yar v. Emp., (1922) 25 Cr. L.J. 939: In re Tarit Kante, A.I.R. 1918 C. 988; (1917) 45 C. 169; Manak Lal v. Premchand (Bar Council enquiry)—A.I.R. 1957 S.C. 425: (1957) 1 M.L.J. (Cr.) 254: 1957 S.C.J. 359: 1957 S.C.A. 719: 1957 S.C.R. 575. satisfied beyond all doubt. In matrimonial cases, the standard of proof drawn from the criminal law is not a safe or proper analogy.8

The cumulative effect of the evidence on record to prove adultery should be such as to satisfy the conscience of the Court that a matrimonial offence has been committed by a spouse. Where matrimonial relationship is in question and future of children is involved very careful consideration should be made of the Evidence to see whether the standards of proof as required has been met keeping in view that the result of such decision may change the social status of the parties and their dependants. To prove that charge against the wife, the conduct of the co-respondent in this regard cannot go against her to fill up the blank in the evidence which ought to have been produced. Where the parties had opportunity to commit such offence, it must also be shown by some cogent evidence that such opportunity was in fact availed of by them.9

(z) Circumstantial evidence, Rules as to. "In cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should, in the first instance, be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency, and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that, within all human probability, the act must have been done by the accused.¹⁰

 Subrata Kumar Banerjee v. Dipti Banerji, A. I. R. 1974 Calcutta 61

10. Hanumant Govind Nargundkar v. State of Madhya Pradesh, 1952 S.C. 343; 1952 S. C. R. 1091; (1952) 2 M. L. J. 631; 1952 All W. R. Sup. 109; 1952 S. C. A. 623; 1952 S. C. J. 509; Bhagat Ram v. State of Punjab, 1954 S. C. 621; 55 Cr. L. J. 1645; Gaya Prasad v. State, A. I. R. 1957 All, 459; Upputholla Srinivasulu, In re, A. I. R. 1958 Andh. Pra. 37; Kodar Thimma Reddy. In re, A. I. R. 1957 Andh. Pra. 758; Madugula Jeremiah, A. I. R. 1957 Andh. Pra. 611; Jani Shah, In re, (1957) 2 Andh. W. R. 222; A. I. R. 1922 Andh. 273; State v. Abraham, A. I. R. 1960 Ker, 115; Silveri Narsiah v. State, 1958 Andh. L. T. 633; Himachal Pradesh v. Shiv Devi, 1959 Cr. L. J. 448; A. I. R. 1959 H. P. 3; Sivaranjan v.

State, I. L. R. 1959 Ker. 319; Tribat Singh v. Bimla Devi, A. I. R. 1959 J. & K. 72; Govinda Reddi v. State, A. I. R. 1960 S. C. 29: 1960 Cr. L. J. 137; Krishna v. Jagarnath, A. I. R. 1965 Pat. 76; Subedar v. State of U. P., (1971) 2 S. C. Cr. R. 135, 140; Awadhi Yadav v. State of Bihar, (1971) 2 S. C. Cr. R. 141, 142 (regard to human, not imaginary, probabilities); Jaswant Singh v. The State, I. L. R. (1965) 15 Raj. 966: 1965 Raj. L. W. 402: 1966 Cr. L. J. 451; A. I. R. 1966 Raj. 83, 89; Charan Singh v. The State of U. P., 1967 Cr. E. J. 525: A. I. R. 1967 S. C. 520, 522 reiterating the danger in such cases referred to in Hanumant Govind Nargundkar v. State of Madhya Pradesh, supra, that conjecture or suspicion may take the place of legal proof; Rajanikant Keshav Bhandari v. State, 1967 Cr. L. J. 357; A. I. R. 1967 Goa 21, 25; A. N. O, Thaba v. The State of Manipur, 1967 Cr. L. J. 1023; A. I. R. 1967 Manipur I (the absence of explanation or a false explanation completes the chain of circumstantial evidence); Kishore v. State, 1967 Cr. L. J. 1155; A. I. R. 1967 Orissa 118, 127; Bandha v. State, 1967 Cr. L. J. 187; Bandha v. State, 1967 Orissa 118, 127; Bandha v. State, 1967 Orissa 118, 127; Bandha v. State, 1967 Orissa 118, 127; Bandha v. State, 1967 A.

^{8.} Dr. H. T. Vira Reddi v. Kistamma, (1969) 1 M. L. J. 366, 373: 81 M. L. W. 490: A.I.R. 1969 Mad. 235 relying on the statement of law in Prestone Jones v. Prestone Jones 1951 A. C. 391, 417, cited with approval by the Supreme Court in E. J. White v. Mrs. K. O. White, A. I. R. 1958 P. C. 441.

In deciding the sufficiency of circumstantial evidence for the purpose of conviction, the court has to consider the total cumulative effect of all the proved facts, each one of which reinforces the conclusion of guilt, and if the combined effect of all these facts taken together is conclusive in establishing the guilt of the accused, the conviction would be justified even though it may be that one or more of these facts by itself or themselves is, or are, not decisive.11

Circumstantial evidence in cases of murder by poisoning means a combination of facts creating a network through which there is no escape for the accused, because the facts, taken as a whole, do not admit of any inference but

W. R. (H.C.) 352; Palaniswamy Vaiyapuri v. State, 68 Bom. L. R. 941; 1967 Mah. L. T. 25; 1968 Cr. L. J. 453; A. I. R. 1968 Bom. 127 following Anant Lagu v. State, A. I. R. 1960 S. C. 500 at p. 523 (circumstances may raise inference of unnatural death, despite negative medical evidence): Jairam Ojha v. The State, 1968 Cr. L. J. 765; A. I. R. 1968 Bom. 97 (else the benefit of doubt should go to the accused). of doubt should go to the accused). Ful Kumar Tripura v. State, 1969 Cr. L. J. 1549: A. I. R. 1969 Tripura 57; Mangar Sahni v. State, 1969 P. L. J. R. 265, 270; Awadhi Yadav v. The State of Bihar, (1970) 2 S. G. W. R. 428: 1970 U. J. (S.C.) 776: 1970 P. L. J. R. 713 (ordinary human probabilities, not imaginary possibilities to be consinary human probabilities, not imaginary possibilities, to be considered); B. Lingappa v. State, (1969) 17 Law Rep. 486, 491; Adinath Chakrabarty v. The State, 1967 Cr. L. J. 125; A. I. R. 1967 Tripura 1; Abdul Halim v. State of Assam, 1967 Cr. L. J. 714; A. I. R. 1967 Assam 26; Khashaba Maruti Shelka v. State of Maharashtra. R. 1967 Assam 26; Khashaba Maruti Shelke v. State of Maharashtra, (1973) 2 S. C. W. R. 173; 1973 S. G. C. (Cri.) 863; (1975) 1 S. C. J. 48; (1973) 2 S. C. C. 449; 1973 S. C. D. 797; 1973 S. C. Cri. R. 397; 1978 Cri. App. R. 349 (S.C.); 1973 B. B. C. J. 662; 1973 Cri. L. R. (S.C.) 546; 1975 Mad. L. J. (Cri.) 1; (1974) 1 S. C. R. 266; 1975 Mad. L. J. (Cri.) 1; (1974) 1 S. C. R. 266; 1975 Mad. L. J. (Cri.) 1; (1974) 1 S. C. R. 266; 1975 Mad. L. W. (Cri.) 219; 1973 Cri. L. J. 1607 at 1612; A. I. R. 1973 S. C. 2474; Abdul Gani v. State of U. P., A. I. R. 1973 S. C. 264; Bakshish Singh v. State of Punjab, 1971 U. J. (S.C.) 281; (1971) 1 S. C. W. R. 502; 1971 Cri. A. P. R. 169 (S.C.); (1971) 3 S. C. C. 182; 1971 Cri. L. J. 145; A. I. R. 1971 S. C. 2016; Public Prosecutor v. Haribabu, (1975) 1 An. W. R. 304; 1975 M.

L. J. (Cri.) 283; B. K. Parekh v. Joint Chief Controller, 1971 Cri. L. J. 1620 (Delhi); Kali Ram v. State, (1973) 3 Sim. L. J. 195; State v. Zilla Singh, 1973 J. & K. L. R. 51; 1973 Cri. L. J. 1384; Pratap Singh v. State, 1971 Cri. L. J. 172; In Re Rayapsa Asari, 1972 Cri. L. J. 1226 (Mad.); Kuma v. State, 1975 Cut. L. R. (Cri.) 404 (Orissa); Suna v. State, (1974) 40 (Orissa); Suna v. State, (1974) 40 (Out. L. T. 159; Kartika Ram v. The State, (1976) 42 C. L. T. 453; Bhan Singh v. State, 1973 Chand L. R. (Cri.) 529; (Suspicion, surmises and conjectures, however, plausible are no substitute for positive proof); Mohinder Singh v. Punjab State, 1971 Cri. L. J. 1764 (Punjab); Chandmal v. State of Rajasthan, 1975 W. L. N. 717; 1976 Cri. App. R. (S.C.) 32; (1976) 1 S. C. G. 621; 1976 S. C. C. (Cri.) 120; 1976 Cri. L. R. (S.C.) 7; 1976 Cri. L. J. 679; A. I. R. 1976 S. C. 917; Mohan Lal v. State of U. P., 1974 Cri. L. J. 800 at 801, 802; A. I. R. 1974 S. C. 1144; Rahman v. State of U. P., 1972 Cri. L. J. 23 at 29; 1971 Cri. A. P. R. 403 (S.C.): 1971 S. C. D. 1000; A. I. R. 1972 S. C. 110; Eswarappa v. State of Karnataka, (1977) 1 Karn. L. J. 52; (1977) M. L. J. (Cri.) 97.

11. State of Andhra Pradesh v. I. B. S. Prasada Rao, 1970 S. G. Cr. R. 533; (1969) 2 S. G. W. R. 807; 1970 Cr. L. J. 733; A. I. R. 1970 S. C. 648, 651; Dharam Das Wadhwani v. State of U. P., 1974 Cri. L. J. 1249 at 1252; 1974 S. C. Cri. R. 159; 1974 S. G. C. (Cri.) 429; 1974 Cri. L. R. (S.C.) 413; (1974) 2 S. G. C. 267; 1974 Gri. A. P. R. (S.C.) 167; 1974 Gri. A. P. R. (S.C.) 167; 1974 S. G. C. (Cri.) 429; 1974 Cri. L. R. (S.C.) 413; (1974) 2 S. G. C. 267; 1974 Gri. A. P. R. 589; (1974) S. G. C. C. (Cri.) 429; 1974 Cri. L. R. (S.C.) 413; (1974) 2 S. G. C. 267; 1974 Gri. A. P. R. (S.C.) 167; 1974 S. G. D. 589; (1974) 8 S. G. R. 607; A. I. R. 1975 S. C. 241.

of his guilt.12 It is well settled that the cumulative effect of the circumstances must be such as to negative the innocence of the accused and to bring the offence home to him beyond any reasonable doubt.18 What has to be seen is not the effect of each item of circumstantial evidence separately but their cumulative effect.14 If the cumulative effect of all the proved facts is conclusive in establishing the guilt of the accused, the conviction would be justified even though one or more of there facts by itself or themselves is, or are, not decisive. 15 The circumstantial evidence, or any reasonable hypothesis, must be consistent only with the guilt of the accused and not with his innocence.16 In a criminal case the negative onus of affirmatively establishing a crucial fact which is the subject-matter of the charge by appropriate circumstantial evidence which, on any reasonable hypothesis, does not admit of any safe inference other than the guilt of the accused and the court can confidently record a verdict of guilty beyond reasonable doubt. The court should not be influenced by the failure of the accused in his examination under Section 342, Cr. P. C., to give evidence on the crucial fact aforesaid.17 Any hypothesis or explanation, tending to show the innocence of the accused, must be 'rational' because an irrational, or unnatural, or a highly improbable explanation cannot be taken into consideration. The test is of probabilities upon which a prudent man may base his opinion.18 It is not, however, correct to say that before circumstantial evidence can be made the basis of a safe inference of guilt, it must exclude every possible hypothesis except that of the guilt of the accused.19 But, if the possibility is remote and one which he is able to explain, the absence of explanation may be taken into account.20 Where the various links in the chain of circumstantial evidence against an accused have been satisfactorily made out and the circumstances point to the accused as the probable assailant with reasonable definiteness and in proximity to the deceased as regards time and situation, and he offers no explanation, which, if accepted, though not proved, would afford a reasonable basis for a conclusion on the entire case consistent with his innocence, such absence of explanation or false explanation would itself be an additional link which completes the chain,21 At the same

 1970 Cr. L. J. 6033 (All.) 618.
 State of A. P. v. I. B. S. Prasada Rao, 1970 G. A. R. (S.C.) 34, 39.

^{12.} Anant Lagu v. State of Bombay, A.
I. R. 1960 S. C. 500: 1960 Mad.
L. J. Cr. 493: 62 Bom, L. R. 371:
1960 Cr. L. J. 682: 1960 S.C.J.
779: 1960 2 S. C. R. 46: (1960) 2

S. C. A. 62.

13. Bhagat Ram v. State of Punjab, 1954 S. C. 621: 55 Cr. L. J. 1645; State v. Prabhu Sahay Kharia, 1969 B. L. J. R. 578, 584, following Raghay Prapanna Tripathi v. State of U. P., A. I. R. 1963 S. C. 74 and M. G. Agarwal v. State of Maharashtra, A. I. R. 1963 S. C. 200 200.

^{14.} Palvinder Kaur v. State of Punjab, 1953 S. G. R. 94; 1952 S. C. .J. 545; I. L. R. 1953 Punj. 107; 1953 A. L. J. 18; 1953 M. W. N. 418; 1953 Cr L. J. 154; A. I. R. 1952 S. C. 354; Irfan Ali v. State, 1970 Cr. L. J. 6033 (All) 618

^{16.} Serjug Mahton v. State, 1969 P. L.

J. R. 532, 535. 17. H. S. Das Godeja v. State of Maharashtra, 1970 C. A R. (S.C.) 288,

^{18.} Pershadi v, State, 1955 All. 443 at 461; see also Ata Mohammad Khan v. The Crown, 1950 L. 199 (F.B.); N. N. Naik v. State of Maharash-tra, (1971) 1 S. C. J. 72: (1971) 1 S. C. R. 133; A. I. R. 1971 S. C. 1656 at 1658.

^{19.} Balmukup 1 v. Ghansam Ram, (1894) 22 C. 391, 409: "the hypothesis of the prisoner's guilt should flow naturally from the facts proved and

be consistent with them all; R. v. Beharce, (1865) 3 R. Cr. 23, 26.

20 Smith v. Emperor, 19 Gr. L. J. 189; see S. 106, post.

21. Deonandan Mishra v. The State of Bihar, (1955) 2 S. C. R. 670: 1956 S. C. A. 336: 1956 S. C. J. 41: 1956 A. L. J. 97: 1956 A. W. R. (Sup.) 17: 1956 B. L. J. R. 77:

time, it must be remembered that though a false explanation given by the accused may give rise to a suspicion against him, suspicion is not proof.22 Thus, where the point for decision is, whether the accused had accepted a sum of money from another on the pretext of helping that other in a criminal case, the pendency of the criminal case at the time when the sum of money is said to have been paid is a relevant circumstance. And the association of the accused with that other person is also another relevant circumstance. These and other circumstances, however, are not such as are consistent only with the acceptance of the money by the accused. In order to find a person guilty on circumstantial evidence, the circumstance or the circumstances must be such as would irresistibly lead to an inference of the guilt of the accused. If the inference, as drawn from the existing circumstances, is not the only irresistible inference, then there is an error of law committed which may merit rectification.23 So, where the dead body is recovered from the house of the accused, this fact is a piece of circumstantial evidence which may lead to the inference of guilt, provided exclusiveness or opportunity to kill the deceased is also established. Such circumstances are strong enough to create a grave suspicion asainst the accused, though they are insufficient by themselves to establish the offence, and reasonable possibility of innocence of the accused is not excluded.24 Where, in a criminal trial the weapon is recovered on statement of accused, the reliability of evidence relating to recovery of the weapon depends, in a large measure, on whether the investigation was honest and straightforward. If evidence of facts of most damaging character has been manufactured and produced in Court, and the F. I. R. was got prepared in an improper manner, evidence relating to discovery of the alleged murderous weapon cannot be accepted unless the same is above board and free from doubt.25 If the methods adopted by investigating agency are fair and inspire confidence, the evidence of the witnesses in proof of the circumstances could be relied on.1 The mere fact that the dead body is pointed out by the accused or is discovered as a result of a statement made by him cannot necessarily lead to the conclusion of the offence of murder, though the discovery of some property, e.g., silver buttons belonging to the deceased with human blood stains, at the instance of the accused, is a circumstance which may raise a presumption of the participation of the accused in the murder.2 The recent and unexplained possession of stolen property may be presumptive evidence against an accused on a charge of robbery and murder, though it must depend upon

^{(1955) 1} M. L. J. (S. C.) 31; 1956 M. W. N. 385; 58 Pun. L. R. 171; 1955 Cr. L. J. 1647; A. J. R. 1955 S. C. 801 at pp. 806, 807; Sardul Singh v. The State, (1967) 69 Pun. L. R. (B.) 168; Patra Bahare v. State, (1969) 35 Cut. L. T. 258, 261; State of Orissa v. Sukra Singh, (1975) 2 Cr. L. T. 119 (H. P.).

^{22.} Brij Bhushan Singh v. Emperor, 1946 P. C. 38; 73 I. A. 1; 222 I. C. 529.

^{23.} Golam Mohiuddin v, State of West Bengal, A. I. R. 1964 C. 503; 68 C. W.N. 215.

Ghazi v. State, A. I. R. 1966 All.
 142; 1966 Cr. I., J. 369; 1966 A.
 W. R. (H.C.) 149; 1966 Cr. L.J.

Ibid at p. 148 of A. I. R. 1966
 All. 142.

¹ Public Prosecutor v. A. Hari Babu, 1975 M. L. J. (Cri.) 283 at 287; (1975) 1 An. W. R. 304.

2. Kanbi Karsan v State of Gujarat, (1962) Supp. (2) S. C. R. 726; (1963) 2 S. G. J. 364; A. I. R. 1966 S. C. 821; (1962) 1 Ker. L. R. 511; (1963) Mad. L. J. Cri. 465; 1966 Cr. L. J. 605.

the circumstance of each case.3 The fact that an accused person, after finding out that he is wanted by the police, takes fright and absconds before presenting himself in the court of a Magistrate, is suspicious but explicable on other grounds than guilt.4 Subsequent conduct of the accused being that of a normal man cannot be taken to be any guide to establish the innocence of the accused and even to cause doubt in favour of the accused because in fact human behaviour is seldom uniform and is often impredictable because what motivates him is difficult to postulate.5

The motive of the accused, his abscondence from the village for four days, his extra-judicial confession and recoveries including the blood-stained gandasa borrowed by him a couple of days before the occurrence along with the medical evidence constituted sufficient evidence to compel the inference of the accused being responsible for the murder of his wife.6-7

The following facts were constituted to be sufficient circumstantial evidence to connect the accused with the crime: The motive for the crime, conduct of the accused immediately before and after the crime being unnatural and unreasonable, the refusal of the accused to participate in identification parade and to give specimen of his footprints.8 'The fact that accused alone was with his wife in the house when she was murdered there with khokhri and the fact that the relations of the accused with his wife were strained pointed to his guilt.9 The accused murdered the

1186.

8. Mulkh Raj Sikka v. Delhi Administration, 1974 Cri. L. J. 1171 at 1172, 1174; 1974 Cri. L. R. (S.C.) 512; 1974 S. C. C. (Cri.) 698; 1974 Cri. App. R. (S.G.) 226; (1975) 3 S. C. C. 2; 1975 All Cri. C. 17; A. I. R. 1974 S.C. 1723.

9. Nika Ram v. State of H. P., 1972 Gri. L. J. 1317 at 1322; (1972) 2 S. C. C. 80; (1972) 3 UM NP 427; 1972 Cri. App. R. 445; 1972 S. C. C. (Cri.) 635; 1972 U. J. (S.G.) 932; (1973) 1 S.C.R. 428; I. L. R. (1974) H. P. 187; A. I. R. 1972 S. C. 2077. S. C. 2077.

^{3.} Wasim Khan v. State of U. P., 1956 S. C. R. 191; A. I. R. 1956 S.C. 400: (1956) 2 M. L. J. (S.C.) 9: 1956 B. L. J. R. 431; 1956 All W. R. 371: 1956 Cr. L. J. 590: 1956 All L. T. 543: 69 M. L. W. 849; 1956 S. G. A. 549: 1956 S. C. J. 437

^{849: 1956} S. G. A. 549: 1956 S. C. J. 437.

4. Pirthi v. State, 1966 Cr. L. J. 1369: A. I. R. 1966 All, 607, 613: Rahman v. State of U. P., 1972 Cri. L. J. 23: 1971 S. C. D. 1000; Raghubir Singh v. State of U. P., 1971 U. J. (S.C.) 762: (1972) 3 S. C. C. 79: 1971 Cri. L. J. 1468: 1972 S.G.C. (Cri.) 399: A. I. R. 1971 S.C. 2156 (If the evidence of eye witnesses is trustworthy, then the act of absconding would fortify the conclusion of the Court with respect to the guilt of the accused); 1975 Mah. L. J. 431 (Abscondance cannot be a determining link in completing the chain (Abscondance cannot be a determining link in completing the chain of circumstantial evidence); State of Rajasthan v. Manga, 1973 Raj. L. W. 58; 1973 Cri. L. J. 1075; Mazahar Ali v. State, 1976 Cri. L. J. 1629; 1976 Kash. L. J. 179 (It is a very small item in the chain of

circumstantial evidence and too much importance should not be placed on it); Public Prosecutor v. A. Hari Babu, (1975) 1 An. W. R. 304; 1975 Mad. L. J. (Cri.) 283 (abscondence not an incriminating circumstance when the other evidence done not an incriminating dence does not prove the various links); S. B. Shome v. State, Assam L. R. (1972) Gau. 141; 1973 Cri. L. J. 76.

5. State v. Bhagwan Das, 1973 W. L. N. 330 at 341 (Raj.).

6-7. Iqbal Miru v. State, 1969 Gr. L. J.

decease at a certain place with the spade, the accused took his cash of Rs 700 in the bag, disposed of the corpse in the channel, buried the clothes of the deceased, washing his own clothes at the culvert, paid Rs. 80 to his mother and concealed Rs. 500 with the cloth bag in the hayrick behind his house,10

The circumstance that the accused was the person last seen with the deceased, his conduct of running away when challenged and chased by the railway police guards, and crouching underneath a railway bogie when the guards were about to run him down, his wearing clothes which were blood stained; the recovery of the knife from the pocket of his trousers and his conduct in telling the guards that he murdered his companion, the fact that the accused led the police party to the discovery of the dead body of his companion were too overwhelmingly against him and were incompatible with any possible inference of innocence. The further circumstance that he put forward a false plea in defence was also taken by the Supreme Court into consideration because there were other compelling materials bringing home the guilt to the accused.11-12

Besides possession of stolen property belonging to the deceased the fact that the accused was in the house of the three murdered persons at night on which they were murdered and the accused had concealed the blood-stained crowbar established that the accused was himself the murderer.13

The following circumstances were held not to be sufficient to connect the accused with the crime-

The untrustworthy explanation of the accused as to how he got injuries on his person as we'll as the circumstance about his being present at the scene of offence.14 Where circumstantial evidence held not sufficient for conviction, see the following cases. 15-16

In cases based on circumstantial evidence the legal requirement is that such evidence should be so strong as to point unmistakably to the guilt of the accused. In order to justify the inference of guilt the inculpatory facts must be incompatible with the innocence of the accured and incapable of explanation upon any other reasonable hypothesis than that of his guilt. The Court's decision should not rest on suspicion.17

An original contract to continue a partnership may be implied from the

^{10.} Vairavan, In re, 1974 Mad. L. W. (Cri.) 43 at 43.

^{11-12.} Mohan Lal Pangasa v. The State of U. P., A. I. R. 1974 S. C. 1144 at 1145, 1146; 1974 Cr. L. J. 799.

13. Ponnuswami v. State, 1975 Cri. L.

J. 509 at 516.

^{14.} Jagta v. State of Haryana, 1974 Cr. L. J. 1010 at 1015 (S. C.): 1974 Cri. L. R. (S. C.) 472; 1974 S. C. C. (Cri.) 657: (1974) 4 S. C. C. 747; (1975) 1 S. C. R. 165: A. I. R. 1974 S. C. 1545. 15-16. Om Prakash v. State of H. P., 1975 Chand L. R. (Cri.) 485 (Him.

Chand L. R. (Cri.) 485 (Him.

Pra.); Narain Barack v. State, 1972 Cri. L. J. 177 (Pat.); Dukhharan Mian v. State of Bihar. 1971 Pat. L. J. R. 165: 1971 B. L. J. R. 641 (Evidence of 'last seen' alone is not sufficient); State of Mysore v. Manje Gowda, (1978) 2 Mys. L. J.

Manje Gowda, (1973) 2 Mys. L. J.
190: I. L. R. (1973) Kant. 1454:
1973 Mad. L. J. (Cri.) 673.
17. Om Prakash v. State of H. P.,
1974 Cr. L. J. 556 at 558; (1972)
2 Sim. L. J. (H. P.) 4139 (relying
on Udaipal Singh v. State of U. P.,
(1972) Gri. L. J. 7 (S.C.)).

conduct of the parties. Though the contract must be one between the original partners, the conduct of the surviving partner and the heirs of the deceased partner after the death of the partner may evidence an original contract that the partnership should not be dissolved on the death of a partner.18

Circumstantial evidence has the same place and relevancy in election matters as in civil or criminal proceedings. 19 It is very difficult to prove by direct evidence the corrupt practice of bribery. It is only by circumstantial evidence that such a corrupt practice is normally established.29

In a charge of copying answers, not a case where petitioner had been caught red handed while copying or using unfair means but based on circum. stantial evidence, it was not possible to infer from proved facts that the answers of the petitioner and other candidates emanated from the same source. It was accordingly held that the charge of unfair practice cannot be held proved.21

- (aa) Cases covered by Section 118 (a), Negotiable Instruments Act. In cases covered by Section 118 (a) of the Negotiable Instruments Act, when the defendant fails to prove absence of consideration and the plaintiff also fails to prove consideration, the Court shou'd consider all the matters before it and then decide.22
- (bb) Presumption under Section 4(1), Prevention of Corruption Act. The presumption under Section 4(1) of the Prevention of Corruption Act, 1947, cannot be rebutted by a mere explanation uncorroborated by other evidence direct or circumstantial.28 Burden to disprove allegation against accused in respect of having property and assets disproportionate to known sources of income for a charge of offence of criminal misconduct is on the accused and he should adduce evidence.24
- (cc) Mode of proving previous conviction. The prosecution can prove a previous conviction not only by acting upon Section 298 of Cr. P. C. 1973, but also by following any other law, e.g., the law of evidence or by documentary evidence, or by admission.25
- 9. Appreciation of evidence by trial Court. (a) Circumstantial evidence. Principles applicable. Where the case against the accused depends on circumstantial evidence, any circumstance which destroys the presumption of innocence, can be taken into account to find out if the circumstances lead to no other inference but that of guilt. The court has to take the totality of circumstances into consideration, and find if the case is established, that is, the

Kartar Singh v. Harcharan Singh, 71 Punj. L. R. 152, 159; A. I. R. 1969 Punj. 244.
 C. Subba Rao v. K. Brahmananda Reddy, (1966) 2 Andh. W. R. 401: 1967 Cr. L. J. 691; A. I. R. 1967 Andh. Pra. 155, 160.
 Sarla Prashar v. Shri Ram. Dec.

Sarla Prashar v. Shri Ram Dec. (1969) 42 E. L. R. 412 at 421.
 Kusum Kumari v. Board of High

School and Intermediate Education, A. I. R. 1973 All. 513 at 514.

Heerchand v. Jeevaraj, A. I. R. 1959 Raj. 1 (F.B.); Manyam v. Janaklakshmi, 1973 Mer. L. R. 161

(A.P.). Kunhi Mohammad v. State, A. I. R. 1959 Ker. 88.

Rajan v. R public of India, 1975 Gut. L. R. (Cr.) 79 at 88. Medical Officer of Health v. State of U. P.. A. I. R. 1960 All. 53: 1959 All L. J. 585.

facts established are inconsistent with the innocence of the accused and incapable of explanation on any hypothesis other than that of guilt.¹ The chain of evidence must be so far complete—

- (i) as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused; and
- (ii) as to show that within all human probability the act must have been done by the accused.2

And the hypothesis suggested must be reasonable.³ If the circumstances proved are consistent either with the innocence of the accused or with his guilt, then the accused is entitled to the benefit of doubt. In applying this principle, distinction must be made between facts, called primary or basic on the one hand, and inference of facts to be drawn from them on the other. In regard to the proof of basic or primary facts, the Court has to judge the evidence in the ordinary way. It has to consider the evidence and decide whether that evidence proves a particular fact or not and if that fact is proved, the question arises whether that fact leads to the inference of guilt of the accused person or not and in dealing with this aspect of the problem, the doctrine of benefit of doubt applies, and an inference of guilt can be drawn only, if the proved fact is wholly inconsistent with the innocence of the accused and is consistent only with his guilt.⁴

It is well established that in a case resting on circumstantial evidence all the circumstances brought out by the prosecution, must inevitably and exclusively point to the guilt of the accused and there should be no circumstance which may reasonably be considered consistent with the innocence of the accused. Even in the case of circumstantial evidence, the court will have to bear in mind the cumulative effect of all the circumstances in a given case and weigh them as an integrated whole. Any missing link may be fatal to the prosecution case.⁴⁻¹

It is no doubt true that direct evidence of persons who saw the fact and whose veracity is not open to doubt is the best proof. But the circumstances may often be so closely connected with the fact in issue as to lead only to one conclusion, so that the Judge may be as well convinced as if it were proved by eye-witnesses. Circumstantial evidence is sometimes more credible than direct evidence but the proved circumstances must be such which bring home the offence to the accused beyond reasonable doubt. Thus the inference of guilt upon a charge of murder can be safely drawn where the accused is in unexplained possession of articles of the victim after the crime, and where, in addition, there is some evidence at least connecting the movements of the

See Govinda v. State of Mysore, A.
 R. 1960 S. C. 29; 1960 Cr. L.
 J. 137; Anant v. State of Bombay, (1960) 2 S. C. R. 460; A. I. R.
 1960 S. C. 500; Raghav Prapanna v.
 State of U. P., A. I. R. 1963 S. C.
 74: 1963 (1) Cr. L. J. 70; Manmohan Singh v. State, I. L. R.
 (1969) 2 Punj. 173; 1969 Cr. L. J.
 932; A. I. R. 1969 Punj. 225, 243; Kacharji Hariji v. State of Gujarat, 1969 Cr. L. J. 471; A. I. R. 1969 Cuj. 100, 102.

Govinda v. State of Mysore, supra.
 Ibid.

M. G. Agarwal v. State, (1963) 2
 S. G. R. 405; A. I. R. 1963 S.C. 200; 64 Bom, L. R. 773: 1961 Cr. L. J. (1) 235.

^{4-1.} Umedbhai v. State of Gujarat, A. I. R. 1978 S.C. 424 at p. 427.

Janna Das v. State, A. I. R. 1963
 M. P. 106; 1962 M. P. L. J. 1064.
 Shahbuddin v. State of Rajasthan, 1972 W.L.N. 648: 1972 Raj. L.W. 629; 1973 Cr. L. J. 723.

accused with those of the victim, either before or after the crime, and in some manner or another establishing a nexus between the accused and the offence.7 B fore it can be held that the circumstantial evidence establishes the guilt of the accused, some further evidence must be adduced, establishing some connection between the accused and the victim, in relation to the time and locality of offence, or to the crime itself.8 The circumstantial evidence must, besides, relate unerringly to the accused.9

In the appreciation of circumstantial evidence, the law may be taken to be that-

- (1) the circumstances alleged wast be established by satisfactory evidence, as in the case of other evidence;
- (2) the circumstances proved must be of a conclusive nature and tendency so as to be totally inconsistent with his innocence and are not explainable on any other hypothesis except the guilt of the accused;10
- (3) although there should be no missing links in the case, yet it is not essential that every one of the links must appear on the surface of the evidence adduced; some of these links may have to be inferred from the proved facts;
- (4) in drawing those inferences or presumptions, the Court must have regard to the common course of natural events, to human conduct and their relation to the facts of the particular case;11
- (5) where circumstances are susceptible of two equally possible inferences, the Courts should accept that inference which favours the accused rather than an inference which goes in favour of the prosecution.

In a case of murder by poisoning, the prosecution must ordinarily establish-

- (1) that death was caused by poisoning,
- (2) that the accused had poison in his possession, and
- (3) that the accused had opportunity to administer poison.

Still, the sufficiency of the evidence to establish murder by poisoning depends on the facts of each case. Thus, if the circumstantial evidence alone is so decisive that the Court can unhesitatingly hold that the death was the result of administration of poison by the accused conviction can rest on it alone.12

In circumstantial evidence, all the incriminating facts and circumstances should be fully established by cogent and reliable evidence and the facts so established must be consistent with the guilt of the accused and should not be capable of being explained away on any other reasonable hypothesis than that of his

In re Thangaswami, A. I. R. 1963
M. 476; (1963) 2 Cr. L. J. 651.
 Ibid. (Care-Law reviewed); S. B.
Shoma v. State, 1973 Cri. L. J. 76.
 Harbans Singh Chohan v. The
State. A. I. R. 1960 Cal. 722: 1960
Cr. L. J. 1577.

Ram Das v. State of Maharashtra.
 A. I. R. 1977 S.C. 1164 at page 1166, 1167.

In re Virabhadrappa, A. I. R. 1962
 Mys. 138: 1962 M. L. J. (Cr.) 41.
 State of Orissa v. Kaushalya Dei,

A. I. R. 1965 Orissa 38,

guilt. In short, the circumstantial evidence should unmistakably point to one and one conclusion only that the accused person and none other perpetrated the alleged crime. If the circumstances proved in a particular case are not inconsistent with the innocence of the accused and if they are susceptible of any rational explanation, no conviction can lie. 12-1

Where the first circumstance relied on by prosecution in a murder case was that when the police went to arrest appellant No. 1, he did not open the door for the purpose of letting in the police. But this was not regarded as an incriminating circumstance on consideration of the time at which the police went to the house of appellant No. 1. It was about mid-night and there was nothing unnatural in appellant No. 1 refusing to open the door at such an unearthly hour. Another circumstance relied upon on behalf of the prosecution was the recovery of a black piece of cloth, a cord and a reel of white thread from the house of appellant No. 1. It was argued that the cloth of the black bag, which was found near the scene of offence, tallied with the black piece of cloth seized from the house of the first appellant and also the cord of the black bag and the thread used in the black bag tallied with the cord and the white thread recovered from his house and this circumstance showed that the black bag belonged to appellant No. 1 and established his presence at the scene of offence. But this circumstance was held to have no probative value because the black cloth, cord and white thread seized from the house of the first appe'lant were ordinary articles which would be found in many houses in the village and they had no such identifying marks as would establish their connection with the first appellant. The last circumstance on which reliance was placed was the recovery of a coita as a result of a statement made by appellant No. 2, but the evidence in regard to this recovery was held to be far from satisfactory. Hence circumstantial evidence was held to be insufficient to prove guilt of the accused,12-2

Where the commencement or genesis of the occurrence is not available because there was no witness to the occurrence available, the only direct version of the commencement of the occurrence would be found in the statement of the accused, if he chooses to give out his version of the occurrence. His statement has to be considered in the light of the evidence adduced by the prosecution and weighing his statement with the probabilities of the case either in his favour or against him.12-3

(b) There must be evidence. (i) General. One of the necessary conditions for the appreciation of evidence is that there must be evidence. This means there must be evidence, either documentary or oral. Where there is no documentary evidence nor any oral evidence, and the party even is not examined in Court, his mere allegation, in the absence of any statement on oath, is of no use.12 Suggestions, if denied cannot take the place of evidence.14

Hukam Singh v. State of Rajasthan, A. J. R. 1977 S.C. 1063 at page 1066; 1977 Cri. L. J. 639; (1977) 2 S.G.C. 99: 1977 U. J. (S.C.) 365 (2).
 C. P. Fernandes v. Union Territory Goa, A. J. R. 1977 S.C. 135 at page 141; 1977 Cri. L. J. 167;

^{(1977) 1} S.C.C. 707. 12-3. State of H. P. v. Wazir Chand, A. I. R. 1978 S.C. 315 at page 323.

^{13.} Bhola Ram v. Peari Devi, A. I. R.

¹⁹⁷⁶ Pat. 176. 14. Sant Ram Pandey v. State of Bihar, 1976 Cr. L. J. 800.

Further, the evidence must be both relevant and admissible. Thus hearsay evidence, not being admissible, cannot be taken into consideration in appreciating evidence. Age stated by witness while giving his description before taking oath is not evidence.15

Statement made before court of law being on solemn affirmation must rank higher than allegations made in complaint.16

- (ii) Hearsay evidence. It is well settled that at the hearing, hearsay evidence is not admissible and cannot be considered in appreciating evidence.
- (iii) Witness whether must be cross-examined. Under the Act, crossexamination of a witness is not essential. The Court is not precluded from assessing the veracity of a witness in the absence of any cross-examination.17
- (c) Evidence to be scrutinised on merits. (i) General. The correct method of appreciating and assessing the evidence of a witness is by scrutinising the evidence on its merits. It is only when a doubt arises whether the witness is in fact deposing to the truth or not, that the necessity can arise to investigate into the possible reason for this conduct and what could have motivated the same, such as intimate interest in the person on whose behalf he had come to court to give evidence or enmity or ill-will prevailing between the witness and the party against whom he had come to give evidence. The Court should not start with the investigation of these reasons, without first making an impartial and judicious appreciation of the evidence of the witness on its own merits.18

When the burden of proof rests on a particular person, he must prove the fact to the satisfaction of the Court. Where there are suspicious circumstances, the person, on whom onus lies, must explain them to the satisfaction of the Court. In all cases, even in the absence of any plea, where the circumstances give rise to doubts, it is for the party, on whom the burden rests, to satisfy the conscience of the Court and to completely remove all legitimate suspicion. If there is hardly any suspicious circumstance, much evidence will not be required to prove the fact in issue.19

Witnesses do exaggerate and sometimes give wide omnibus statements. Such statements should be scrutinised with special care to see whether the statement is given with the precision that could be reasonably expected in the context.20

When oral evidence is sought to be given of a fact which happened some generations ago, it has to be assessed with a great deal of care.21 If a witness is not a witness of truth his evidence cannot be utilised to discredit another

 ⁽¹⁹⁷¹⁾ I. A., P., L., J. 350.
 Prabhakar V., Sinari v., Shanker Anant Verlekar, 1967, Cr., L., J. 1304; A., I. R., 1967, Goa 12.
 Ambika Singh v., State, A., I., R., 1961, All., 38: 1960, A., L., J., 782.
 Satyanarayana v., Ramulu, A., I. R., Satyanarayana v., Ramulu, A., I. R.

Satyanarayana v. Ramulu, A. I. R., 1961 A. P. 461; 1961 Andh. L. T.

^{19.} Sce Shashi Kumar v. Subodh Kumar, A. I. R. 1964 S. C. 529.

^{20.} In re Kalusingh, A. I. R. 1964 M. P. 30; (1964) 1 Cr. L. J. 198; Rai-Singh v. State of Haryana, 1971 S. C. D. 980; (1971) 2 S. G. W. R. 614; 1971 Cr. L. J. 1738; 1972 U. J. (S.C.) 4; A. I. R. 1971 S.C. 2505

Haribar Prasad v. Balmiki Prasad.
 A. I. R. 1975 S.C. 793 at 785: (1975) S. C. C. 212; 1975 Pat. L. J. R. 84.

witness.22 In appreciating evidence of a partisan witness in a case where a large number of persons are involved and in the commotion some persons cause injuries to others and the evidence is of a partisan character it is often safer for the Judge to be guided by the compass of probabilities along the rock-ribbed contours of the case converging on the heart of the matter.23 In cases with communal background in which partisan witnesses may depose falsely out of a mistaken or misplaced sense of group loyalty the judge must sift and analyse evidence very carefully.²⁴ Courts and Tribunals in judging evidence before them should apply the test of human probabilities. Human minds may differ as to the reliability of evidence. But in that sphere the decision of the final fact finding authority is made conclusive by law.25

Evidence of dog tracking, even if admissible is ordinarily not of much weight.1-2 It is not safe to rely on the evidence of layman whether article seized is ganja when chemical report has not been believed.3-4

Where the prosecution case is one integrated whole which the trial court has accepted but if the High Court did not find it possible to accept a vital part of the story the other part which did not stand by itself could not be accepted.5

When a witness has been examined earlier under Section 164, Cr. P. C., his evidence does not lose its value or become doubtful on this account but this is also a circumstance to be taken into account in scrutinising the value of his test mony.6

Evidence about which no question was put in examination of accused, cannot be used against him.7

When some accused have been discharged on the ground that evidence adduced has no bearing on case committed to the Court of Session as the material is innocuous, other accused should also be discharged.8

W tnesses may lie but the circumstances would not. In proceedings under Section 145, Cr. P. C., if the oral evidence is not reliable the broad probabilities of the case as would emerge from documents should be considered.9-10

22. Chuhar Singh v. State of Harvana. 1975 Gur. L. J. 577 at 579 (S.C.): 1975 Cri. L. R. (S.C.) 463: (1975) 2 Cri. L. T. 487: 1975 B.B.C.J. 730: 1975 All Cri. C. 282: 1975 Cri. App. R. (S.C.) 306: 1975 U. J. (S.C.) 576: 1975 S.C. (Cri.) R. 468.

R. 468.

23 Bava Haji Homsa v. State of Kerala, A I. R. 1974 S.C. 902 at 909; 1974 Cri. L. J. 755: 1974 S.C.D. 449: 1974 S. C. C. (Cri.) 515: 1974 Cri. L. R. (S.C.) 317: (1974) 4 S. C. C. 479.

24. Ahrr Bhagu Jetha v. State of Gujarat, A.I.R. 1974 S.C. 292 at 294: 1974 Cri. App. R. 20: 1974 Cri. L. J. 343: 1974 S. C. C. (Cri.) 183: 15 Guj. L. R. 342: (1974) 3 S.C. C. 653: 1974 Cri. L. R. (S.C.) 30: (1974) 2 S. C. R. 477.

25. I. T. Commissioner W. B. v. D. P. More. A. I. R. 1971 S.C.

2439 at 2443; 82 I. T. R. 540: 1971 U. I. (S.C.) 872: (1972) 1 S. C. I. 334: 1971 Tax L. R. 1622: (1972) I Um. N. P. 87: (1972) 1 I. T. J.

1-2. Medu Seth v. State of Assam, 1972
Cri. L. J. 362 at 366.
3-4. Budheshwar Singh v. The State, Assam L. R. (1971) Assam 32 at

Hari Dev v. State, A. I. R. 1976
 S.C. 1489 at 1492; Reversing 1971

Cr. L. J. 1615 (Delhi).

6. State of Assam v. Rajkhowa, 1975
Cr. L. J. 354 at 390 (Gauhati).

7. Panchappa Muttappa v. State, 1971 Cri. L. J. 595 at 598; A. I. R. 1971 Goa 15.

Muniswami v. State of Karnataka, 1975 Mad. L. J. (Cri.) 690 at 696.
 Satyabhama Dei v. Suryamani Dibya, (1973) 1 Cut. W. R. 392 at 394;

Merely on the ground of non-production of an eye-witness, the evidence of other eye-witnesses should not be thrown away.11-13 Failure on the part of the prosecution to examine any independent witness available to unfold the prosecution story, is a material infirmity as the best evidence has not been placed before the Court,14

The plea of alibi serves its purpose if it raises a doubt in the mind of the Court that the accused may not be present at the time of incident, the accused is entitled to benefit of doubt.15

When oral evidence of a witness is sought to be given about what happened some generations ago it has to be assessed with a great deal of care.18-17 In appreciating evidence against the accused the Court should ensure that evidence is legally admissible, the witnesses are credible and have no interest in implicating him, or have ulterior motive.18 The mere fact that no person of the assaulting party received injuries would not entail their acquittal.19 If the conduct of a sole witness to the occurrence is abnormal, his testimony is untrustworthy.20 Where the High Court found that if an assault was made by all the 9 persons armed with lathis, kantas and ballams and out of the nine, two had spears, there was no reason why the spears would have been used in a manner as not to cause any injury on the body below the neck. The High Court rightly found that the injuries on the lower portion of the body were so few that the prosecution case was belied by the consideration that there were as many as 9 assailants armed with dangerous weapons. The acquittal by the High Court was upheld by the Supreme Court.21 Where the prosecution evidence failed to prove that the empty cartridges or mis-fired cartridge or the jacket of the cap of the bullet sent by the police were fired from the rifle alleged to have been used, the discovery of rifle at the instance of accused was not held sufficient to convict accused.22 Empty cartridges recovered from scene of occurrence were on the testimony of expert fired from the gun recovered from the accused, but other evidence being unreliable, accused was acquitted.23 The

16-17. Hari Har Prasad v. Balmiki Prasad. A. I. R. 1975 S.C. 733 at 735; (1975) 1 S. C. C. 212; 1975 Pat. L. J. R. 84.

18. Himachal Pradesh Administration v. Himachal Pradesh Administration v. Om Prakash, 1972 Cri. L. J. 606 at 611 (S.C.): 1972 1 S. C. C. 249: 1972 S. C. D. 128: (1972) 1 S. C. J. 691: (1971) 2 S. C. W. R. 819: (1972) 2 M. L. C. (S. C.) 16: (1972) 2 An. W. R. (S. C.) 16: 1972 Cur. L. J. 654: (1972) 2 An. W. R. (S. C.) 16: N. P. 105: (1972) S. C. C. (Cri.) 88; (1972) 2 S. C. R. 765; (1973) Mad. L. W. (Cri.) 161; I. L. R. (1974) 2 Delhi 73; A. I. R. 1972 S. C. 975.

19. Damodar Prasad Ghandrika Prasad Damodar Prasad Chandrika Prasad v. State of Maharashtra, A. I. R. 1972 S.C. 622 at 626; (1972) 1 S. C.C. 107: 1972 S. G. D. 186; 1972 S. C. Cri. R. 183; 1972 U. I. (S. C.) 321: (1972) 2 Um. N. P. 67; 1972 S. C. C. (Cri.) 110; (1972) 2 S. C. R. 622; 75 Bom. L. R. 368; 1974 Mad. L. W. (Cri.) 97; 1972 Cri. L. T. 451

L. R. 368; 1974 Mad. L. W. (Cri.)
97; 1972 Cri. L. J. 451.
20. Charan Singh v. State of Haryana,
A. I. R. 1971 S. C. 1554 at 1556,
1557 (1971) 3 S. C. C. 466.
21. State of U. P. v. Ram Autar, (1971)
2 S. C. Cri. R. 442 at 444, 445;
1971 U. J. (S. C.) 406; 1972 S.
C. G. (Cri.) 20; (1971) 3 S. C. C.
774.

22. State of Gujarat v. Adam Mohammad Umatiya, (1971) 2 S. C. Cri. R. 322 at 327: (1971). 3 S. C. C. 208.

Nawali v. State, (1974) All. Cri. R., 13 at 15 (All.).

^{11-13.} Leela v. State, 1971 W. L. N. (Part II) 45 at 49.

^{14.} In re Bejjagani Moogadu Thiru-pathayya. (1971) 1 Andh. W. R. 316 at 322. See V. Thavar v. State of Madras, A. I. R. 1957 S. G. 614; Vaikuntam Chandrappa v. State of A. P., A. I. R. 1960 S.C. 1340; B. Hariprasad Deva v. State of Gujarat, (1969) 1 S. C. J. 300.

15. State v. Jittu, 1972 All. W. R. (H.C.) 861 at 863; 1972 All. Cri. R.

defence story that unknown dacoits have committed the crime was not substantiated and hence not believed in view of the fact that many villagers had come and it was improbable that the accused would have been falsely involved and implicated.24 It cannot be laid down as a proposition of law that after the lapse of a long period, witnesses in no case would be able to identify the dacoits, they had seen in the course of a dacoity committed during the night. However, the Court must be extremely cautious in weighing such evidence.25 In dark night witnesses may not be in a position to identify assailants beyond two or three feet beyond possibility of mistake and when dying declaration was not acceptable and other evidence regarding identity of assailants was not of much value, accused was held not guilty.1 Accused was charged for committing murder with pistol. In the Arms Act case he was acquitted, but witnesses A and B not examined in that case, can be relied upon in murder case to prove that it was the accused who shot the deceased by the same pistol.2 Accused cannot be convicted in a case under Arms Act on the basis of evidence of the connected murder case.3

Accused, a poor labourer could not engage an advocate, himself crossexamined the witnesses, the Sessions Judge himself did not put questions to the prosecution witnesses to find out whether they were speaking the truth but remarked in the judgment that cross-examination was not convincing. From a labourer and villager better cross-examination could not be expected. It was held that appreciation of evidence was not satisfactory and accused was acquitted.4-6

If two interpretations of a statement are possible in a given case, then the one which favours the accused has to be adopted.7-9 Normally when the witness says that an axe or spear is used there is no warrant for supposing that what the witness means is that the blunt side of weapon was used, unless clarification is obtained from the witness that blunt side of weapon was used. 10 Most often the accused persons belong to a class which do scratch or slightly wound themselves in course of their daily avocation. Many of them are also not particularly clean in their habits or accustomed to change clothing or even to wash them thoroughly. Thus the blood marks found on the clothing might be their own received even without their knowledge and allowed to remain in part. What courts should see is whether the blood marks are such that by their size, shape and location they indicate that they came from some other

Goa 15. Jamuna Chaudhary v. State of Bihar, 1972 Cri. L. J. 824 at 827: 1972 Raj. L. W. 18: 1971 W. L. N. (Part I) 651.

^{24.} Brahma Singh v. State, A. I. R. 1972 S. C. 1229 at 1231; 1972 S. C. Cri. R. 407; 1972 U. J. (S. C.) 808; (1972) 3 S. C. C. 388; 1972 S. C. C. (Cri.) 582; 1972 Cri, L. J.

Delhi Administration v. Balkrishan, 1972 Cri. L. J. 1: 1972 U. J. (S.C.) 103: 1972 S.C. Cri. R. 144: (1972) 1 S. C. J. 347: 1972 M. I., J. (Cri.) 205: A. I. R. 1972 S. C. 3.
 Het Ram v. State, 1974 Cri. L. J. 871 at 873 (All.).
 Chandrika Piasad v. State, 1975 Rajdhani L. R. 551 at 562, 563.
 Tara Singh v. State of Punjab. 1975 Chand. L. R. (Cri.) 526 at 528.
 Panhappa v. The State, 1971 Cri. L. J. 595 at 598; A. I. R. 1971 25. Delhi Administration v. Balkrishan,

N. (Part I) 651.

10. Hallu v. State of M. P., A. J. R. 1974 S.C. 1936 at 1939; 1975 All Cri. C. 62. 1974 B. B. C. J. 398; 1974 S. C. C. (Cri.) 462; (1974) 1 Cri. L. J. 101; (1974) 4 S. C. C. 300; 1974 Cri. App. R. 172 (S.C.) 1974 S. C. D. 614; 1974 M. P. L. J. 685; 1974 Cri. L. R. (S.C.) 697; 1974 S.C. Cri. R. 246; 1974 Mah. L. J. 694; (1974) 3 S. C. C. 652; 1974 Cri. L. J. 1385; 1974 Serv. L. C. 628; 1975 Chand L. R. (Cri.) 27

person and that too in course of an attack in which the blood of the latter was shed. For appreciation of evidence in criminal cases also see the following cases, 11-13

An advocate is at least expected to know that he should not be a party to undesirable practice of getting a poster printed so as to adversely affect the election of a candidate. As the poster contained allegation against the character of the appellant and, consequently, the advocate should have been on guard and should not have taken an active part in getting it printed. If there is specification about the date and place at which each meeting took place in which speeches against the character of appellant were made, respondent cannot be expected to meet the case put forward in evidence by witnesses of the appellant.14

When conclusion has been reached on an appreciation of a number of facts established by evidence, its soundness or otherwise has to be judged by assessing the cumulative effect of all the facts.15

If the plaintiff puts the defendant in the witness box as his witness, then the plaintiff must be treated as a person who puts the defendant forward as a witness of truth.18

Even though direct evidence in proof of the gold being smuggled one, is not available, reliance can be placed on the conduct of the persons who possessed gold in order to reach the conclusion that gold was smuggled one.17-19

If the representor does not in fact, believe in the truth of his representation he is as much guilty of fraud as if he had made any other representation which he knew to be false.20

It is well settled that where a person on whom fraud is committed is in a position to discover truth by due diligence, fraud is not proved. It is neither a case of suggestio falsi, nor suppressio veri.21

Muniswami v. State of Karnataka, 1975 Mad. L. J. (Cri.) 690 (Kant.): (1975) 2 Cri. L. T. 119 (H.P.); Kesar Singh v. State of Punjab, 1974 Cri. L. J. 780; A. I. R. 1974

S. C. 985.

14. Nihal Singh v. Rao Birendra Singh, 1970 U. J. (S.C.) 753 at 756, 758; 45 E. L. R. 207; (1970) 3 S. C. C.

239.

15. I. T. Commissioner v. Baba Autar Singh, 1971 Tax L. R. 1479 (Delhi)

16. Shive Lal v. Jatinder Kumar, 1976 Kash. L. J. 318 at 328; 1975 J. & K. L. R. 413 (Relying on Mahunt Satrugan Das v. Bewa Shyam Das, A. I. R. 1938 P. C. 59).

17-19. Abdul Rahiman v. State of Mysore, 1972 Cri. L. J. 406 at 413; 1971 Mad. L. J. (Cr.) 420; (1971) 2 Mys. L. J. 422.

20. R. C. Thakkar v. Gujarat Housing Board, A. I. R. 1973 Gujarat 34 at 54.

21. Sri Krishan v. Kurukshettra University, A. I. R. 1976 S.C. 376 at 381; (1976) 1 S. C. C. 311.

^{11-13.} Shyam Narain v. State, 1972 All. Cr. R. 7; Balkrishna v. State of Kerala, 1971 Ker. L. R. 455; State of Mysore v. Ramji Ramappa Malagi, (1972) 2 Mys. L. J. 6; Subhlal Gope v. State of Bihar, 1971 Cri. L. Gope v. State of Bihar, 1971 Cri. L., L. J. 630: A. I. R. 1971 Pat, 151; Badri v. State of U. P., A. I. R. 1975 S.C. 1985; Sheo Lochan v. State, 1973 All. W. R. (H.C.) 420: 1973 All. Cri R. 269; State v. Bhima, (1971) 37 Cut. L. T. 765; I. L. R. (1971) Cut. 920: (1971) 2 Cut. W. R. 121; Krishna Bahadur v. P. Gorwora, 1973 B. L. J. R. 284: 1972 Pat. L. J. R. 217 (offence resulting in indirect benefit to third person does not necessarily make him party to a crime); State third person does not necessarily make him party to a crime); State v. Kainilal, 1975 Rajdhani L. R. 145; 1975 W. L. N. (U.C.) 257; Om Parkash v. State of Haryana, (1971) Cri. L. J. 749; Pritam Singh v. State, I. L. R. (1970) 20 Raj. 439; 1971 Cri. L. J. 974; 1970 W. L. W. (Part I) 38; A. I. R. 1971 Raj. 184; (1972) 1 C. W. R. 237;

A witness deposing about the correctness of a figure in audited balancesheet of company was not cross-examined on that point as to how the figure was arrived at, there would be no justification in discarding such evidence.22 See the cases cited in the foot-note.23-25

In cases, where any general exception is pleaded by an accused person and evidence is adduced which fails to satisfy the Court affirmatively, the accused is entitled to be acquitted, if a reasonable doubt is created whether the accused is or is not entitled to the benefit of the said exception.1

An accused can establish his plea by reference to circumstances transpiring from the prosecution evidence itself.2

(2) Credibility of witnesses. In order to judge the credibility of witnesses, the Court should not confine itself to the way in which the witnesses have deposed or to their demeanour but it should also look into the surrounding circumstances as well as the probabilities, so that it may be able to form a correct idea of the trustworthiness of the witnesses.3

If injuries caused on the person of an accused are proved by medical evidence to have been caused earlier than the time of arrest, the whole investigation becomes suspect and no reliance can be placed on the evidence of the investigating officer or of the witnesses who support the version of the prosecution.4

A witness who was working in his field cannot be disbelieved because at mid-day he and his wife went home to fetch food when it was already prepared at home.5

The evidence of the chowkidar who lodged a report, before the murder was discovered and before any one had suspected that the accused had a hand in the crime, containing all details of the incident, is trustworthy.6 The mere

U. P. Elec. Supply Co. v. The Work-men, A.I.R. 1971 S.C. 2521 at 2528;

men, A.I.R. 1971 S.C. 2521 at 2528;
(1971) 2 Lab. L.J. 528; (1972) 3 Civ.
A. P. J. 123 (S.C.); 40 F. J. R.
378; 24 Fac. L. R. 249; (1971) 3
S. C. C. 495; 1971 Lab. I. C.
1495; (1972) 1 S. C. R. 553; (1973)
I S. C. J. 661.

23-25. Collector of Jabalpur v. A. Y. Jehangir Khan, 1971 M. P. 32; Chandra
Bhan Singh v. State, 1971 Cri. L.
J. 94 (All.); I. L. R. 1972 (2)
Cal. 480; Tillu v. State, 1971 Raj.
L. W. 456; 1971 W. L. N. (Part.)
I) 74.
I. Prabhoo v. Emperor, A. I. R. 1941

1. Prabhoo v. Emperor, A. I. R. 1941 All. 402 (F.B.); Narain v. Emperor, A. I. R. 1948 Pat. 294; (accused need merely make out a prima facie case).

2. Dhirendranath v. State, A. I. R. 1952 C. 621.

3. Ramchandra v. Champabai, A. I. R. 1965 S. C. 354: 66 Bom. L. R. 486: 1965 M. P. L. J. 17: 1965 Mah. L. J. 37: (1965) 2 S. C. J. 557: 1965 S. C. D. 362: Chandara-

raj Kandamba v. Nemiraja Balipa, (1967) 12 Law Rep. 92 (also a case of will as in the Sup-(also a case of will as in the Supreme Court case). Charan Singh v. State of Punjab, 1974 Cri. L. J. 1258; 1974 Cri. L. R. (S.C.) 517: 1974 S. C. C. (Cri.) 735: 1974 Cri. App. R. (S.C.) 295: 1974 S. C. C. (Cri.) 458: (1975) 3 S. C. C. 39; A. I. R. 1975 S. C. 246 (Criminal cases cannot be put in a straight jacket): Brainbandhu in a straight jacket); Brajabandhu Naik v. State, 1975 Cri. L. J. 1933 (Orissa).

Bhagwan Dayal v. State, 1968 Cr. L. J. 1028: A. I. R. 1968 All, 290.

Rati Pal v. State, I.L.R. (1967) 2
 All. 360; 1968 A. L. J. 423, 426.
 Mulkh Raj Sikka v. Delhi Administration, 1973 Cri. L. J. 1171 at 1175 (S.C.): 1974 Cri. L. R. (S.C.) 512; 1974 S. C. C. (Cri.) 698: 1974 Cri. App. R. (S.C.) 226: (1975) 3 S. C. C. 2: 1975 All. Cri. C. 17: A. I. R. 1974 S.C. 1723.

fact that some times complaints were made against a senior officer or that he used rather inappropriate language in describing his powers and functions would not show that he is not a very truthful witness particularly when higher authorities did not find substance in the complaints.7 Merely because prosecuting witnesses were not examined by the Police and were also not examined as witnesses in the connected criminal case on the complaint filed by the police against the driver, it cannot be held that their evidence cannot be relied on.8 Merely because a witness has taken part in the investigation at an earlier stage is no reason to doubt his veracity on the ground that he agreed to participate in subsequent stages of investigation.9

But the evidence of an infirm witness merely because it has been corroborated by several witnesses of same type,10 negative evidence to prove the factum of meetings,11 deposition of the Pradhan in a case where Gaon Sabha was one of the plaintiffs a defendant and Pradhan showed ignorance of such fact,12 the evidence of witness not sent to identify the accused in identification parade of the accused despite his request,13 witness though respectable and belonging to honourable protession but giving statement to suit what he believes to be just, rather than what has actually taken place,12 witness giving different versions at different stages of examination.15 Even if there is no enmity there are persons who give false evidence, either because they are interested or they are influenced or they are coerced or threatened.16 Where the material and integral portion of the testimony of the sole witness is unreliable,17 witness whose testimony suffers from infirmity of suppression, concoction and embellishments of facts in material particulars and it being not possible to disengage truth from falsehood;18-19 if the intrinsic evidence of a witness is unreliable,20 it should not be given weight.

When witness is acquitted by appellate court, his credibility cannot be assailed on the ground of previous conviction or slight mistake. A witness prosecuted under Sections 107 and 110, Cr. P. C., a few years back in 36 cases cannot be relied upon.21-23 Evidence of witnesses appearing as prosecution or police witnesses four or five times in police cases pertaining to same police sta-

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8. Varadamma v. H. Mallappa Gowda, 1972 A. C. J. 375 at 377 (Mys.).

9. Onkar v. State of M. P., 1974 Cri. L. J. 1200 at 1207 (S.C.): 1974 M. P. 1., J. 429: 1974 Jab. L. J. 377.

10. Muluwa v. State of M. P., 1976 Cri. L. J. 717 at 722 (S.C.): 1975 U. J. (S.G.) 692: 1975 Cri. L.R. (S.C.) 521: 1975 Cri. App. R. (S.C.) 322: (1976) 1 S. C. C. 37; A. J. R. 1976 S.G., 989.

11. Rahim Khan v. Khurshid Ahmad.

11. Rahim Khan v. Khurshid Ahmad, (1974) 2 S. C. C. 660; (1975) 1 S. C. R. 643; (1975) 2 S. C. J. 178: A. I. R. 1975 S. C. 290.

- State of U. P. v. Ram Shri, A. I. R. 1976 All. 121 at 130; 1975 All. W. C. 632; 1975 R. D. 339.
 Jhabbu v. State of U. P., 1972 All
- Cri. R. 101 at 102.
- Smt. Kamla Kuer v. Ratan Lal,
 A. I. R. 1971 All. 304 at 315.
 Narayan Pillai v. State, 1971 Cri. Ratan Lal,

- Narayan Pillai v. State, 1971 Cri. L. J. 168 at 169.
 Kolandivelu, In re, 1974 M.L.W. (Cri.) 147 at 156.
 In re Thangaraj and others, 1973 Cri. L. J. 1301 at 1309: (1972) 2 Mad. L. J. 376: 1972 Mad. L. W. (Gri.) 638 (Relying on Khusal Rao v. State, A. I. R. 1958 Cri. L. J. 106 (S.C.)): A. I. R. 1958 S.C. 22.
 State of Orissa v. Sukra Singh, 1975 Cri. L. J. 200 at 203: I. L. R. 1974 Cut. 563: 41 Cut. L. T. 119.
 Kanika Bewa v. State, 1976 Cri. L. J. 418 at 419: (1975) 41 Cut.
 - - L. J. 418 at 419; (1975) 41 Cut. L. T. 798.
- 21-23. Jageshwar Mandal v. Safia, A. I. R. 1972 Pat. 297 at 303.

^{7.} Mohan Das Lalwani v. State of M. P., 1973 Cri. L. J. 1812 at 1816 (S.C.): 1973 S. C. C. (Cri.) 1011: 1974 S. C. Cri. R. 27: (1974) 2 S. C. W. R. 682: (1974) 3 S. C. C. 361: 1973 Cri. L. R. (S.C.) 653: 1974 Mad. L. J. (Cri.) 374: (1974) 1 S. C. J. 688: (1974) 1 S. C. R. 636; A. I. R. 1973 S.C. 2679.

tion does not carry any value,24 but in the following case25 evidence of witness appearing in 5-7 cases as prosecution witness coupled with the fact that there was a judgment in which his evidence was not considered sufficient for conviction, was not held unreliable. Evidence of men of substance appearing as a witness after a lapse of 18 months after the occurrence, even though suffering from lapse of memory on some aspects, would not cast any doubt on their veracity even though they had appeared previously in five or seven cases for the prosecution should not be discarded merely on that ground but should be scrutinised carefully.1-2 Where names of assailants were not disclosed to the eye-witnesses and there was deep enmity between the parties, the accused were entitled to be acquitted.3 Open hostility between parties is as much a ground for murder as for fabrication of false case.4 Where the evidence of confession is not believable, the mere circumstance that witnesses have spoken about bad blood between the parties cannot be given undue emphasis to convict.5

Evidence of prosecution witnesses who offer no explanation as to how accused sustained injuries or who are silent on this point or who have tried to suppress the injuries should be discarded.6 But in the following cases it has been said that there is no such hard and fast rule.7 It has also been held that in the facts and circumstances of a case failure of the witnesses to explain the injuries of the accused does not affect their credibility. Even if prosecution witnesses have suppressed facts regarding injuries sustained by accused or have given belated explanation about them, their evidence can be believed,9

1-2 Singha v. State, (1972) 74 P. L. R. 176 at 178.

R. 176 at 178.

3. State of Punjab v. Sohan Singh, 1974 Cr. L. J. 351 at 352 (S.C.): 1974 U. J. (S.C.) 67; 1974 S. C. C. (Cri.) 63; 1974 S. C. W. R. 91: (1974) 3 S. C. C. 585; 1978 Cri. L. R. (S.C.) 790; A. I. R. 1974 S. C. 300.

4. State v. Hukam Chand, I. L. R. (1974) 1 Delhi 419 at 424.

5. State v. Dinu Santa, (1973) 39 Cut L. T. 291 at 298.

6. Tek Chand v. State of Haryana.

L. T. 291 at 298.

6. Tek Chand v. State of Haryana, 1972 Cri. L. J. 51 at 52 (S.C.): 1972 S.C. Cri. R. 157: 1972 U. J. (S.C.) 277: (1972) 1 S.C.J. 483: 1972 Mad. L.J. (Cri.) 268: A.I.R. 1972 S.C. 228; Bansidhar Dandapat v. State of Orista, 1976 Gut. L. T. 1011; 1971 Pat. L. J. 124; Balbir Singh v. State of Haryana, 1976 C. L. R. 383 (Punj. and Haryana); (1971) 2 Cut. W. R. 373; (1972)

 Cut. L. R. (Cri.) 595: Thakarda Genaji Balaji v. State of Gujarat, (1971) 12 Guj. L. R. 536 (A. I. R. 1968 S.C. 1281 followed); Guljara Singh v. State, 1971 Cri. L. J. 498; 1970 W. L. N. (Part I) 265: A. I. R. 1971 Raj. 68.
 Bhagwan Tana Patel v. State ot Maharashtra, 1974 Cri. L. J. 145 at 148, 149: (1973) 2 S. C. W. R. 554; 1974 Mad. L. J. (Cri.) 258; (1974) 3 S. C. C. 536; A. I. R. 1974 S.C. 21; Ujagar Singh v. State of H. P., 1976 C. L. R. 6 (Him, Pra.). Pra.)

Pra.).

8. Gajendra Singh v. State of U. P., 1975 Cri. L. J. 1494 at 1498 (S.C.): 1975 Cri. L. J. 1494 at 1498 (S.C.): 1975 S. C. C. (Cri.) 499: 1975 Cri. L. R. (S.C.) 388: A. I. R. 1975 S. C. 1703 relying on State of Gujarat v. Sai Fatima, A. I. R. 1975 S. C. 1478; Ambika Yadav v. State, 1972 B. L. J. R. 107.

9. Siddiq v. State, 1974 All Cri. R. 215, See Hazara Singh v. State of Punjab, A. I. R. 1957 S.C. 469: 1975 W. L. N. (U.G.) 185: (1974) 76 Punj. L. R. 84: 1973 J. & K. L. R. 855: 1973 Kash. L. J. 123; State of Assam v. Bhabananda Sarma, 1972 Cri. L. J. 1552; Bankey Lal v. State of U. P., 1971 S. C. D. 400: 1971 Civ. Ap. R. 239 (S.C.): 1971 Cri. L. J. 1540: (1971) 1 S. C. W. R. 514: (1971) 3 S. C. C. 184: A. F. R. 1971 S.C. 2233.

State of Punjab v. Rameshwar Das, 1975 Cri. L. J. 1630 at 1633: 1974 Punj. L. J. (Cri.) 383: 77 Punj. L. R. 189: (1973) 2 Cri. L. T. 74: 1974 Punj. L. J. (Cri.) 329; Hira Lal v. State of Haryana, 1971 Cri. L. J. 290: 1971 U. J. (S.C.) 106: (1970) 3 S. C. C. 933: A. I. R. 1971 S. C. 356.
 Amarjit Singh v. State of Punjab, (1971) 73 Punj. L. R. 774 at 781, 782.

non-explanation of injuries on accused which are mere bruises or abrasions or if the positive evidence of guilt of accused is otherwise cogent and reasonable, failure to explain injuries on accused cannot compel acquittal.10 The effect of non explanation of injuries on the accused or of some injuries on the deceased is a question of fact which in some cases may undermine the evidence and shake the foundation of the case, while in others it may have little or no adverse effect on the prosecution case. In such cases evidence of the prosecution witnesses has got to be carefully examined.11 But in a recent case the Supreme Court has enunciated the law thus: In a murder case, the non-explanation of the injuries sustained by the accused at about the time of occurrence or in the course of altercation is a very important circumstance from which the Court can draw the following inferences:

- (1) That the prosecution has suppressed the genesis and the origin of the occurrence and has thus not presented the true version;
- (2) That the witnesses who have denied the presence of the injuries on the person of the accused are lying on a very material point and, therefore, their evidence is unreliable;
- (3) That in case there is a defence version which explains the injuries on the person of the accused it is rendered probable so as to throw doubt on the prosecution case,

The omission on the part of the prosecution to explain the injuries on the person of the accused assumes much greater importance where the evidence of the prosecution consists of interested or inimical witnesses or where the defence gives a version which competes in probability with that of the prosecution one.

There may be cases where the non-explanation of the injuries by the prosecution may not affect the prosecution case. This principle would obviously apply to cases where the injuries sustained by the accused are minor and superficial or where the evidence is so clear and cogent, so independent and disinterested, so probable, consistent and creditworthy that it far outweighs the effect o the omission on the part of prosecution to explain the injuries. 12

Evidence of injured witness is entitled to weight. An injured witness, in any case, would not easily substitute a wrong person for his actual assailant.18 But his evidence should be scrutinised by applying the test of probability.14 The assessment of the credibility of a witness is affected by the demeanour of the witness on the witness stand particularly when he is confronted with inconvenient facts or contradictory statements said to have been made on carlier

^{10.} State of Orissa v. Sukra Singh, 1975 Cri. L. J. 200 at 202; I. L. R. (1974) Cut. 563; 41 Cut. L. T. 119.

^{11.} Vasudevan v. State, 1976 Kerala L. T. 354 at 358.

Lakshmi Singh and others v. State of Bihar, A. I. R. 1976 S. C. 2263 at 2269, 2270; (1976) 4 S. C. C. 394; 1976 S. C. C. (Gri.) 671; 1976 Cri. I. J. 1736; 1976 All.

Cr. C. 372.

^{13.} Jamuna Chaudhry v. State of Bihar, 1974 Cri. L. J. 890 at 894 (S.C.):
1974 S. C. Cri. R. 92: 1974 S. C.
C. (Cri.) 250: (1974) 3 S. C. C.
774: 1974 Cri. App. R. 125: 1974
B. B. C. J. 168: 1974 Cri. L. R.
(S. C.) 73: (1974) 2 S. C. R. 609:
A. I. R. 1974 S. C. 1822.
14. Harihar v. State of U. P., 1971
Cri. L. J. 1578 at 1580,

occasions.15-16 In case testimony of such witnesses is found acceptable on its own, there being no inherent infirmities found in it, there would be no need to seek for corroboration from independent quarters.17 A person could not be a competent witness when he was 10 years old at the time of the transaction for which he has deposed.18 If the testimony of a witness appears to be reliable it should not be discarded simply because some suggestions were made to him but not established.19

Regarding credibility of witnesses if there is no suggestion made by the accused to the witnesses during their cross-examination that there is enmity between the accused on the one side and the prosecution witnesses on the other, such evidence cannot be disbelieved particularly when it is corroborated and the accused have not taken defence of enmity.²⁰ But it has also been held that there is no rule of law or prudence that if witnesses are neither interested, nor inimical the court must accept their evidence without testing it by yardstick of probabilities and without considering other factors and features of the case.21 It is submitted that the latter view is correct.

Where all the three courts, including the High Court, rejected the defence evidence summarily without pausing to consider it in the light of the probabilities of the case on the assumption that defence witnesses are often untrust worthy but it is wrong for that reason to assume that they always lie and that the prosecution witnesses are always trustworthy. The prime infirmity from which the judgment of the High Court suffered consisted in this double assumption. The Court should assess the credibility of defence witnesses in the same manner as it should assess credibility of prosecution witnesses.22

- (d) Number of witness. (1) General. Section 134 of this Act states that no particular number of witnesses shall in any case be required for the proof of any fact. Section 3 lays down that a fact is said to be proved when, after considering the matters before it, the court believes it to exist, or considers the existence so probable that a prudent man under the circumstances of the particular case would act upon the supposition that it exists. The Mosaic Law in some cases, and the Civilians and Canonist in all, accepted the evidence of more than one witness, the doctrine adopted by most nations in Europe and by the ecclesiastical and some other tribunals.
- (2) The English Rule of Common Law. Unus nullus rule that one is equal to none, governed strictly at one time the effect of evidence. Testimony usually was counted, not weighed, one oath in any case being insufficient. In Anglo-Saxon and Norman times, proof was according to the importance of the case made six-handed, twelve-handed, etc.; and he who had the greater number of witnesses prevailed. This rule came to be greatly relaxed, and in England

^{15-16.} Harsarup Das v. Paramanabhaih, 1972 Gri. L. J. 1956 at 959: 1972 Sim. L. J. (H. P.) 1. 17. Satyanarayana Rao v. State of Mysore, 1972 Mad. L. J. (Cri.)

³²¹ at 331.

State of Bihar v. Hanuman Koeri, 1971 Cri. L. J. 187 at 191.
 Pukhraj v. State of Rajasthan, 1970 W. L. N. (Part I) 518 at 531: I. L. R. (1971) 21 Raj. 52.
 In re Thipauna, 1971 Cri. L. J. 1640 at 1645; 1971 Mad. L. J. (Cri.)

^{200: (1971) 1} Mys. L. J. 473. Sadhu Charan Pande v. Mahani Tripathi, 1974 Cri. L. J. 1120 at 1121: 40 Cut. L. R. 577: 1974 Cut.

L. R. (Cri.) 310. 22. Kaur Sain v. State of Punjab, 1974 Cri. L. J. 358 at 359; 1974 Cri. App. R. 76; 1974 S. C. Cri. R. 132; (1974) 3 S. C. C. 649; 1974 Cri. L. R. (S. C.) 23; 1974 S. C. C. (Gri:) 179; (1974) 2 S. C. R. 393; A. I. R. 1974 S. C. 329; (1972) 1 Cut. I. P. (Cri.) 450

^{(1972) 1} Cut, L. R. (Cri.) 450.

now the general rule is the same as enacted by Section 134 of the Indian Evidence Act.

- (3) Rule in India. There are certain exceptions, where the testimony of single witness is declared by Indian statutes to be insufficient to prove a particular fact; for example, in cases of treason, perjury and personation at elections.
- (4) Rule in criminal cases. In Criminal cases as pointed out in the decisions of the Supreme Court,28 it is the weight of the evidence and not the number of witnesses which the court ought to consider and on credible witness outweighs the testimony of a number of witnesses of indifferent character, and unless corroboration is insisted upon by statute, court should not insist on corroboration, except in cases, where the nature of the testimony of the single witness itself requires that corroboration should be insisted upon, as a rule of prudence; and this will depend on the circumstances of each case. It is not incumbent, unless there are special circumstances in the individual case, on the prosecution, to produce all the persons who happened to be gathered at the spot, when the offence occurred or was discovered. It is necessary for the prosecution to produce every witness who can speak to a particular fact; where the prosecution produces one witness when there are two witnesses available, it does not follow that the evidence of the person who has been produced should be disbelieved. The only limitation is, witnesses essential to the unfolding of the narrative on which the prosecution rests, must be called by the prosecution. This view has been followed in the following cases.24 It can, by no means be laid down as a general maxim that the assertions of two witnesses is more convincing to the mind than the assertion of one witness. An accused can be convicted even on the basis of the evidence of a single eyewitness; but such a witness must be a man or woman of worth. Court can rely on the evidence of one witness alone.25

C. (Cri.) 527. (There is no duty on prosecution to examine witnesses who have been gained over by the accused)

24. N. Vasudeva Pillai v. State of Kerala, I. L. R. (1968) 2 Ker. 303: 1968 Cr. L. J. 1362 (Witnesses mere soda vendors, with convictions for petty offences); P. B. Gupta v. State, 1968 Cr. L. J. 1613: A. I. R. 1968 Tripura 57 (62).

25. Food Inspector v. Cannanore Municipality, A. I. R. 1964 Ker. 261; Baishnab Gharan Mohanty v. Madan Sahu, I. L. R. 1967 Cut. 616; 33 Cut. L. T. 640; The Chairman, Suri Municipality v. Sisir Kumar Ghose, 66 C. W. N. 102, 106; Rama v. State, 1969 Cr. L. J.1393; A. I. R. 1969 Goa 116, 118; Chandulal Gordhan Patil v. State of Gujarat, 1970 G. A. R. (S.C.) 352, 355. In re Thangaraj, 1972 Mad. L. W. (Cri.) 638; (1972) 2 Mad. L. J. 376; 1973 Cri. L. J. 1301; Ram August Tewari v. Bindeshwari Tiwari, 191 Pat. L. J. R. 587; I. L. R. (1972) 51 Pat. 78; 1972 B. L. J. R. 97; A. I. R. 1972 Pat. 142; 1973 Cut. L. R. (Cri.) 512.

^{23.} Vadivelu Theevar v. State of Mad. ras, A. I. R. 1957 S. C. 614: 1957 S. C. J. 527: (1957) 2 M L. J. (S.C.) 69: 1957 Cri. L. J. 1000: 1956 M. P. C. 711: 1957 All. L. J. 898: 1957 2 All. W. R. (S. C.) 69: 1952 All W. R. (H. C.) 640; Shiv.ji Sahebrao Bobade v. State of Maharashtra, (1973) 2 S. C. W. R. 426: 1973 S. C. C. (Cri.) 1033: (1973) 2 S. C. C. 793: 1973 Cri. App. R. 410 (S.C.): 1973 Cri. L. R. (S. C.) 602: (1974) 1 S. C. R. 489: 1975 Mad. L. J. (Cri.) 417: (1975) 2 S. C. J. 82: 1973 Cri. L. J. 1783: A. I. R. 1973 S. C. 2622; Jose v. State of Kerala, 1973 S. C. 2622; Jose v. State of Kerala, 1973 S. C. 944: Chuhar Singh v. State of Haryana, (1975) 2 Cri. L. T. 487: 1975 B. B. C. J. 730: 1975 Cri. L. R. (S. C.) 463: 1975 All. Cri. C. 282: 1975 U. J. (S. C.) 576: 1975 Cri. App. R. (S. C.) 306: 1975 Cri. App. R. (S. C.) 576: 1975 Cri. App. R. (S. C.) 577: 1975 S. C. (Cri.) R. 468: Mst. Dalbir Kaur v. State of Punjab, (1977) 1 S. C. J. 54: (1977) M. L. J. (Cri.) 50: A. I. R. 1977 S. C. 472: (1976) 4 S. C. C. 158: 1976 S. C.

If a case rests upon the statement of a solitary eye-witness who has changed the version in the Sessions Court from that given in the committing Court and there is nothing further to connect the accused with the offence with which he is charged, there would be good ground for acquitting him but not when there are other clear circumstances in the case to show that the earlier statement is definitely to the preferred. But ordinarily it is very risky to rely upon a solitary witness who has made conflicting statements.2 Legally there can be no objection to basing the conviction of an accused on the sole testimony of a witness, provided he is above reproach and entitled to full credit.3 There is no rule of law that conviction cannot be based on the sole testimony of a Food Inspector. It is only out of a sense of caution that the courts insist that the testimony of a Food Inspector should be corroborated by some independent witness. This is a necessary caution which has to be borne in mind because the Food Inspector may in a sense be regarded as an interested witness, but this caution is a rule of prudence and not a rule of law: if it were otherwise, it would be possible for any guilty person to escape punishment by resorting to the device of bribing panch witnesses. The conviction of the appellants under Prevention of Food Adulteration Act could not be assailed as infirm on the ground that it rested merely on the evidence of the Food Inspector.3-1

The evidence of a single witness, if believed, would be sufficient to prove a fact. This is because the evidence has to be weighed, not counted.4 In prosecution for offence under Prevention of Food Adulteration Act, the public witness admitted his signatures on papers relating to supply of food article to the Food Inspector but turned hostile, it was held that conviction on the solitary evidence of Food Inspector is proper.5

Where the victim of a murder was the manager of land in the possession of the accused as lessees and the only eye-witness to the crime was interested in the purchase of the land, his evidence cannot be rejected on the ground of his interest which can have no bearing on the question of his evidence in relation to the murder, especially as the minor discrepancies in his evidence were immaterial and the evidence was substantially corroborated by other evidence on record.6

Permission granted to cross-examine a witness by itself is not enough to discredit the witness.7

To sum up in the language of English Text-book, Harrison Advocacy at Petty Sessions, 1956, page 30, "what is required is quality and not quantity of testimony. If two witnesses give almost identical evidence, it frequently pays to call one of them to the witness-box, choosing the one who gives the greater appearance of truth. If one witness is called and he is believed, the

Periyasami v. State of Madras, (1967) 2 S. C. R. 122; (1967) S. C. D. 761; (1967) 2 S. G. J. 227; (1967) 2 Andh. W. R. (S. C.) 41; 1967 Cr. L. J. 975; A. I. R. 1967 S. C. 1027, 1029.
 In re Muruga Goundan, A. I. R. 1949 Mad. 628.

^{3.} Joginder Singh v. State, 1968 Raj. L. W. 35: 1968 Cr. L. J. 378; A. I. R. 1968 Raj. 63, 68.

3-1. Prem Ballab v. State, A. I. R. 1977 S. C. 56 at page 59; 1976 F. A. J.

^{390; (1977) 1} S. C. C. 173; (1977) Andh. L. J. (S.C.) 11. 4. Rama v. State, 1969 Cr. L. J. 1393;

A. I. R. 1969 Goa 116, 118.

A. I. R. 1969 Goa 116, 118.
 Mohan Poddar v. State of Bihar, 1974 B. L. J. R. 267 at 269; 1975; F. A. J. 67; 1975 F. A. C. 154.
 Ramsetty Butchaiah v. State, 1969 Cr. L. J. 542 (Andh. Pra.).
 Sachdeo Tanti v. Biptin Pasin, 1969 Cr. L. J. 1527; A. I. R. 1969 Pat. 415; Emperor v. Haradhan, A. I. R. 1933 Pat. 517;

other does no more than waste the time (and we may add, public funds) and gives the cross-examiner another chance by cross-examination to throw doubts on the testimony of both. The object of adduction of evidence is to convince the judge with the best evidence of the truth of the version proposed to be proved and not to furnish material by repetitive evidence for the cross-examiner to work upon and manufacture discrepancies, the favourite pastime in our courts."

There is no absolute bar against relying upon uncorroborated testimony of a single witness if it is otherwise reliable.8 Unless corroboration is insisted upon by statute, the Court should not insist on corroboration except in cases where the nature of the testimony of a single witness itself requires as a rule of prudence that corroboration should be insisted upon " In cases where there is no dearth of witnesses or where all the witnesses are partly reliable and partly unreliable or are persons of bad character or are accomplices, or persons in the nature of accomplices or are children or victims of sexual assault, insistence on plurality of witnesses implicating an accused for convicting him may or may not result in injustice depending on circumstances of each case. But it would result in injustice if where only one eye-witness is available and he is wholly reliable witness and even then corroboration is insisted upon.10

Where the evidence of a sole witness suffers under a serious infirmity of its being partly reliable and partly unreliable, there should be "corroboration in material particulars by reliable testimony" with a particular note of caution that the Court must look for corroboration more so, in cases where several persons have been implicated and the sole witness gives varying and discrepant versions as to the details of the occurrence.¹¹. Evidence in short should be weighed and not counted.¹² Where a witness names a number of persons as having committed an offence and the court gives the benefit of doubt to some of them, that is no reason for disbelieving him.13

(e) Interested witnesses. Interested evidence is the sort of evidence the source of which is likely to be tainted.14 Where the Sub-Inspector was himself a participant in the offence of offering a bribe, though it was with the object of working out against the accused a case of offering a bribe, he was an interested witness.15 The evidence adduced on behalf of the petitioners consisted of the evidence of 4 alleged eye-witnesses, two of whom, were employees of the Moti Mahal Restaurant, and the other two were residents of the locality. The evidence of employees could not be assailed on the ground that they were inte-

13. Ramratan v. State, supra.

 Hira Lal v. State of Haryana, 1971
 Cri. L. J. 290 at 291; 1971 U. J.
 C.) 106; (1970) 3 S. G. C. 933; A. I. R. 1971 S. C. 356.

^{8.} Ramanuj w. State, 1970 All. (Cri.) R. 328 at 329

^{9.} Ramratan v. State. A. I. R. 1962 S. C. 424; 1962 (1) Cr. L. J. 473; 1962 M. L. J. (Gr.) 263; 1962 All. W. R. (H. C.) 268; (1962) 1 S. C. J. 371; 1962 All. Cri. Report 166; Shwaji Sahebrao Bobade v.

^{166;} Shwaji Sahebrao Bobade v. State of Maharashtra, A. 1. R. 1973 S.C. 2622

10. Kunhaman v. State of Kerala, 1974 Ker. L. T. 328 at 424.

11. In re Thangaraj,1972 Mad. L. W. (Cri.) 638: (1972) 2 Mad. L. J. 376; 1973 Cr. L. J. 1301 at 1305.

12. In re Repana Naganna, A. I. R. 1961 A. P. 70, relying on Piare v. Emperor, A. I. R. 1944 F. C. 1, (17). (17).

^{14.} See Jogendra Krishna Ray v. See Jogendra Krishna Ray V. Keerpal Harshi & Go., I. L. R. 49 Cal. 345; 35 C. L. J. 176; A. I. R. 1923 Cal. 63; Rameshwar Kalyan Singh V. State of Rajasthan, 1952 S. C. R. 377; 1952 S. C. J. 46; (1952) 1 M L. J. 440; 65 M. L. W. 351; 1952 M. W. N. 150; 1952 Cr. L. J. 547; A. I. R. 1952 S. G. 54, 58; Binami Properties (Private) Ltd. V. M. Gulamali Abdul Hossain & Co., A. I. R. 1967 Cal. 390, 401.

rested witnesses being employees of the Moti Mahal Restaurant where the deceased also was the Manager. This is, however, not a valid reason for rejecting their evidence inasmuch as the presence of employees is natural and probable.16 A person could not be a competent witness when he was 10 years old at the time of the transaction for which he has deposed. Moreover the witness was also connected with the transaction in which he had attested the two documents on behalf of the deceased which was the cause of the murder. His evidence in Court was contradicted by his statement made before the police. His evidence is not of an independent witness.¹⁷ Witness compromising a civil suit filed against him and father of accused and thereafter the decree was passed only against latter, such a witness is not an interested witness.18 A witness would not develop malice against accused and his father merely because like others the accused and his father were supporters of opposing candidates during election of Sarpanch,19 complainant and all witnesses employed in same office cannot be dubbed as interested witness.20

A close relative who is a very natural witness cannot be regarded as an interested witness. The term "interested" postulates that the person concerned must have some direct interest in seeing that the accused person is somehow or the other convicted either because he had some animus with the accused or for some other reason.21

If an accused person offers to sign any money order slip holding out an identity card and establishing by that act that he is the particular person shown in the photograph and after obtaining his signatures the postman makes the payment, then in any case, the postman will not become an accomplice. On a perusal of the proven circumstances of the case none of the two witnesses, on whom the case depended were even interested witnesses. They had been subjected to deliberate fraud and deception.22 A person may be an interested witness but on that account his evidence cannot be totally disregarded; 28 only such evi-

Delhi Transport Undertaking v. Raj Kumari, 1972 A. C. J. 403, 405

(Delhi).

17. State of Bihar v. Hanuman Koeri, 1971 Cr. L. J. 187 at 191 (Pat).

18. Shingara Singh v. State, 1971 Cri. L. J. 966 at 967, 968: I. L. R. (1973) 1 Punj. 51; A. I. R. 1971 Punj. 246.

19. Ibid at p. 967 of 1971 Cr. L. J. Jagdish B. Rao v. Govt. of Union Territory of Goa, 1976 Cri. L. J. 182 at 134

132 at 134.

21. Mst. Dalbir Kaur v. State of Pun-jab, A. I. R. 1977 S. C. 472 at 481: (1977) I S. C. J. 54: (1977) M. L. J. (Gri.) 50: (1976) 4 S. C. C. 158: (1976) S. C. C. (Cr.)

22. Kharaiti Ram v. State, 1972 Delhi

13 at 16, 17.

23. Bishwanath Rai v. Schhidanand Singh, A. I. R. 1971 S.C. 1949, 1954; Abdul Shakoor-& Co. v. Union of India, (1971) 1 Mad. L. J. 400 (unless it is inherently improbable, untrue and not worthy of acceptance); Lakshmi Pasi v. State, 1971 B. L. J. R. 386; Sheo Lochan v. State, 1971 A. W. R. (H.C.) 92;

Gurphekan v. State of U. P., 1972 Cri. L. J. 746; A. I. R. 1972 S. C. 1172 (Evidence supported by Cri. L. J. 746; A. I. R. 1972
S. C. 1172 (Evidence supported by circumstantial evidence); Apren Joseph v. State of Kerala, 1972 Mad. L. J. (Cri.) 10: 1971 Ker. L. T. 761: I. L. R. (1971) 2 Ker. 381: 1972 Cri. L. J. 1162 (where partisan witnesses alone saw the occurrence having taken place in a desolate place in the dead of night); Surindar Kumar v. State, 1978 Cur. L. J. 924: 76 Punj. L. R. 265: 1975 F. A. J. 190 (D.B.); Karuni Samal v. The State, (1974) Cut. L. R. (Cri.) 380; 42 Cut. L. T. 207; Samson Hyam Kemkar v. State of Maharashtra, 1974 U. J. (S.C.) 43: (1974) 1 S. C. W. R. 213: 1973 S. C. C. 494: 1973 Cri. L. R. (S.C.) 691: 1974 Cri. L. J. 809: A. I. R. 1974 S.C. 1153; Bhagwati Devi v. Ish Kumar, 1975 A. C. J. 56: 1975 Rajdhani L. R. 172; Ganga Ram v. State of M. P., 1972 U. J. (S.C.) 817: (1978) 3 S. C. C. 876: 1973 S. C. C. (Cri.) 558: 1973 All. Gri. R. 272: 1973 Cri. L. J. 661: A. I. R. 1973 S. C. S. 852. A. I. R. 1973 S. C. 852.

dence has to be scrutinised with great care.24 Though the testimony of interested witnesses must be scrutinised with great care, the present trend of decisions is that this appreciation of oral evidence by a court cannot conform to certain set formula or be measured by the yardstick common to all cases.25 Even in the case of interested witnesses it is not desirable that the evidence should be at once discarded. A judge cannot shut out the evidence from consideration simply because it came from interested parties. No evidence is tainted simply because it comes from quarters interested in the case; but it has to be judged on its own merits.1 It is well settled that the evidence of interested or inimical witnesses is to be scrutinised with care but cannot be rejected merely on the ground of being a partisan evidence. If on a perusal of the evidence the Court is satisfied that the evidence is creditworthy there is no bar in the Court relying on the said evidence.1-1 The fact that there is a longstanding enmity between the family of the accused and the family of the plaintiff alone is not enough to reject the testimony of prosecution unless other circumstances exist which render the prosecution evidence unworthy of credit. It must be remembered that enmity is a double edged weapon; it may be that because of enmity, the crime has been perpetrated, and it may also be that the accused has been falsely implicated. In a case where parties are admittedly on inimical terms, prudence enjoins that the court should scrutinise the evidence with circumspection.1-2 The relationship of the prosecution witnesses to the murdered man is no ground for not acting upon its testimony, if it is otherwise reliable, in the sense that those witnesses are competent witnesses who could be

\$02: 1973 Cri. L. J. 1828: 1973 S. C. W. R. 465: 1973 Cri. L. R. (S.C.) 634: A. I. R. 1973 S. C. 2695; Nankha Singh v. State of Bihar, 1972 Cri. L. J. 1204: (1972) 1 S. C. W. R. 926: 1972 Cri. App. R. (S.C.) 234: 1972 S. C. Cri. R. 400: 1972 S. C. D. 793: 1973 U. J. (S.C.) 14: (1972) 3 S. C. C. 590: A. I. R. 1973 S. C. 491; Sarjang Mahto v. State of Bihar, 1971 Pat. L. J. R. 107; Prem Datta Gautam v. State of U. P., 1978 S. C. C. (Cri.) 912: 1973 U. J. (S. C.) 808: 1973 Cri. App. R. 387 (S.C.): (1974) 3 S. C. C. 286: 1973 Cri. L. R. (S.C.) 600: 1973 Cri. L. J. 1767: A. I. R. 1973 S. C. 2496; Maghar Singh v. The State of Punjab, 1974 Chand. L. R. (Cri.) 128.

(Cri.) 128.
25. In re P. Ramulu, A. I. R. 1956
Andhra 247; 1956 Cr. L. J. 1389.
1. Maidhandas v. Şricharan, A. I. R.

1956 Assam 170; see also Mangal Singh v. M. B. State, A. I. R. 1957 S. C. 199: 1957 Cr. L. J. 325.

1-1. Piara Singh v. State of Punjab, A. I. R. 1977 S.C. 2274 at page 2275: 1977 Cr. L. J. 1941: (1977) 4 S. C. C. 374.

Khalaksingh v. The Statt, A. I. R. 1957 Madh. Pra. 153; 1957 Cr. L. J. 1158; Tahsildar Singh v. State, A. I. R. 1958 All. 214; 1958 Cr. L. J. 324.

²⁴ Ramaphupala Reddy v. State of A. P., (1971) 1 S. C. W. R. 34. 45; Public Prosecutor v. S. Gopala Rao, 1971 Cri. L. J. 536; (1969) 2 Andh. W. R. 304: 1969 Mad. L. J. 902; Mangulu Malik v. State, (1971) 37 Cut. L. T. 1264; (1971) 2 Cut. W. R. 527; Awadh Singh v. State of Bihar, 1971 Pat. L. J. R. 206; 1971 B. W. R. 605; 1972 Cri. L. J. 446; State of Bihar v. Hanuman Koeri, 1971 Cri. L. J. 187; State v. Ladhu Singh, I. L. R. (1971) 21 Raj. 119: 1970 W. L. N. 278 (Part I); Sarwan v. State of Rajasthan, 1971 Raj. L. W. 249; State of U. P. v. Iftikhar Khan, 1973 Cri. App. R. 88; (1973) 1 S. C. C. 512; 1973 S. C. Cri. R. 288; 1973 S. C. D. 225; 1973 Cri. L. R. (S.C.) 196; (1973) 3 S. C. R. 328; 1973 S. C. C. (Cri.) 384; 1973 Gri. L. J. 636; A. I. R. 1978 S. C. 863; Channa Ram v. Indro, 1974 Chand L. R. (Cri.) 475; Municipal Committee, Amritsar v. Behari Lal, (1974) 1 Cr. L. T. 154; 1974 F. A. C. 432; 1974 Chand L. R. 370; Rahim-ud-Din v. Satwant Kaur, 1974 Punj. L. J. (Cri.) 271; Sarwon Singh v. State of Punjab, A. I. R. 1976 S. C. 2304; 1976 Cri. L. J. 1756; (1976) 4 S. C. C. 396; Dargahi v. State of U. P., 1973 S. C. G. (Cri.) 928; (1973) 2 S. C. W. R. 357; 1973 S. C. D. 1057; (1974) 3 S: C. C.

expected to be nearabout the place of occurrence and could have seen what

A witness is normally considered to be independent, unless he or she springs from sources which are likely to be tainted and that usually means that unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely; ordinarily a near relative will be the last person to screen the real culprit and falsely implicate an innocent person. The mere fact of relationship is not enough to throw away the evidence of a witness if it is found to be true.3 Such evidence is reliable if the witness was competent and

2. Gurcharansingh v. State of Punjab,
A. I. R. 1956 S. C. 460; Bindeshri
v. Rajaram, A. I. R. 1961 All.
198; Tulsiram v. Shyamlal, A. I.
R. 1960 M. P. 73; Jam Khoksi
Kuki v. State, 1968 Cr. L. J. 64
(2): A. I. R. 1968 Manipur 7, 11;
Om Prakash v. State of Delhi;
(1971) 2 S. C. Cri. R. 585; 1971
U. J. (S.C.) 367; (1971) 3 S. C. C.
413: 1971 S. C. C. (Cri.) 661;
1974 Cri. L. J. 1383; A. I. R.
1974 S. C. 1983; Balak Ram v.
State of U. P., 1974 Cri. L. J.
1486; N. W. Naik v. State of Maharashtra, (1970) 2 S. C. C. 101;
1970 S. C. D. 697; 1970 S. C. Cri.
R. 516; (1971) 1 S. C. J. 72; 1971
M. L. J. (Cri.) 43; 1971 All. Cri.
R. 156; 1971 All. W. R. (H.C.)
160; 1971 M. L. W. (Cri.) 71 (2);
1971 (1) S. C. R. 133; A. I. R.
1971 S. C. 1656; Hari Krishna Mathur v. Kiram Bahadur Singh, 1972
All L. J. 337; 1972 A. W. R.
(H.C.) 129; 1972 Ren, C. J. 773;
1972 Ren, C. R. 448; I. L. R.
(1972) 1 All. 412; A. I. R. 1972
All. 369; Mahender Singh v. State,
1972 Cri. L. J. 1590 (Delhi); Kanaran v. State, I. L. R. (1972) 1
Ker. 476; Kuma alias Kumbhakaran v. State, 1, L. R. (1972) 1
Ker. 476; Kuma alias Kumbhakaran v. State, 1975 Cut, L. R.
(Cri.) 404 (Orissa); Surjan Singh v.
State, 1971 W. L. N. 360 (D.B.);
Ram Dhani Pande v. State of M.P.,
1973 Jab. L. J. 504; 1973 M. P.
W. R. 326; 1973 M. P. L. J. 570;
1973 Cri. L. J. 1880; Kala v. State of Punjab, A. I. R. 1976 S. C. 2304;
(1976) Cr. L. J. 1757; (1976) 4
S. C. C. 369; Gazumuddin Mian v.
Abdul Gafoor, 1972 Cri. L. J. 182
(Assam).
3. Dalip Singh v. The State of Pun-Abdul Gafoor, 1972 Cri. L. J. 182

(Assam).

3. Dalip Singh v. The State of Punjab, 1954 S. C. R. 145: 1953 S. C. A. 709: 1953 S. C. J. 532: 1953 M. W. N. 642: 1953 Cr. L. J. 1465: A. I. R. 1953 S. C. 364, 366: State v. Bhola Singh, 1969 Cr. L. J. L. 1002: A. I. R. 1969 Rai, 219. L. J. 1002; A. I. R. 1969 Raj. 219,

224; Angroo v. State of U. P., (1971) 2 S. C. Cri. R. 35: 1971 Cri. L. J. 285: (1970) 3 S. C. C. 208: A. I. R. 1971 S. C. 296 (The fact of relationship would rather add to the value of his evidence); Ram Kishun v. State of U. P., 1971 All. Cr. R. 137; State v. Mayadhar Rana, (1971) 1 Cut. L. R. (Cri.) 363: (1972) 38 Cut. L. T. 725 (unless they are otherwise biased); State of U. P. v. Samman Dass, 1972 U. J. (S.C.) 526: (1972) 2 Um. N. P. 262: (1972) 3 S. C. C. 201: 1972 S. C. Cri. R. 511; 1972 S. C. C. (Cri.) 275; (1972) 3 S. C. R. 58; 1973 Mad. L. J. (Cri.) 504: 1973 All L. J. (1973) 2 S. C. J. 345: 1978 M. P. W. R. 452: 1972 Cri. L. J. 487: A. I. R. 1972 S. C. 677 (unless a motive is alleged and proved against them to implicate falsely an to the value of his evidence); Ram against them to implicate falsely an innocent person); Varadamma v. against them to implicate falsely an innocent person); Varadamma v. H. Mallappa Gowda, 1972 A. C. J. 375; Paras Ram v. H. P., 1973 Cut. L. J. 428; Radhu Kandi v. State, 39 Cut. L. T. 337: 1973 Cut. L. R. (Cri.) 101: 1973 Cri. L. J. 1320 (In fact this adds to the value of his evidence); Guli Chand v. State of Rajasthan, 1974 Cri. App. R. 120 (S.C.): 1973 W. L. N. 998; 1974 Cri. L. R. (S.C.) 53: (1974) 3 S. C. C. 698: A. I. R. 1974 S.C. 276; Barati v. State of U. P., 1974 Cri. L. J. 709: 1974 S. C. C. (Cri.) 420: (1974) 4 S. C. C. (Cri.) 420: (1974) 4 S. C. C. (S.C.) 365: A. I. R. 1974 S. C. D. 579: 1974 Cri. L. R. (S.C.) 365: A. I. R. 1974 S. C. D. 579: 1974 Cri. L. R. (S.C.) 365: A. I. R. 1974 S. C. 1168; State v. Bansidhar Panda, 1974 Cut. L. R. (Cri.) 475 (Place of occurrence and time was such that presence of independent witnesses was least expected); Gajendra Dandseva v. State, (1974) 40 Cut. L. T. 650 (In the absence of any special reason of general unreliability, relationship is often a sure guarantee of truth); Suna v. State, (1974) 40 Cut. L. is often a sure guarantee of truth); Suna v. State, (1974) 40 Cut. L.

could be expected to be nearabout the place of occurrence and could have seen what had happened then.4 The judicial approach in appraising such evidence should be cautious and evidence should be scrutinised with more than ordinary care.5-6 There is no rule of evidence that witnesses, who are relations of the victim of a murder, should not be believed.7 Relationship is a sure guarantee of truth.8

The mere fact that injured prosecution witnesses are related to each other would not be a sufficient ground for discrediting their testimony.9

When only the family members saw the occurrence and disinterested neighbours did not see it, the evidence of such relations is not to be disbelieved,10 provided it is otherwise credible and fits in with the broad probabilities of the case.11

The burden of proving the guilt of the accused lies on the prosecution. If the parties are closely related it is often said that a close relation would normally not falsely implicate his relations and leave the real culprits. This principle applies in stricto sensu to those cases where no other blemish can be found with the quality of the prosecution witnesses. When both the parties are injured, and the Court is called upon to determine which of them initiated the trouble, it would be unsafe to accept the evidence of the relation-witnesses, which does not fit in with the circumstances of the case. 12-18

In civil cases the principle of interestedness of witnesses based on relationship affecting their evidentiary value cannot be applied for a proper apprecia-

T. 159 (Close relation even sharing the hostility of the victim towards the assailant, can be believed); Tarlok Singh v. State of Punjab, (1974) 76 Punj. L. R. 84 (testimony should be from any inmony should be free from any infirmities); Samai Kisku v. State of Orissa, 41 Cut. L. T. 627: 1975 Cut. L. R. (Cri.) 171; Bhupat Kumar v. State of Bihar, 1975 B. B. C. J. 317: I. L. R. (1974) 53 Pat. 644: 1975 Cri. L. J. 1405 (far from affecting his testimony adversely, adds weight to the evidence); Mukhtar Singh v. State of Punjab, (1974) 1 Cri. L. T. 225: 1974 Punj. L. T. (Cri.) 338: 1975 Cri. L. J. 132 (is rather more trustworthy); State of Gujarat v. Pramukh Lal, 1975 Cur. L. J. 324 (the principle applies when there is no blemish on the quality of such evidence); Chandrika Prasad v. State, 1975 Rajdhani L. R. 551; Charat Singh v. Jaswant L. R. 551; Charat Singh v. Jaswant Kaur, 1975 Cur. L. J. 159; Chaman Lal v. State, 1976 Kash. L. J. 253; 1973 Cr. L. J. 1310.

4. State v. Bhola Singh, 1969 Cr. L. J. 1002; A. I. R. 1969 Raj. 219, 224.

5-6. Ambika Yadav v. State, 1972 B.L. J. R. 107; Pritam Singh v. State, (1974) 76 Punj. L. R. 77; Ravul-appali Kondiah v. State of A. P., (1975) 2 S. C. J. 499; 1976 Mad. L. J. (Cri.) 21: (1976) 1 Andh. W. R. (S.C.) 1: 1975 Cri. App. R. (S.C.) 24: 1975 Cri. L. R. (S.C.) 54: 1975 S.C. Cri. R. 50: (1975) 3 S. C. C. 752: 1975 S. C. C. (Cri.) 213: 1975 Cri. L. J. 262: A. I. R. 1975 S.C. 216; Haji Lal Din v. State, 1977 Cri. L. J. 538. Meena v. State, 1966 A. W. R. (H.C.) 554, 556.

Chandra Bhan Singh v. State, 1970 All Gri. R. 243: 1970 All W. R. (H.C.) 381: 1971 Cri. L. J. 94.

9. Balwant Singh v. State, 1972 Cri. L. J. 645 at 648: (1972) 2 S. G. J. 287: 1972 M. L. J. (Cri.) 561: 1972 + U. J. (S.C.) 708: 1972 S.C. Cri. R. 506: (1972) 3 S. C. C. 769: 1972 S. C. C. (Cri.) 837: A. I. R. 1972 S. G. 860.

1972 S. C. 860.

10. Amar Singh v. State of Haryana, 1973 Cri. L. J. 1409 at 1410, 1411: 1973 S. C. C. (Cri.) 789: 1978 S. G. (Cri.) R. 361: 1973 U. J. (S.C.) 680: 1973 Cri. App. R. 301 (S.C.): (1974) 1 S. C. W. R. 208: (1974) 3 S. C. C. 81: 1973 Cri. L. R. (S.C.) 483: A. J. R. 1973 S.C. 2221.

11. State of Orissa v. Domana Majhi, 1976 Cri. L. J. 605 at 609: (1975) 41 Gut. L. T. 1283.

12-13. Deep Chand v. Haryana State, 1975 Cur. L. J. 324 at 330.

tion of the evidence when the question is about the ceremonies having been performed, where relatives only were invited to witness the same.14 A witness in a partition suit cannot be said to be an interested witness because if he is related to one of the defendants, but the witness himself is not going to be benefitted by the result of the suit.15 The imputation of interestedness could be made only when it is shown that the witness is inimically disposed towards the accused. If the witness is interested the court will exercise extra caution in evaluating his evidence.16

Though no enmity or grudge is suggested against a witness, but if this witness was not even examined by the police nor was he cited in the charge-sheet, in a grave charge of dacoity with murder, it will not be proper to place reliance on a witness who never figured during the investigation and was not named in the charge-sheet. The accused who are entitled to know his earlier version to the police are naturally deprived of an opportunity of effective cross-eaxmination and it will be difficult to give any credence to a statement which was given for the first time in court after about a year of the occurrence. The High Court was not right in accepting the evidence of such witness as lending assurance to the testimony of other witnesses on the basis of which alone pernaps the High Court felt unsafe to convict the accused. 16-1

In an election case before the Supreme Court all the witnesses on either side except the Returning Officer were interested in the rival candidates. Though there were a few circumstances against the Returning Officer showing that he was not altogether a totally independent witness, the Supreme Court held that those circumstances would not justify rejection of his evidence in toto; only his evidence required to be scrutinised carefully and accepted at least to the extent to which it was supported by circumstantial evidence.17

Where, in a husband's application for judicial separation from his wife, an elderly man of 63 years, who was admittedly the landlord of the house in which the spouses had been living for three years, gave evidence and there was nothing on the record to show that he was interested in the husband or inimical to the wife, there was no justification for rejecting his evidence.18

In a murder case, the relation of master and servant existed both at the time of the incident and of giving evidence in the Sessions Court and there was nothing on record to show any strained relations. Such a witness can be correctly described as an independent, disinterested witness who was worthy of credence.19

In the last cited case every one of four witnesses had equal opportunity to see the accused and three of them were relations of the deceased and the fourth was an independent witness, even though the individual act of each of

^{14.} Sankara Warrier v. Sree Devi, A. I. R. 1973 Kerala 250 at 252;

Ker. L. R. 228: 1973 Ker. L. J. 332: 1973 Ker. L. T. 963.

15. Jagdhandhu v. Bhagu, (1973) 1
Cut. W. R. 809: I. L. R. 1973
Cut. 553: A. I. R. 1974 Orissa 120

^{16.} Narangbham v. The Union Territory of Manipur, 1966 Cr. L. J. 772:

A. I. R. 1966 Manipur 8, 10.

16-1. Ram Lakhan v. State of U. P.,
A. I. R. 1977 S.C. 1936 at 1943:

¹⁹⁷⁷ Gr. L. J. 1566; (1977) 3 S. C. C. 268: 1977 S. C. Cr. R. 357.

17. Khaje Khanavar v S. Nijalingappa,

Khaje Khanavar v S. Nijalingappa, (1969) 3 S. C. R. 524; 1969 S. C. C. 636; (1969) 2 S. C. J. 759; A. I. R. 1969 S. C. 1034, 1042.
 N. Sreepadachar v. Vasantha Bai, A. I. R. 1970 Mys. 232, 235.
 Nana Gangaram v. State, I. L. R. 1969 Bom. 654; 71 Bom. L. R. 375; 1970 Mab. L. L. 172; 1970 Cr. L. L. 1970 Mab. L. L. 172; 1970 Cr. L. L.

¹⁹⁷⁰ Mah. L. J. 172: 1970 Cr. L J. 621, 625.

the accused was not described, the evidence suffered no infirmity on that account. Further, as the evidence of all was natural, it was accepted.20

In a case of evidence of a partisan witness a conviction can be based solely thereon if the court is satisfied that the evidence is reliable but in appropriate cases the court may look for corroboration.21

However, it has also been held that partisan evidence cannot be rejected merely because there were several litigations between the P. WS. and the appellant. It should be scrutinised with more than ordinary care and even corroboration is not necessary.22

There is no hard and fast rule that the evidence of a partisan witness cannot be acted upon, without corroboration. If his presence at the scene of occurrence cannot be doubted and his evidence is consistent with the surrounding circumstances and the probabilities of the case strikes the Court as true, it can be a good foundation for conviction, more so if some assurance for it is available from the medical evidence.23

Evidence of partisan witness is not to be equated with tainted evidence or that of approver so as to require corroboration as of necessity. The Court require corroboration as a rule of prudence and not as a rule of law. The evidence of such witnesses should be scrutinised with a little care. Once that approach is made and the Court is satisfied that the evidence of interested witnesses has a ring of truth, it can be relied upon without corroboration.24

Where witnesses have poor moral fibre and have to their discredit a heavy load of bad antecedents indicative of his possible motive to harm the accused who was an obstacle to his immoral activities, it will be hazardous to rely upon such evidence in the absence of corroboration from independent witness.25

20. Nana Gangaram v. State, 1970 Cr.

evidence should be required); Municipal Committee, Amritsar v. Behari Lal, (1974) 1 Cri. L. T. 154; 1974 F. A. C. 432; Maghar Singh v. State of Punjab, 1974 Chand L. R. 128 (may book for corroboration as a matter of caution); Vithoba Paiku v. The State of Maharashtra, (1975) 77 Bom. L. R. 465: 1976 Cri. L. J. 1281 (must look for corroboration);
Radha Kande v. State, 39 Cut. L.
T. 337: 1973 Cut. L. R. (Cri.)
101: 1973 Cri. L. J. 1320.
22. Hazari Parida v. State of Orissa,
1974 Cr. L. J. 1212 at 1214: 40
Cut. L. T. 422: (1974) 1 Cut. W.
R. 468

R. 468.

23. Tameshwar Sahi v. State of U. P. 1976 Cri. L.J. 6 at 9: A.I.R. 1976 S.C. 59: 1976 S. C. C. (Cri) 14: (1976) 1 S. C. C. 401.

24. Sarwan Singh v. State of Punjab, 1976 Cr. L. J. 1757 at 1764; A. I. R. 1976 S. C. 2304: (1976) 4 S. C. C. 369.

C. 369.

25. Sat Paul v. Delhi Administration, 1976 Cri. L. J. 295 at 304; A. I. R. 1976 S. G. 294; 78 P. L. R. 1974; (1976) 1 S. C. C. 727; 1976 Mad. L. J. 174; 1976 M, P. L. J. 206;

L. J. 621. Bhanu Prasad v. State of Gujarat, 1968 S. C. D. 1026: 9 Guj. L. R. 853: 1968 Cr. L. J. 1505; A. I. R. 1968 S.C. 1323, 1327; The State of Bihar v. Basavan Singh, 1959 S. C. R. 195: 1958 S. C. J. 856: 1958 A. L. J. 608: 608: 1958 A. W. R. (H. C.) 609: (1958) 2 Andh. W. R. (S. C.) 136: 1958 B. L. J. R. 618: (1958) 2 M. L. J. (S. C.) 136: 1958 M. L. J. (S. C.) 136: 1958 M. L. J. (S. C.) 136: 1958 M. L. J. (Cr.) 641: 1958 Cr. L. J. 976: A. I. R. 1958 S. C. 500 (a decision of a Bench of five Judges) overruling the decision in Rao Shiv 21. Bhanu Prasad v. State of Gujarat, (a decision of a Bench of five Judges) overruling the decision in Rao Shiv Bahadur Singh v. State of Vindhya Pradesh, 1954 S. C. R. 1098; A. I. R. 1954 S. G. 322; Manka Hari v. State of Gujarat, I. L. R. 1967. Guj. 457; 8 Guj. L. R. 588; 1968 Cr. L. J. 746; A. I. R. 1968 Guj. 88; 1973 Cri. L. J. 1582 (Defence witnesses co-workers of accused corroboration by independent evidence roboration by independent evidence needed); Sheodan v. State of Rajasthan, 1973 W. L. N. 582; 1973 Raj. L. W. 572; 1974 Cr. L. J. 284; 1974 Chand L. R. (Cri.) 475 (Corroboration by independent

In a case of communal riot, the witnesses belonging to a particular community may be partisan or interested witnesses but their evidence cannot be discarded. The court, however, has to weigh such evidence carefully with a view to ensure that taking advantage of the situation, innocent persons are not falsely implicated,1

Merely because no enmity is established between the deceased and the witnesses, it cannot be held that they were uninterested or independent witnesses, especially when the evidence given by them showed that they were tutored to give one and the same version of the sequence of events in almost identical words.2

In the case of a witness who gives a distorted version of an incident right from the beginning, it is not correct to rely on a portion which accords with the testimony of another witness. If the truth and falsehood are inseparably mixed in the evidence of a witness, it must be rejected in its entirety.8

Where a criminal court has to appreciate evidence given by witnesses who are partisan or interested, it should carefully weigh the evidence and take the following matter into account:

- (i) whether or not there are discrepancies in the evidence;
- (ii) whether or not the evidence strikes the court as genuine;
- (iii) whether or not the story disclosed by the evidence is probable.

But it would be unreasonable to contend that evidence given by witnesses should be discarded only on the ground that it is evidence of partisan or interested witnesses. The mechanical rejection of such evidence would invariably lead to failure of justice.4

The evidence of a witness cannot be discarded on the ground of his having close interest in the complainant's party or of being a distant relation of one of the parties particularly when no enmity or ill will has been proved to exist between the witness and the accused.5

Interested and partisan evidence is by itself no ground for rejection of the testimony.6

^{1.} Manilal Sahu v. State. 35 Cut. L. T. 35; A. I. R. 1969 Orissa 176,

K. Sankaran v. The State of Kerala, 1970 S. C. Cr. 225, 228.
 Kanbi Nanji Virji v. State of Gujarat, 1970 G. A. R. (S.C.) 1, 4.
 Masalti v. State of U. P., (1964) 8 S. C. R. 133: 1964 S. C. D. 980: (1965) 1 S. C. J. 605: J. L. R. (1964) 2 All 694: (1964) 1 Andh. L. T. 19: 1965 M. L. J. (Cr.) 312: (1965) 1 Cr. L. J. 226: A. J. R. 1965 S.C. 202, 209; Sudhir Chandra Jana v. Amulya Chandra Misra, 1969 Jana v. Amulya Chandra Misra, 1969 Cr. L. J. 1079, 1080 (Cal.); Rama Kanta v. State, (1969) 35 Cut. L. T. 400, 406; Ishwar Devi Malik v.

Union of India, A. I. R. 1969 Delhi 183; Bakhtawar Singh v. State, 1975 W. L. N. 1; 1975 Cri. L. J. 968 (Raj.).

^{5.} Ramchander v. State of Rajasthan, 1970 Gr. L. I. 653, 656 at 656: 1970 Raj. L. W. 118; Bhupendra Singh v. State of Punjab, (1968) 2 S.C. J. 716; (1968) 2 S. G. W. R. 496; 1969 Cr. L. J. 6; A. I. R.

R. 496: 1969 Cr. L. J. 6: A. I. R. 1968 S. C. 1438.

6. Samson Hyam Kemkar v. State of Maharashtra, (1974) Cri. L. J. 809 at 811: 1973 S. C. C. (Cri.) 1096: (1974) 1 S. C. W. R. 213: 1974 U. J. (S.C.) 43: (1974) 3 S. C. C. 494: 1973 Cri. L. R. (S.C.) 691: A. I. R. 1974 S.C. 1153.

Where both the management, as well as the work-men, adduced oral evidence in support of their respective claims; but the Tribunal characterised that evidence as interested and had not chosen to place any reliance on such evidence, held no error was committed by the Tribunal when it disregarded that evidence, 7-8

Being a close relation, the witness would have no reason for leaving out the real assailant of his brother, and implicating respondent falsely particularly when there was not even a suggestion, in the court of the Committing Magistrate or in the trial Court, that the witness had any enmity or other reason to falsely implicate the respondent. His statement could not therefore be viewed with suspicion merely because of his relationship with the deceased.9

In considering the question as to whether evidence given by a witness should be accepted or not, the Court has to see whether the witness is an interested witness and to enquire whether the story deposed to by him is probable and whether it has been shaken in cross-examination.10 Partisanship by itself is no ground for discrediting sworn testimony. Interested evidence is not necessarily false evidence. It should be subjected to careful scrutiny and accepted with caution.11 Once the evidence of interested witnesses is considered with care and caution, the mere fact that they are interested witnesses is no ground for discarding that evidence.¹² Courts have to be very careful in weighing their evidence.¹³ Evidence of witnesses supported by. circumstantial evidence cannot be justifiably rejected on the mere ground that the witnesses who gave it are interested witnesses.14 Where it is difficult to rely upon the oral testimony of either side, as where they are interested persons, their testimony may not carry much weight.15 The evidence of partisan witnesses when that is not consistent with broad probabilities of case, is unreliable. 16 When witness bore malice against accused, and no independent witness was joined except that of Sub-Inspector, conviction under Section 27 of Arms Act was set aside.17 But in the circumstances of a particular case, the court may rely on the oral testimony even of interested witnesses. Thus, in a factious village, people who are really neutral may be reluctant to come forward as witnesses to support one or the other side, lest they should invite trouble for themselves.

be believed with respect to other

parts of the case).

Deep Chand v. State of Haryana,
1970 S. C. D. 123, 126: 1970 Cr. A. R. 62.

State of U. P. v. Iftikhar Khan, 1973 Cr. L. J. 636 at 641; 1973 Cr. App. A. 88; (1973) 1 S. C. C. 512; 1973 S. C. Cr. R. 288; 1973 S. C. D. 325; 1973 Cr. L. R. (S.C.) 196; (1973) 3 S. C. R. 328; 1973 S. C. C. (Cr.) 384, A. I. R. 1973 S. C. 863.

14. Ghurphekan v. State of U. P., 1972 Cr. L. J. 746 at 750; A. I. R. 1972 S. C. 1172.

15. Kashinathsa v. Narsingsa, (1961) 2 S. C. A. 542; A. I. R. 1961 S. C. 1077; 63 Bom. L. R. 659.

16. Jamini Ranjan v. State, (1973) 39

Cut. L. T. 237 at 242.

Mukhtiar Singh v. State of Punjab, 1975 Chand L. R. (Cr.) 503 at 505; (1975) Gr. L. J. 132.

^{7-8.} West Jamuria Coal Co. Ltd. v. Workmen, 1972 Lab. I. C. 1151 at 1152; 24 Fact. L. R. 140; (1971) 1

^{1152; 24} Fact. L. R. 140; (1971) 1
Lab. L. J. 549.

9. State of Punjab v. Ramji Das,
A. I. R. 1977 S. C. 1085 at page
1087; 1977 Cri. L. J. 705; (1977) 2
S. C. W. R. 373.

10. Ishwari Prasad v. Mohammad Isa,
A. I. R. 1963 S. G. 1728; 1963 B.
L. J. R. 226.

11. In re Vuyyuri Ratna Reddy, A. I.
R. 1963 A. P. 252; (1962) 2 Andh

R. 1963 A. P. 252; (1962) 2 Andh L. T. 368; Ramdeo Ram v. Akalu Ahir, 1970 P. L. J. R. 462, 465 (prosecution with the sees from inimical sources); Kishan v. State of Rajasthan, 1972 W. L. N. 231; 1972 Raj. L. W. 545; 1972 Cri. L. J. 1387 (Witnesses partisan, the chances of over-implicating their adversaries may not be ruled out, and court not accepting part of the prosecution case, even then they cannot be dubbed as liars and may,

Where such is the tendency, then, in spite of the fact that prosecution witnesses are interested witnesses the Court may in the circumstances of a particular case, rely on their testimony.18 So also where in an election dispute, witnesses depose in favour of the petitioner and against the successful candidate and his party, their testimony should not be rejected merely because they are interested witnesses, if there are good grounds for accepting their evidence.19

A Food Inspector, who is bound to investigate and prosecute offenders under the Prevention of Food Adulteration Act, 1954 (37 of 1954), is not excluded from the category of competent witnesses. He cannot be considered to be an interested witness.20

Although it is open to a Court to accept or reject a grave criticism that can be levelled against the testimony of a witness, yet it is not open to it to close eyes and ignore the criticism altogether. It must present a true picture of the case. If it does not even mention important criticism in its decision, the decision may not be a judicial decision if it presents only an incomplete picture.21-22 The testimony of an interested witness, when he is a relation may not be rejected unless he is shown to be unreliable.23

Granting that decoy or trap witnesses may to an extent be considered to be interested inasmuch as they be inclined to see that their trap succeeds, in the final analysis, however, the necessity of corroborations depends on the circum tances of each case including, inter alia, the status and calibre of the witnesses and the quality of their evidence. It is indeed a rule of caution devised to seek assurance and dispel doubts in regard to the credibility of the evidence and is dictated by judicial experience of the common course of human conduct. No hard and fast rule demanding rigid adherence need or can be formulated to be followed in all cases without considering the background, the totality of circumstances and the intrinsic quality of testimony in each case.24

Even if a prosecution witness has a past history of conviction in a criminal case, but there is nothing brought out in cross-examination to show when he was convicted or for what offence and in the absence of any such details, the Court cannot reject his evidence merely on the ground that he was once convicted in the past. Even a man who has once erred may speak the truth,24-1

If a person's duty as an officer is to look certain offences, he does not, on that account, become an "interested" witness whose evidence should be rejected.25

nial of justice).

19. Punjabrao v. D. P. Meshram, A. I.
R. 1965 S. C. 1179: 1965 M. P.
L. J. 257: 62 Bom. L. R. 812: (1965) 2 S. C. J. 721.

Public Prosecutor, Andhra Pradesh
 v. Purala Rama Rao, (1966) 1

Andh. L. T. 279; 1967 Cr. L. J. 154; A. I. R. 1967 Andh. Pra, 49,

21-22. Anwar v. State, I. L. R. (1958) 1 All. 151: A. I. R. 1961 All. 50. 23. Bindeshri Prasad v. Raja Ram, A. I. R. 1961 All. 198.

Kesho Pershad v. State, 69 P.L.R.
 (D) 25; 1967 Cr. L. J. 1138; A. I. R. 1967 Delhi 51, 53. See also Note 9 (r) post.

4-1. Varghese Thomas v. State of Kerala, A. I. R. 1977 S. C. 701 at page 703; 1977 Cri. L. J. 343; 1977 Cri. L. R. (S. C.) 86.

25. Public Prosecutor v. Avyaru Annappa. 1969 Cr. L. J. 1022; A. I. R. 1969 Andh. Pra. 278, 279.

Basappa v. State. A. I. R. 1960 Mys. 28: 1960 M.L.J. (Cri.) 575; I. L. R. (1971) 21 Raj. 119: 1970 W. L. N. 278 (Part I) (A. I. R. 1965 S. C. 202 relied on) (such evidence has to be carefully weighed. It should not be mechanically rejected); (1972) 2 Cut. W.R. 1623 (must be scrutinised thoroughly); 1973 Gut. L. R. (Cri.) 270 (mechanical rejection would amount to de-

Trap witnesses being partisan in nature do require corroboration in a general way although material corroboration is not required as in the case of evidence of accomplices.1 If trap witnesses are accomplices, their evidence would require confirmation as that of an accomplice, but if they are not accomplices but are interested in the success of the trap only, their evidence must be treated as that of interested or partisan witnesses and should be tested in the same way as that of any other interested witness by all possible checks and in a proper case it may not be acted upon without independent corroboration.2 When there was no independent search witness and no other evidence from which corroboration could be found the conviction was set aside.3 In order to corroborate trap witnesses independent and trustworthy witnesses are necessary.4 If a witness is otherwise reliable and independent, his association in prearranged raid does not make him an accomplice or partisan and conviction can be based on his evidence.5 If junior officer of the status of Sub-Inspector of Police himself lays trap, this fact itself makes the evidence of such officer and the witnesses procured by him unreliable.6 A witness hailing from a place 18 miles away was a member of raiding party. Want of satisfactory reason of his presence at odd hour of 4.00 a.m. at the place of raid, and conflict in evidence how his presence was secured by police would raise grave doubt about his presence.7

In weighing partisan or interested evidence the court has to be very careful and should not mechanically reject such evidence. The court should take into account the following matters, viz., whether or not (i) there are discrepancies in the evidence, (ii) evidence strikes the court as genuine and (iii) the story disclosed by the prosecution is probable.8

(f) Faction Cases. Independent evidence in faction cases is impossible. In cases arising out of acute factions, as a rule, persons unconnected with either faction do not dare or care to come forward as witnesses, lest they should become unpopular and incur the displeasure of the other party. In such cases, the witnesses may rope in the innocent along with the guilty, not so much out of personal animosity but in the hope of furthering the interests of the faction. To guard against the danger of condemning innocent persons on factious testimony, the Court should scrutinise the oral evidence with more

2. Om Prakash Mathur v. The State, 1974 W. L. N. 324 at 335.

(Cri.) 135; (1976) 1 S. C. C. 644; 1976 Cri. L. J. 346; 1976 Cri. A.

Hira Lal v. State of Haryana, A. I.
 R. 1971 S. C. 356 at 357: 1971 Cr.
 L. J. 290: 1971 U. J. (S.C.) 106: (1970) 3 S. C. C. 933.
 Gurbachan Singh v. State, 1973 Cur.

L. J. 312: 1973 Chand L. J. (Cri.) 217.

217.

8. Masalti v. State of U. P., (1964) 8
S. C. R. 133: 1964 S. C. D. 980:
(1965) 1 S. G. J. 605: I. L. R.
(1964) 2 All. 694: (1965) 1 Andh.
L. T. 32: 1965 (1) Gr. L. J. 226:
1965 M. L. J. (Cri.) 312; A. I. R.
1965 S. C. 202, 209; Awad Singh v.
State, 1971 B. L. J. R. 605, 609:
1971 P. L. J. R. 206.

^{1.} Khembu Ram v. State, 1972 Cri. L. J. 381 at 385; 1971 Sim. L. J. 289 (H.P.); Satyanarayana Rao v. State of Mysore, 1972 Mad. L. J. (Cri.) 321 (Mys.).

^{3.} Ram Prakash Arora v. State of Pun-jab, A. I. R. 1973 S. C. 498 at 501: 1972 Cri. L. J. 1293: 1972 S. C. D. 1040: 1972 Cri. App. R. 344: (1972) S. C. C. 652: 1972 U. J. (S.C.) 857: 1972 S. G. C. (Cri.)

Kishan Chand v. State of Punjab, 1975 Chand L. R. (Cri.) 178 at 180: 1974 Punj. L. J. (Cri.) 380; 1974 Punj. L. J. (Cr.) 424.
 Maha Singh v. State, A. I. R. 1976 S. C. 449 at 455: (1976) S. C. C.

than ordinary care and, in particular, sweeping statements and wholesale implications should be received with great caution.9

(g) Occupation, caste, calling, status and locality or sex of witnesses. No witness's evidence can be discarded by reason merely of the profession he pursues, or status or caste. In all cases, evidence of each witness has to be weighed on its own merits and considered in the light of the other accepted evidence of the case.10-11 It is only when there are inherent improbabilities in the evidence given by the witness that court of law is justified in coming to the conclusion that he is incredible. So, the testimony of a witness is not liable to be rejected merely because he belongs to the police-force, if it is trustworthy.12

A witness cannot be disbelieved on the sole ground that he belongs to a particular party.13 Evidence of a witness cannot be rejected merely because he belongs to a particular class.14 The evidence of eye-witnesses, because some of them are day labourers and landless, cannot by itself be a ground for not relying upon their evidence.15 Where witnesses depose about distribution of offending pamphlets in an election case, it is relevant to see if the witnesses are interested in supporting a particular political party. Change of their loyalty to successful candidate after election should also be considered.16

Merely because persons may owe loyalty to the same religious institution (Varkaris), they do not become partisan witnesses. 17

If the statement of an illiterate villager, who can have no correct idea of time as to an occurrence, is at variance with the medical evidence, it is no reason for doubting her testimony.18 Witnesses coming from village generally have vague ideas of placing incidents in correct year by calculation of years in relation to different incidents. The Court should not judge the evidence of this type of village witnesses by mathematical accuracy.19

Want of status or of riches on the part of a witness can have no bearing on his credibility and reliance.20

9. In re Poreddi Venkata Reddy, A. I. R. 1961 A. P. 23; (1961) 1 Cr. L. J. 42; Ranbir v. State of Punjab, (1973) 2 S. C. W. R. 25; 1973 Cri. L. J. 1120; 1973 S. G. C. (Cri.) 858; 1973 Cur. L. J. 721; 1973 S. C. D. 723; 1973 Cri. L. R. (S.C.) 488; 1973 B. B. C. J. 505; (1974) 1 S. C. R. 102; A. I. R. 1973 S. C. 1409; Baldeo Singh v. State of Bihar. (1972) 1 S. C. W. State of Bihar, (1972) 1 S. C. W. R. 179: 1972 Cri. A. P. R. 86 (S.C.): 1972 S. C. D. 117: 1972 S. C. Gri. R. 117: (1972) S. C.J. 339: 1972 Pat. L. J. R. 240: 1972 Cri. L. J. 262: A. I. R. 1972 S.G. 464: See also note 9 (u) post.

10-11, See Mulpura Venkataramayya v. Kesavanarayana, A. I. R. 1963 A. P. 447: (1963) 1 Andh. W. R. 251. 12. State of Mysore v. Koti, A. I. R.

1965 Mys. 264; Aher Raja Khima v. State of Saurashtra, A. I. R. 1956 S. C. 217; Tarsem Lal v. State, A. I. R. 1965 Punj. 27.

13. Rebekka Bibi v. Japamony, 1967 Ker. L. T. 1122, 1124; 1967 Ker.

- L. J. 399; (1967) 1 M. L. J. (Cr.) 511.
- 14. Kiran Bahadur Singh v. Hari Kri-14. Kiran Bahadur Singh V. Hari Krishna Mathur, A. I. R. 1972 All. 369 at 371; 1972 A. W. R. (H.C.) 129; 1972 A. L. J. 337; 1972 Ren. C. R. 448; 1972 Ren. C. J. 773; I. L. R. (1972) 1 All. 412.

 15. State of Assam v. Bhabanand Sarma, 1972 Cri. L. J. 1552 at 1561 (Assam).

- Babu Rao Bagaji Karemore v. Gobind, A. I. R. 1974 S. C. 405 at 416; (1974) 3 S. C. C. 719; (1974) 2 S. C. R. 429.
 Dinkar Bandhu Deshmukh v. State, 72 Bom. L. R. 405; 1970 Mah. L. J. 634; A. I. R. 1970 Bom. 438, 444
- 18. Mahendra Das v. State of Bihar, 1969 B. L. J. R. 897, 899; 1969 Pat. L. J. R. 482,
- Jagbandhu v. Bhag, A. I. R. 1974
 Orissa 120 at 123: (1973) 1 Cut. W.
 R. 809: I. L. R. 1973 Cut. 553.
 B. B. Mishra v. State of Maharashtra, 1965 Mah. L. J. 565: 1967
 Cr. L. J. 21; A. I. R. 1967 Bom, 1, 4.,

The mere fact that the accused belongs to a particular caste is not sufficient for rejecting evidence of witnesses if they are prima facie reliable.21

Witnesses who can depose to good or bad character of a person are witnesses who live in the same village or neighbouring village and their statements cannot be discarded merely on that ground.22

An illiterate witness should not be taken very strictly when he gives any arithmetical calculation concerning the birth or death of members of another family.23

To characterise that a witness is a pleader's clerk and therefore his evidence should not be accepted is a situation which is totally repugnant to the rules bearing on the rejection of evidence.24 The fact that a public servant had been suspended is by itself no ground for disbelieving his testimony.25

There is no reason for discarding the evidence of a witness simply because he is Police Officer who is charged with the investigation of the case. Police officers are not worse than ordinary human beings, and it cannot be said that all of them are liars; just as it cannot be said that all of them are entirely truthful. The evidence of a witness is to be examined on its merits, and if it is improbable or absurd, it would be difficult to believe that evidence, from whatever quarter it might come. If it is natural consistent and bears a ring of truth, there is no reason to disbelieve it, simply because a witness is lowly placed, or belongs to a department of the Government. Disbelieving the testimony of a witness simply on the ground that he being village Ramoshi would be under police influence is improper.¹⁻¹

The court should treat the evidence of a Police Officer as that of any other witness and apply the same standards or tests in judging his evidence.2 But where the same police officer, who claims to have witnessed an incident, investigates, then his evidence has got to be looked into with great caution.3 When the accused persons are themselves police officers, the character and conduct of police investigation should be subjected to keen judicial scrutiny. If such investigation is proved to be mala fide as a result of which some obvious facts have not been proved or brought out, which might have given corroboration to the defence case, the duty of the court is to direct an acquittal.4 A

of a small and compact village).

Jagannath v. State, 1966 A. W. R.

(H.C.) 729, 730.

Md. Ayub Khan v. Abdus Samad Khan, 1969 B. L. J. R. 932, 938. Vadrevu Annapurnamma v. Vadrevu Bhimasankararao, A. I. R. 1960 Andh. Pra. 359.

State v. Sant Prakash, 1976 Cr. L. J. 274 at 277 (F.B.): 1976 All. L. J. 100 (F.B.).
 Aher Raja Khima v. State of Sau-

rashtra 1956 S.C.J. 243; (1956) 1 M.L. . (S.C.) 136; A. I. R. 1956 S. C. 217; 1956 Gr. L. J. 421; 1957 Andh. 1-1. Shivji Genu Mohite v. State of Maharashtra, 1973 Cr. L. J. 159: (1978) 3 S. C. C. 219: A. I. R. 1973 S.C. 55.

Ratna Kumar v. State of Mysore, (1965) 2 Law Rep. 442: (1965) 1 Mys. L. J. 485: (1965) 2 Cr. L. J. 829, 830 (offence under s. 116, Motor Vehicles Act, 1939).
 Bhagwan Dayal v. The State, 1969 Cr. L. J. 1028: A. I. R. 1968 All, 290, 292.

 Sanker Behera v. State, 34 Cut. L.
 T. 766; 1969 Cr. L. J. 502; A. I.
 R. 1969 Orissa, 73, 75, relying upon Santa Singh v. State of Punjab, A. I, R. 1956 S.C. 526, 529.

Sheoram v. R., 75 I. C. 733 (Lah.)
 A. I. R. 1925 L. 436, Public Prosecutor v. Appalanem Hari Babu, (1975) 1 An. W. R. 304; 1975 Mad. L. J. (Cri.) 283 (merely because witnesses are castemen and residents

L. T. 92: (1955) 2 S. C. R. 1285; 1956 S. C. A. 440. Relied on, Aziz Khan v. State, 1958 Raj. L. W.

police officer should not be disbelieved simply because he figures as a witness, provided his evidence is reliable and credible.5 Unless there is something specific such as hostility to the accused, the testimony of police officers or public servants is not to be discarded simply because of their being police officers or public servants.6 Previous suspension of the public servant is by itself not sufficient for discarding his testimony.7 The law nowhere says that the testimony of a Police or Excise officer should necessarily be discarded, unless it is corroborated by that of a non-official.8 It would depend on the facts and circumstances of each case, whether corroboration is necessary.9 If independent witnesses taking part in the raid do not support the prosecution in a case under Section 61 (1) (c) of Punjab Excise Act, conviction can be based on the testimony of official witnesses alone, if there is sufficient evidence to bring home the guilt of the accused.10 When an attack on a police station is sought to be established on the basis of evidence of police witnesses, they being natural witnesses should be relied if that evidence rings true in the light of the circumstances.11 It will be too much to expect disinterested persons to become members of Nakabandi parties which have to wait for hours on before the quarry is ensnared. Members of such parties have to give up their normal pursuits for the time being and to forego their earnings for the period of Nakabandi. Quite naturally, therefore, members of the public do not normally look with favour upon being such members. But this fact alone is not sufficient to disbelieve any of the police officers, interested as they were in the success of the Nakabandi, on the point of the recovery particularly when none of them had any motive whatsoever to involve any of the petitioners in a false case under the Opium Act.12 But when accused while passing on a road was apprehended and was found to be in possession of opium, the official position of such police witnesses does demand strict scrutiny especially when accused had come forth with plausible explanation.18 When there was ample opportunity for

5. State of Tripura v Shri Ashu Ranjan, 1970 Gr. L. J. 69: A. I. R. 1970 Tripura 1; Ram Sarup Charan Singh v. The State, A. I. R. 1967 Delhi 26; Kesho Prasad v. State, A. I. R. 1967 Delhi 51; Ganpat Singh v. The State, A. I. R. 1967 Pai 10 Raj. 10.

cannot be disbelieved on that account only).

7. State v. Sant Prakash, 1976 Cri. L. J. 274 at 277: 1975 All. W. C. 444: 1976 A. L. J. 100: 1976 All. Cri. Case 326 (F. B.). 8. State of Himachal Pradesh v. Booti-

nath, A. I. R. 1956 H. P. 26: 1956 Gr. L. J. 747; Babu Lal v. Hargo-vind Das, A. I. R. 1971 S. C.

9. Girdhari Lal Gupta v. 9. Girdhari Lai Gupta V. D. N.
Mehta, Asstt. Collector of Customs,
1971 Cri. L. J. I at 4, 5; (1970) 2
S. C. C. 530; (1971) 2 S. C. Cri.
R. 67; (1971) 2 S. C. J. 12; (1971)
M. L. J. (Cri.) 387; 1970 Cri. App.
R. (S. C.) 390; A. I. R. 1971
S. C. 28.

10. Chander Bhan Ram Chand V.

State, 1971 Cri. L. J. 197 at 198-200. K. Kunhaman v. State of Kerala, 1974 Ker. L. T. 328 at 359, 360.

Jaswant Singh v. State of Haryana, 78 Punj. L. R. 288 at 291: 1976 Chand L. R. (Cri.) 116; (1976) 3 Cri. L. T. 171: 1975 Cur. L. J.

Daljit Singh v. State of Punjab, 1973 Chand L. R. (Cri.) 460 at

Raj. 10.

6. Ghandra Bhan Ram Chand v. State, 1971 Cri. L. J. 197; Singha v. State, (1972) 74 P. L. R. 176; Inder Lal v. The State, 1973 (1) Chand L. R. (Gri.) 93; State of Punjab v. Rameshwar Das, 1974 Punj. L. J. (Cri.) 383; 77 Punj. L. R. 189; (1975) 2 Cri. L. T. 79; 1975 Cri. L. J. 1630 (Punj.); Nathu Singh v. State, 1974 U. J. (S. C.) 29; (1974) 1 S. C. W. R. 105; 1974 S. C. C. (Cri.) 62; 1974 Mad. L. J. (Cri.) 296; (1974) 1 S. C. J. 526; (1974) 3 S. C. G. 584; 1973 Cri. L. R. (S. C.) 752; 1974 Cri. L. J. 11; A. I. R. 1973 S. C. 2783; State v. Sant Prakash, 1976 A. L. J. 100; (1975) All. W. C. 444; 1976 Cri. L. J. 274; Jaswant Singh v. State of Haryana, 1976 Chand L. R. (Cri.) 116; (1976) 3 Cri. L. J. 171; 78 Punj. L. R. 288; 1975 Cur. L. J. 702 (witnesses either being police officials or under their influence officials or under their influence

the police party to have joined independent witnesses the testimony of the official witnesses be viewed with suspicion. The fact that no witness was made to join the party at that stage would cast a strong suspicion on the evidence of the official witnesses. Even if it has not been shown that the police officials or the officials of the Railway Protection Force had any animus against the accused, it is a matter of common experience that investigating officers are often overzealous in the success of raids conducted by them. This circumstance attaches an infirmity to their testimony and requires that their evidence be scrutinised closely.¹⁴ When the evidence of police witnesses was discrepant regarding place of recovery of opium, it was discarded for want of corroboration.¹⁵

It is a truism that when countries like India, U.S.A. and U.S.S.R. have a polyglot population drawn from practically every race, and, in addition, in India, have become stratified into castes and sub-castes, these races and castes differ from one another, have characteristic virtues and characteristic drawbacks. Speaking broadly, and admitting the existence of exceptions, some races and castes of artistic and musical capacity have coupled with it emotional unstability. Some are deficient in the fine arts, but of rugged reliability Some have a low moral standard of respect to business transactions. Some have simple and childlike minds with a child's incapacity to distinguish between what they have seen and what has been suggested to them. It is also well known that people who have in the past been enslaved and subjected to capricious exactions of their masters, develop a propensity for lying. All these considerations, judges and lawyers must weigh in passing on the credibility of a witness, and it is a perversion of terms to call it a prejudice, if they weigh them in the light of their own experience and not according to high sounding platitudes, that people are on the average verge of equal credibility and stability of character.

In this connection a well-known American writer, Arthur Train points out, most people have strong racial (and caste) and religious prejudices, often wholly unconscious. They are such an usual part of our normal existence that we take them for granted and often fail to realise their real significance. As one judge has sagely remarked, the bias of man, of which we are not conscious, is more dangerous than that of which we are conscious. Our beliefs and opinions, like our standards of conduct, come to us insensibly, by being imposed upon us, by the traditions of the group to which we belong. It would be strange, therefore, if these likes and dislikes did not appear in our legal proceedings. A witness may try to be fair and may be interested in telling the truth, but the presence of the prejudice will prompt him to put his best foot foremost for the one he likes and hold pack in the case which he hopes, will not win. A very good description of these prejudices is given by Osborne in The Problem of Proof, page 352, as follows:

"The cautious Attorney in any case carefully considers the question of all, 'off the record' influences. Mr. Prejudice and Miss Sympathy are the names of two witnesses whose testimony is not recorded, but nevertheless most often to be reckoned with in trial at law".16

One of the notable contributions in modern psychology is the study of the behaviour of the opposite sexes in the witness stand through their various stages of

Nasib Chand v. State of Punjab, 1973 Chand L. R. (Cri.) 304 at 306, 307.

^{15.} Daljit Singh v. State of Punjabi

¹⁹⁷³ Ghand L. R. (Gri.) 460 at 462

McCarty: Psychology for the Lawyer, Ch. V, p. 102 and foll.

life, viz., as boys and girls, teenagers and adults and old men and women. There can be no dispute that, by reason of the marked increase in the field of activity open to women and the great strides in all phases of modern life, the same type of education being given to both men and women in this country, the significant differences between the sexes are disappearing. But, still there are marked differences owing to physiological structural differences and different social traditions for men and women. This study can be neglected only at the peril of the examiner of witnesses in the box and the appraiser of their evidence on the bench. Those interested may study with profit Hans Gross Criminal Investigation and McCarty's Psychology for the Lawyer. There are some feminine characteristics which may carefully be borne in mind. On account of physiological structural differences, there are resultant differences in the social attitudes and positions of the sexes. Female intuition is well known. This is probably the result of their emotionally keener perceptive sense. On the other hand, a sort of mental exaggerated suggestibility is more common in women than in men and their emotional stirrings are not so firmly controlled as in men. The time estimates of women are far more variable than those of men and on the whole markedly less accurate. The women overestimate and are notably inaccurate in comparison with men. Insistence on convention and the consequent covering of all their feelings, emotions and outpouring on that footing is much more marked in women than in men. There are some of the salient differences. Yet, in evaluating evidence, as has been pointed out by the Supreme Court, the fact, that the witnesses are women and that a number of lives of the accused depend upon their testimony, is not a valid reason for saying that corroboration is necessary to act on their evidence.17 When there is no substantial discrepancies in the evidence of rural ladies it cannot be discarded.18

(h) Chance witnesses. A chance witness is a witness who could not normally be where and when he professes to have been. From that point of view, one may be a chance witness even at one's own house; if, for instance, one should at that hour be at one's office, he or even the nomad in the disolation of Sahara, may not be a chance witness, if his being there and then was on his itinerary.19-21 There is no magic in the words 'chance witness'. If presence of a witness is assured and the witness is present at the time of occurrence, he cannot be termed as chance witness.22 If by coincidence or chance a person happens to be at the place of occurrence, at the time it is taking place, he is called a chance witness.23 Evidence of witnesses who had given reasons for their presence at the spot cannot be said to be that of chance witnesses and cannot be discarded on that ground.24 Persons present at the bus stand to catch a bus when the accused came there and was apprehended and opium was recovered from accused, cannot be called as chance witnesses and their evidence

Dalip Singh v. State of Punjab, A. I. R. 1953 S. C. 364: 1954 S. C. R. 145; 1953 Cr. L. J. 1465; 1953 M. W. N. 642.
 Surendra Nath v. State of Orissa, (1975) 41 Cut. L. T. 1251 at 1256: 1975 Cut. L. R. (Cri.) 421.
 Sunder v. The State, A. I. R. 1957 All. 809: 1957 Cr. L. J. 1378.
 Chaman Lal v. State, 1976 Kash. L. J. 253; (1976) Cri. L. J. 1310

at 1315; State of Bihar v. Ram Balak Singh, 1966 Cri. App. R. 409

⁽S. C.).

23. Bahal Singh v. State of Haryana, (1976) 3 S. C. C. 564: 1976 Cri.
L. J. 1568 at 1572: (1976) S. C. C. (Cr.) 461: A. I. R. 1976 S. C.

State of Bihar v. Ram Balak Singh, 1966 Cri. App. R. 409 (S. C.).

cannot be discarded on that ground.25 A witness returning from fields at the time of occurrence was attracted to the house of accused by hearing hue and cry is not a chance witness unworthy of credit, when he is not interested in prosecution or against accused.1 Chance witnesses, close relations of the deceased (victim of murder) but estranged from the accused, reaching the spot at the crucial moment of occurrence for which there was no corroboration, cannot be believed.2-3 If such a person happens to be a relative or friend of the victim or inimically disposed towards the accused then his being a chance witness is viewed with suspicion. Such a piece of evidence is not necessarily incredible or unbelievable but does require cautions and close scrutiny.4

But a chance witness is not necessarily a false witness, though it is proverbially rash to rely upon his evidence.5 In India, a chance witness plays a considerable part on account of certain settled Police notions regarding proof. "To ease himself" is an easy pretext, used by Indian witnesses in criminal cases, to explain their otherwise unacceptable presence in most unexpected places, but equally unexpected but convenient moments, and to account for their chance meeting of important witnesses and for their fortuitious opportunities for seeing things about which they would otherwise know nothing. (Sir Cecil Walsh, Crimes in India, page 120). Sometimes truthful eye-witnesses are made to appear as chance witnesses. "One point of criticism which one is frequently compelled to regard as an almost fatal defect in the evidence of eye-witness in India, whose testimony demands close scrutiny, is when he becomes an eye-witness, because he rises in the night to make water, or the dog barked. But the witnesses to a brutal murder at night in India are almost invariably taken in this way. It has grown into a sort of custom of the country. Palpable honest witnesses say that they were aroused by the noise of the disturbance, but this is rare. It is difficult to resist the conclusion that the little touch due to the act of Nature which appears again and again in every district in Uttar Pradesh, comes from the Police, who have an undoubted settled conviction that murderers working by stealth at night will take care not to wake the neighbours. But an eye-witness who is peacefully sleeping, must wake somehow, and this demand of Nature synchronises with the murderous act with the regularity of an aperient." However, it remains that

^{25.} State of Punjab v. Rameshwar Das, 1974 Punj. L. J. (Cri.) 383; 77 Punj L. R. 189; (1975) 2 Cri. L. T. 79; 1975 Cr. L. J. 1630 at

^{1.} Fatch v. State of Punjab, (1972) 74

Fateh v. State of Punjab, (1972) 74
 Punj. L. R. 387 at 393.
 State of Rajasthan v. Laxmidan,
 1971 U. J. (S. C.) 613, 614.
 Bahal Singh v. State of Haryana,
 1976 Cr. L. J. 1568 at 1572;
 Mahender Singh v. State of Rajasthan, 1972 W. L. N. 790 (Raj.).
 Ismail Ahmad v. Momin, 93 I. C.
 209: A. I. R. 1941 P. C. 11;
 Wazir Shah v. Sant Shah, A. I. R.
 1961 J. & K. 42; see also Jagabandu
 Behera v. Kshetrabasi Samal, 34

Cut. L. T: 786: 1968 Cr. L. J. 205: A. I. R 1968 Orissa 26, 29 and Himirita Loknath v. State, I. L. R. 1962 Cut. 661; Sri Ram v. L. R. 1962 Cut. 661; Sri Ram v. State, 1973 W. L. N. 401; 1973 Raj. L. W. 495; 1973 Cri. L. J. 1443; Subrata Kumar v. Dipita Banerji, 61 Cal. W. N. 944; A. I. R. 1974 Cal. 61; Guli Chand v. State of Rajasthan, 1974 Cri. L. J. 331; 1974 U. J. (S. C.) 121; 1974 Cri. App. R. 120 (S.C.); 1974 S. C. C. (Cri.) 222; 1973 W. L. N. 998; (1974) 3 S. C. G. 698; 1974 Cri. L. R. (S.C.) 53; A. I. R. 1974 S. C. 276; Chaman Lal v. State, 1976 Kash. L. J. 253; 1976 Cri. L. J. 1310.

though the chance witness is not necessarily a false witness, it is unsafe to rely on such evidence.8

Unless the evidence of a chance witness is otherwise assailable, it cannot be whittled down merely on the theory that he is a chance witness.7 But such evidence would necessarily require corroboration by independent evidence.9

In a case of charge under Section 323, I. P. C., alleging assault on some Harijans, the evidence of the seven prosecution witnesses who were all Harijans, should not be mechanically rejected as partisan because six of them were victims and the seventh a chance witness; all that is required is caution in dealing with partisan evidence.9-10

- (h-1) Hostile witness. It is the duty of the Court in cases where a witness has been found to have given unreliable evidence in regard to certain particulars, to scrutinise the rest of his evidence with care and caution. If the remaining evidence is trustworthy and the substratum of the prosecution case remains intact, then the Court should uphold the prosecution case to the extent it is considered safe and trustworthy.11 The evidence of a hostile witness remains admissible in the trial and there is no legal bar to base a conviction upon the testimony of hostile witness if it is corroborated by other reliable evidence.12-18
- (i) Coincidences. Coincidences have to be carefully scrutinised because they may either be very useful or misleading.14 "Coincidence in the testimony of independent witnesses affords a good ground for the credibility of a witness. Such coincidences, when numerous and presenting themselves as undecisive or incidental, necessarily produce a prodigious effect in enforcing belief, because if the witnesses had concerted a plot, coincidences would almost inevitably have been converted by cross-examination to contradictions; while the supposition of collusion or that some deception has been practised on the witnesses be excluded, then coincidences and harmony in the evidence of several persons can be explained upon no other hypothesis than that their individual statements are true."
- (j) Eye-witnesses. The appreciation of the evidence of eye-witnesses depends upon:
 - (a) the accuracy of the witness's original observation of the events which he described; and
 - (b) correctness and extent of what he remembers and his veracity.

 Ismail Ahmad v. Momin, A. I. R. 1941 P. C. 11 at p. 13.
 Kishore v. State, 1967 Cr. L. J. 1155; A. I. R. 1967 Orissa 118, 125; 1155; A. I. R. 1967 Orissa 118, 125;
State of Bihar N. Ram Balak Singh,
1976 Cr. App. R. 409 (S. C.);
State of Punjab v. Rameshwar Dass,
1974 Punj. L. J. (Cr.) \$85; Fatch
v. State of Punjab, (1972) 74
Punj. L. R. 387.
8. Man Govinda Mandal v. Gangadhar Giri, 71 C. W. N. 781, 783.
9-10 Sambhu Naill v. Purna Chandra
Jena, 10 O. J. D. 163.
11. Suna v. State, (1974) 40 Cut. L.
T. 159 at 164; Babu Lal v. State of

T. 159 at 164; Babu Lal v. State of

Rajasthan, 1976 W. L. N. 338; Chandrika Pd. v. State, 1975 Raj-

dhani L. R. 551. 12-13. Bhagwan Singh v. The State of 2-13. Bhagwan Singh v. The State of Haryana, 1976 Cri. L. J. 203 at 205: 1976 C. R. L. R. (S. C.) 48: 1976 U. J. (S.C.) 78: 1976 S. C. C. (Cri.) 7: 1976 Cr. A. R. (S.G.) 71: 1976 S. C. C. Cri. R. 93: (1976) 2 S. C. R. 921: 1976 Mad. L. J. (Cri.) 599; A.I.R. 1976 S.C. 202; Mazhar Ali and another v. State, 1976 Cri. L. J. 1629 (J. & K): 1976 Kash. L. J. 179.

Inaccuracy in the hour of lodging a first information report will not, on the facts of a case, be enough to discredit the evidence of all the eyewitnesses 15

The fact that eye-witnesses are relations among themselves has no relevance unless previous enmity between the accused and those witnesses is established.16

There can be no doubt that the appreciation of oral evidence by courts will be greatly facilitated by a sound knowledge of Psychology. It is no exaggeration to state that a lucid and comprehensive text-book like McCarty's Psychology for the Lawyer (New York [1929]) is an essential vade mecum for the appreciation of oral evidence.17

In assessing the value of the evidence of an eye-witness, the principal considerations are-

- (1) Whether, in the circumstances of the case, it is possible to believe their presence at the scene of occurrence or in such situations as would make it possible for them to witness the facts deposed to by them; and
- (2) whether there is anything inherently improbable or unreliable in their evidence.

It is to be remembered that witnesses are expected to depose what they have seen and heard and not to draw inferences from what they see. The privilege of drawing inferences is given to courts not to witnesses.18 It is generally not easy to find witnesses on whose testimony implicit reliance can be placed. It is always desirable to test the evidence of witnesses on the anvil of objective circumstances in the case. The High Court by placing implicit reliance on two eye-witnesses denied to itself the benefit of a judicial consideration of the infirmities in their evidence.19 If an eye-witnesses is closely associated with complainant and his statement is inherently improbable and also incongruous with other evidence of the prosecution, it should be rejected.20 The testimony of a witness unshaken by long cross examination should not be rejected outright simply because the evidence of other witnesses has not been accepted due to lack of corroboration from medical evidence.21-23

Sole eye-witness inimical to accused and not disclosing names of assailants for about 20 hours to anyone and there being feeble light at the place of occur-

State of U. P. v. Siya Ram, 1970
 U. J. (S.C.) 42, 48.

^{16.} Bhagwan Swarup v. State of U. P., 1970 C. A. R. (S.C.) 387, 390.

17. See Chapter VIII of McCarty's Psychology for the Lawyer, 1929 [New York].

^{18.} Babuli v. State of Orissa, 1974 Cri. L. J. 510 at 512; 1974 U. J. (S.C.) 82; 1974 S. C. C. (Cri.) 104; 1974 S. C. C. Cri. R. 115; (1974) 3 S. C. C. 562; 1974 B. B. C. J. 282; 1974 Cr. L. R. (S.C.) 9; A. I. R. 1974 S. C. 775.

Hallu v. State of M. P., 1974 Cri.
 L. J. 1385 at 1388; 1974 Punj.
 L. J. (Cri.) 96; 1974 B. B. C. J.
 398: 1975 All. Cri. C. 62; (1974)

¹ Cri. L. T. 101: 1974 S. C. C. (Cri.) 462: (1974) 4 S. C. C. 300: 1974 Cri. App. R. 172 (S.C.) 1974 S. C. D. 614: 1974 M. P. L. J. 685: 1974 Cri. L. R. (S.C.) 697: 1974 S.C. Cri. R. 246: 1974 Mah. L. J. 694: (1974) 3 S. C. R. 652: 1974 Serv. L. C. 628: 1975 Chand L. R. (Cri.) 27: A. I. R. 1974 S. G. 1936

¹⁹⁷⁴ S. G. 1936. 20. Rathi Das v. State, 1974 Cut. L. R. (Cri.) 261; 1975 Cri. L. J. 1393 at 1394, 1395.

^{21-23.} Gulab Singh v. State of Rajasthan, 1975 Cri. L. J. 695 at 697: 1974 Raj. L. W. 130: 1974 W. L. N. 168 [1974 Cri. L. J. 145 S. C. followed].

rence, is not reliable.24 If in a murder charge an eye-witness did not come forward and tell the Investigating Officer what he had long after stated in Court; his omission to do so condemns his testimony as an afterthought.25 If evidence of eye-witnesses is in accord with medical evidence and is also corroborated by recovery of weapons of attack in pursuance of the disclosure statement of the accused there is no reason to disbelieve the eye-witnesses.1

Although, in cases, where the plea of the accused is a mere denial, the evidence of the prosecution has to be examined on its own merit, where, however, the accused raises a definite plea or puts forward a positive case which is inconsistent with that of the prosecution, the nature of such plea or case and the probabilities in respect of it will also have to be taken into account while assessing the prosecution evidence.2-4

If in the evidence of eye-witnesses there are no fatal or material contradictions, it is not unworthy of credence.5

The fact that no eye-witness is mentioned in the First Information Report is a circumstance against the prosecution, particularly when the complainant in the case was aware, or could be reasonably aware, of his presence.6 Nonmention of the names of certain eye-witnesses of the occurrence in the Dying Declaration does not diminish the value of the testimony of the eye-witnesses. On the trifling contradictions their evidence could not be rejected.6-1 In a murder case name of the sole eye-witness was not mentioned in the First Information Report or in inquest report. The witness admitted that he was not on talking terms with accused. Evidence of such witness was not considered trustworthy.7 A witness whose name is mentioned in First Information Report lodged within 2 hours of the occurrence, it was not a case of party faction and the witness had no animus against the accused, such evidence should not be disbelieved merely because the witness was examined by police after two days.8-9 Facts deposed by witness not mentioned in the First Information Report and in the statements recorded by police under Section 161, Cr. P. C. is a serious omission which affects his credibility.10 If as a matter of fact the witnesses had been examined only after a very long time by the police, that certainly is a

^{24.} Babuli v. State of Orissa, 1974 Cri.

Babuli v. Sfate of Orissa, 1974 Cri.
 L. J. 510 at 512; A. I. R. 1974 S.
 G. 775.
 R. Kondaiah v. State of A. P.,
 1975 Cri. L. J. 262 at 267;
 (1975) 2 S. C. J. 499; 1976 Mad.
 L. J. (Cri.) 21; (1976) 1 Andh.
 W. R. (S.C.) 1: 1975 Cri. App.
 R. (S.C.) 24; 1975 Cri. L. R.
 (S.C.) 54; 1975 S.C. Cri. R. 50;
 (1975) 3 S. C. C. 752; 1975 S. C.
 C. (Cri.) 213; A. I. R. 1975 S. C.
 216; Kumar alias Kumbhakaran v. 216; Kumar alias Kumbhakaran v. State, 1975 Cut, L.R. (Cri.) 404 (not disclosing the occurrence to police or anyone else, although police examined five witnesses the lowing day).

^{1.} Asa Singh v. State of Punjab, 1973 Cri. L. J. 623 at 626; 1972 Cri. App. R. 108 (S.C.): 1972 S. C. Cri. R. 204: 1972 U.J. (S.C.) 679; (1972) S. C. C. 746; 1972

S. C. C. (Gri.) 814; A. I. R. 1973 S.C. 512. 2-4. State of Mysore v. Raju, A. I. R. 1961 Mys. 74; (1961) 1 Cri. L. J.

Triloki Nath v. State of U. P., 1966 A. W. R. (H.C.) 352, 354.
 Rama v. State, 1969 Cr. L. J. 1393; A. I. R. 1969 Goa 116, 120.
 Surat Singh v. State of Punjab, A. I. R. 1977 S.C. 705 at page 707; 1977 Cri. L. J. 347; 1977 Cri. L. R. (S.G.) 53; 1977 U. J. (S.C.) 53.
 State v. Jose Gaspar, A. I. R. 1971 Goa 3; 1971 Cri. L. J. 36.
 Balkari v. State of Rajasthan, 1976 Cri. L. J. 828 at 832; 1975 Raj. L. W. 435; 1975 W. L. N. 812.
 State of Rajasthan v. Badri, 1975

State of Rajasthan v. Badri, 1975
 Cri. L. J. 1454 at 1456: 1974
 W. L. N. 736: 1974 Raj. L. W. 477.

circumstance that will have to be taken into account to consider whether the evidence given by them before the court can be relied on.11

When medical evidence is in conflict with the oral testimony of eyewitnesses, it gets the better of the evidence of eye-witnesses and discredits the eye-witness.12 In such a case the evidence of witnesses, who claim to be eyewitnesses, needs, as a rule of prudence, corroboration from circumstantial evidence.18

Though the eye-witness is a relation of the deceased, if his presence at the occurrence is satisfactorily explained and he is not proved to be hostile, his evidence can be relied upon.14

The evidence of an eye-witness should not be discarded merely on the ground of his being a relation of the complainant. Such testimony requires to be judged with caution.15

A witness is normally considered to be independent unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely; ordinarily, a close relative would be the last person to screen a real culprit and falsely implicate an innocent person, and hence the mere fact of relationship, far from being the foundation for criticism of the evidence is often a sure guarantee of truth. No doubt no sweeping generalisation can be possible in all cases; but at the same time, there cannot be any general rule of prudence to require corroboration before the evidence is believed. Each case must be limited to and governed by its own facts.16 Thus, the testimony of the eyewitnesses who are natural witnesses of the occurrence and whom one would expect to have seen the occurrence, cannot be doubted, only because they happened to have a part, or interested otherwise in the party on whose behalf they give evidence. The test to be applied is whether or not the evidence of the witness has a ring of truth.

The conduct of an eye-witness was not unnatural if he remained a silent spectator and did not participate in the fight to stop the parties. The instinct of self-preservation is paramount and in the circumstances of the case it could not be expected that the witness would join the afray at the risk of his own safety.17

Where the alleged improvements made by the witness in his statement are all of a minor nature, they reflect the truthfulness of the witness rather than make

(1952) 2 M.L.J. 100: 65 M.L.W.
429: 1952 Cr. L.J. 363: A.I.R.
1952 S. G. 167; Raj Kishore v.
State, A.I.R. 1969 Cal. 321, 838.

14. P. Ramanna, In re, 1969 Cr. L.J.
1453 (Andh. Pra.).

15. Bisheshwar Prasad v. State, 1967
A.W.R. (H.C.) 604, 606; A. Verghese v. State of Kerala, 1966 Ker.
L. J. 868; Kayumuddin v. Abdul
Gafur, 1972 Cr. L. J. 182 at 183:

16. Dalip Singh v. State of Punjab,
A.I.R. 1953 S.C. 364: 1953 M.W.
N. 642: 1953 Cr. L.J. 465.

17. Haji Lal Din v. State, 1977 Cri.
L. J. 538 at 546.

L. J. 538 at 546.

Atmaduddin 'v. State of U. P., 1974 Cri. L. J. 1800 at 1803: 1973 Cri. App. R. 67: 1973 S.C. Cri. R. 89: (1973) 4 S. C. C. 35: 1978 S. C. C. (Cri.) 676: 1973 Cri. L. R. (S.C.) 69; A. I. R. 1974 S. C. 1901; Balkari v. State of Rajasthan, 1976 Cri. L. J. 828 (not to be disbelieved unless he had any animus and case be of party any animus and case be of party faction).

^{12.} Surjan v. State of Rajasthan, 1956 Cr. L.J. 815: A.I.R. 1956 S.C. 425, 432.

^{13:} Lachhman Singh v. The State, 1952 S. C. J. 230; 1952 A. L. J. 437;

him a false witness. The fact that 15 of the other accused who were also implicated by the witness have been acquitted is not sufficient to discard his testimony.18

In a murder case, when evidence is given by relatives of the victim and the murder is alleged to have been committed by the enemy of the family, the Court must examine the evidence of the interested witnesses very carefully. But a person may be interested in the victim, being his relation or otherwise, and may not necessarily be hostile to the accused. In that case, the fact that the witness was related to the victim or was his friend, may not necessarily introduce any infirmity in his evidence. But, if the witness, besides being a close relation of the victim, is shown to share the victim's hostility to his assailant, that naturally makes it necessary for the Court to examine the evidence given by such witness very carefully, and scrutinise all the infirmities in the evidence before it acts upon it. In dealing with such evidence, the Court should begin with the enquiry whether the witness in question was a chance witness or whether he was really present on the scene of the occurrence. If the court is satisfied that he was not a chance witness, it should examine his evidence from the point of view of probabilities, and the account given by him as to the assault has to be carefully scrutinised. If the witness is shown to be related to the victim and it is also shown that he shared the hostility of the victim towards the assailant, his evidence should not be accepted unless corroborated in material particulars.19

Though prosecution witness was a full brother of deceased and was a solitary eye-witness of the occurrence but this factor alone was not sufficient for setting aside the conviction, in a murder case, recorded by the High Court after a careful appraisal of the evidence. The evidence of the witness, the injuries found on his person by the doctor lend assurance to his presence at the time and place of occurrence had a ring of truth and cannot be easily brushed aside despite the carping criticism to which it had been subjected by the counsel for the accused. His deposition received ample corroboration from the medical evidence as also from the circumstantial evidence. 19-1

If the eye-witnesses to an occurrence are closely related to each other, their evidence cannot be rejected but has to be sifted carefully.20

^{18:} Haji Lal Din v. State, 1977 Cr. L.

^{18:} Haji Lal Din v. State, 1977 Cr. L.
J. 538 at 544.

19. Darya Singh v. State of Punjab,
1965 S.C. 328: (1964) 2 S. C. J. 319:
(1965) 1 Gr. L. J. 350: 1964 Mad.
L. J. Cr. 503: 1964 All. W. R.
H. C. 532: 1964 S. C. R. 397;
Bishan Singh v. State, (1969) 71
Pun. L. R. 73, 81; Hari Har Saran
v. State of U. P., (1975) 1 S. C.
W. R. 536: 1975 S. C. C. (Cri.)
405: 1975 Cri. L. J. 1315: 1975 Cri.
L. R. (S.C.) 344: (1975) 4 S. C.
C. 148: 1975 U. J. (S. C.) 508:
A. J. R. 1975 S.C. 1501 (evidence
of partisan witnesses requires careful
scrutiny); R. Kondaiah v. State of scrutiny); R. Kondaiah v. State of A. P., (1975) 2 S. C. J. 499; 1976 Mad. L. J. (Cri.) 21; (1976) 1 An. W. R. (S.C.) 1: 1975 Cri.

App. R. (S.C.) 24: 1975 Cri. L. R. (S.C.) 54: 1975 S.C. Cri. R. 50: (1975) 3 S. C. C. 752: 1975 S. C. C. (Cri.) 213: 1975 Cri. L. J. 262: A. I. R. 1975 S. C. 266; Satya Narain v. State of Madhya Pradesh, 1972 S. C. Cri. R. 354: (1972) 3 S. C. C. 484; 1972 U.J. (S.C.) 855; 1972 S. C. C. (Cri.) 591; (1973) 1 S. C. J. 344; 1973 Mad. L. J. (Cri.) 210; 1973 A. W.- R. (H.C.) 358; 1973 All, Cri. R. 216; 1972 Cri. L. J. 881; A. 1, R. 1972

S. C. 1309.

19-1. Vishvas v. State of Maharashtra,
A. I. R. 1978 S.C. 414 at page
417, 418.

^{20.} Barjender Singh v. State, 1967 Cr. L. J. 712, 713; 1967 Cur. L. J. 850.

Before an adverse inference can be drawn from the non-examination of witnesses (eye-witnesses in the instant case), the Court should weigh the evidence of witnesses, which has been given before it, as against that adverse inference, and if those witnesses are reliable, act upon it.21

(k) Child witness. The evidence of a child witness is dangerous in the extreme and should be accepted with great caution.22 No provision in the Act requires the corroboration of the evidence of a child but it is a sound rule of practice not to act on the uncorroborated evidence of a child, whether sworn or unsworn.23 Though there were no infirmities in the evidence of a young boy, as it stood, but in view of the fact that he was a young boy it would be prudent to seek corroboration of his evidence.24 Where, according to the Sessions Judge, a child witness (aged about nine years), gave evidence in a straightforward manner, the evidence should be discarded on ground of danger of being tutored.25 Where there were several contradictions from which his evidence suffered, such as who had which weapon, but it was not merely on account of these contradictions of a minor character that the Supreme Court was inclined to reject his evidence. There were serious infirmities affecting his evidence and of them, the most important was that he was supposed to have given the name of appellant No. 2 as the assailant of the deceased even though he had never seen him before the date of the incident. This contradiction was considered to be of a very serious nature and it was held to be unsafe to rely on the testimony of the child witness,25-1 It is a well established rule that children are a most untrustworthy class of witnesses, for when of tender age, they live in a realm of make believer, they are prone to mistake dreams for reality, they are pliable as clay and repeat glibly as of their own knowledge what they had heard from others. The Courts have, therefore, to scrutinise the evidence of a child witness with utmost caution. Though no precise criteria for appraising the evidence of a child witness can be laid down, yet one broad test is, whether there was possibility of any tutoring. If this test is found in the positive, the Court will not, as a rule of prudence, convict the accused on a murder charge on the basis of child evidence unless it is corroborated to material extent in material particulars, directly connecting the accused with the crime.1 If a lad of 13 years has made it explicit in his cross-examination that he was tutored his evidence is unreliable.2

A child witness is a competent witness.3 But the prosecution is entitled

 Jagdishprasad v. State, I. L. R.

 1969 Bom. 1191: 71 Bom. L. R.
 536: 1969 Mah. L. J. 433: 1970
 Cr. L. J. 660, 661; Arjun Ghusi v.
 State of Orissa, (1975) 41 Cut.
 L. T. 517; M. R. Mahton v.
 State, 1972 B. L. J. R. 596.

 State v. Roop Singh, 1966 Raj. L.

 W. 382, at pp. 385, 386 (child ten years old); Manni v. Emperor, A.
 I. R. 1930 Oudh 406 (child six years old); Abbas Ali v. Emperor, A. I. R. 1933 Lah. 667 relying on Dr. Kenney's Outlines of Criminal

 Dr. Kenney's Outlines of Criminal Law, p. 386; Barpan Potdarin v. Emperor, A. I. R. 1938 Pat. 153 (child ten years old); Mohamed Sugal Esa v. The King, A. I. R. 1946 P.C. 3 (child under twelve

years).
23. Mohammed Sugal Esa v. The King,
A. I. R. 1946 P.C. 6; State v.
Roop Singh, 1966 Raj. L. W. 382,

Bharvad Bhikha Valu v. State of Gujarat, 1971 Cri. L. J. 927 at 930; (1971) 2 S. G. Cri. R. 330; A. I. R. 1971 S. C. 1064.
 Shabir Rashid v. State, 1969 Cr. L. 1989 (Delh.)

Shabir Rashid v. State, 1969 Cr. L. J. 1282, 1285 (Delhi).
 G. P. Fernandes v. Union Territory, Goa A. I. R. 1977 S.C. 135 at page 138: 1977 Cri. L. J. 167: (1977) 1 S. C. C. 707.
 Ram Singh v. State, 1973 Chand L. R. (Cri.) 482 at 485.
 Haria v. State of H. P., 1975 Cri. L. J. 78 at 81 (H. P.)

L. J. 78 at 81 (H. P.).

3. Dhani Ram v. Emperor, A. I. R.
1915 All. 437; Panchu Choudhury
v. Emperor, A. I. R. 1923 Pat. 91;
Ghulam Hussein v. Emperor, A. I.
R. 1930 Lah. 337; Rameshwar v. State of Rajasthan A. I. R. 1952 S. C. 54; Jalwant Lodhin v. State, A. I. R. 1953 Pat. 246; A. N. T. O. Thaba v. The State of Manipur, A. I. R. 1967 Manipur 11, 22.

to examine only such witnesses whom it considers to be material for the case.4 A child witness of 11 years gave inconsistent statements as to when he came to the place of occurrence. His name was not mentioned in F. I. R. In the site plan also the place from where he saw was not shown. It is unsafe to rely on his evidence.5

- (1) Identification Evidence. The section enacts that a fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. To justify the Court in holding that a fact is proved, the circumstances must be such that a prudent man would act on the suppositionthat a particular fact exists, and it is only then that the Court should hold that that fact has been proved. Human memory is fallible and it is sometimes difficult to identify a person not very well known, whom one sees with a rather different appearance at the time of identification proceedings. But this does not necessarily cause any infirmity in the evidential value of the witnesses who do, in spite of this difficulty, find it possible to identify the accused. Nor is the value of the identification minimised because of the time gap between the occurrence and the identification thereto. The evidence of the identification has to be judged on the basis of various facts and circumstances of the particular case. It is not possible to lay down any hard and fast rule as to when a particular identification should or should not be accepted.6 Yet the evidence of identification must satisfy the test provided by the section. The Court should approach the evidence with reasonable doubt and accept it only if that doubt is removed. It should accept the evidence only if it is satisfied that-
 - (1) the witness had a fair, if not good, opportunity of seeing the dacoits;
 - (2) the identification parade was held within a reasonable time of the incident:
 - (3) the witness has reliable powers of observation to be judged from the facts that the parade was not made too easy for him to pick out the suspect, and he did not commit so many mistakes, that it would create doubt in the mind of a reasonable man;
 - (4) the statement of the witness that he did not know the suspect previously is believable;
 - (5) the witness was not given an opportunity to see the accused after his arrest; and
 - (6) the investigation conducted in the case inspires confidence.7
 - 4. Doraiswami Udayar v. Emperor. A. I. R. 1924 Mad. 239; Jowaya v. Emperor, A. I. R. 1930 Lah. 163; Stephen Seveviratine v. The King, A. I. R. 1936 P.C. 289; Habeeb v. State of Hyderabad, A. I. R. 1954 S. C. 51; Bakshish Singh v. State of Punish A. I. R. 1957 S. C. 2004. S. C. 51; Bakshish Singh v. State of Punjab, A. I. R. 1957 S.C. 904; A.N.T.O. Thaba v. State of Manipur, A. I. R. 1967 Manipur 11, 22
- (child, daughter of victim of murder not examined for good reason).
- Balkasi v. State of Rajasthan, 1975
 Raj. L. W. 435.

 Sheo Nandan v. The State, A. I.
 R. 1964 All, 139; (1964) 1 Cr. L.
 J. 378.
- 7. Anwar v. State, A.I.R. 1961 All, 50; I.L.R. (1958) 1 All. 151.

The evidence of identification is a weak type of proof for the chances of mistake are far greater in this type of evidence than where the witness deposes about facts within his knowledge.8 Where, however, several marks of the identification are present together, and are regarded in the cumulative effect, the identity must be held established for coincidence can only apply to one feature or other.9

Where the prosecution adduces identification evidence in Sessions Court, while it did not examine such eye-witnesses in Committing Magistrate's Court, this is no ground for disbelieving it.10

In order that an identification memo may be regarded as a record of evidence, it must satisfy a double test, namely-

- (1) that it is a statement made by a witness in a judicial proceeding or before an officer authorised by law to take such evidence,
- (2) it is a statement which was made on oath or affirmation by a witness.

An identification memo is not a record of evidence of a witness.11

Nothing in Section 33 of the Succession Act, 1925 (39 of 1925) or Sections 68 to 72 of the Evidence Act requires that attesting witnesses of a will should be able to identify the signatures of each other or even to know each other.12

If a recovered stolen article is identified, it cannot lead to the conclusion that the witness identified it because he had previously seen it on the body of the victim and not that the recovered article was the one which had been recovered from the body of the victim.13

In a case of identification of dead bodies from skeleton recovered, the lapse of time since they were last seen alive has also to be taken into consideration.14 Evidence of a child witness, of 12 years, as to identification of large number of dacoits could not be accepted without corroboration.15 Evidence of prosecution witnesses that opium was recovered from accused cannot be discarded on the sole ground that he could not identify the accused later on in the Court.16

It is difficult to believe that an Inspector of Post Offices in Orissa who used to inspect the sub-post offices only on some occasions would be so well ac-

9. In re Chinnasami, A.I.R. 1960 Mad.

11. Ramsanehi v. State, A.I.R. 1963 All,

308: 1963 A.L.J. 61. Krishna Kumar Sinha v. The Kayasth Pathshala, I.L.R. 1966 All. 12. Krishna 483; A.I.R. 1966 All. 570, 576.

13. Karan Singh v. State, 1966 A.W.R. (H.C.) 208: 1966 All. Cr. R. 132:

1966 Cr. L.J. 318, 319. 14. State of Assam v. Upendra Nath Rajkowa, 1975 Cri. L. J. 354 at 388 (Gauhati).

15. Bodhia Chamar v. State, 1972 Cri. L.J. 1407 at 1408.

16. State of Punjab v. Rameswar Das, 1975 Cri. L.J. 1630 at 1634: 1974 Punj. L.J. (Cri.) 383: 77 Pun. L.R. 189: (1975) 2 Cri. L.T. 79.

Anmar v. State, A. I. R. 1961 All.
 I. L. R. (1958) All. 151.

^{462: 1960} Cr. L.J. 1344. 10. Jwala Mohan v. The State, I.L.R. (1963) 1 All. 585: A.I.R. 1963 All. 161 (F.B.).

quainted with the Oriya handwriting of the sub-postmasters under him so as to identify their writings not made in his presence.17

(m) Medical evidence. The discrepancies between medical evidence and the testimony of the eye-witnesses should be treated and appraised just like other discrepancies in the statements of the witnesses. It must not be forgotten that the eye-witnesses may not give a very correct and accurate account of the version and may at places make exaggeration or may fail to give correct facts either on account of lapse of memory or on account of inability to observe minutely or to recount and recite correctly. It should also be borne in mind that sometimes the medical officers also do not bestow sufficient care while performing examinations and their opinions may not be properly formed on account of inadequate or defective examinations or lack of complete knowledge. It is hardly fair to expect a complete and perfect correspondence between the medical evidence and the oral testimony, based on what the witnesses saw with their own eyes. Naturally, the Court must carefully exmine the discrepancies, and if it is reasonably possible to arrive at a substantial and true version of the prosecution case, the Court should not adopt the easy course of throwing away the prosecution case on the alleged discrepancies between the medical evidence and the eye testimony.18 In judging the distance from which a firearm was discharged, the appearance and nature of the resultant wound cannot be said to afford a sure criterion and any deductions based thereon would lead at best to a very rough estimate19 or when the evidence of medical witness is based on conjectures and surmises,20 or when due to lapse of time when their statements are recorded after the date of occurrence witnesses are mistaken about the details and consequently their evidence in some particulars runs counter to medical evidence21 or when oral evidence is of unimpeachable character and the same cannot be said about medical evidence,22 inconsistency in the two kinds of evidence is not sufficient to discredit the eye-witnesses. But if injuries are caused by lethal weapon and the prosecution evidence is totally inconsistent with medical evidence and the evidence of ballistic expert22 or when eye-witnesses definitely speak about only two injuries on the head having been caured one by a knife and the other by lathi, but the doctor found four incised wounds on the head, the evidence of eye-witnesses suffers from serious infirmity and is unworthy of credit. If the court is not to be guilty of judicial superstition, it must not abandon a scientific attitude to medical science (digestive processes in the instant case).24 The mere inconsistency of the medical evidence with

^{17.} Nalini Ranjan Sikdar v. Republic of India, 1974 Cut. L. R. (Cri.) 318 at 322.

^{18.} Mohanlal v. The State, I.L.R. 1960 Raj. 1200: A.I.R. 1961 Raj.

Om Prakash v. State of Haryana, 1971 Cr. L. J. 749 at 758.
 Jamuna Chaudhur v. State of Bihar,

^{20.} Jamuna Chaudhur V. State of Bihar, 1971 Cr. L. J. 898 at 901. 21. Paras Ram v. State of H. P., 1973 Cri. L. J. 428 at 431, 432 (H.P.). 22. Vasudevan v. State, 1976 Ker. L. T. 354; 1973 Cut. L. R. (Cri.) 254; I. L. R. 1971 Cut. 1051 (A.I.R. 1955 All. 189 relied on). 23. Ram Narayan v. State of Punish

^{23.} Ram Narayan v. State of Punjab,

¹⁹⁷⁵ Cri. L.J. 1500 at 1508; A.I.R. 1975 S.C. 1727; Sarwan Singh v, State of Punjab, (1976) 4 S.C.C. 369; 1976 C. R. A. R. (S. C.) 385; A.I.R. 1976 S.C. 2304 (Doctor stated that punctured wounds could not have been caused by Chem shown not have been caused by Ghop shown to him); Lakshmi Singh v. State of Bihar, (1976) 4 S.C.C. 394: 1976 Cri. L.J. 1736; A.I.R. 1976 S.C. 2263 (Several persons assaulted with lathis even after dec ased fell down but doctor found only one injury on the abdomen).

^{24.} Shivaji Saheb Rao v. State of Maharashtra, 1973 Cri. L. J. 1783; A.I. R. 1973 S.C. 2622.

the testimony of the eye-witnesses will not by itself make the latter unreliable.25 Evidence of eye-witnesses cannot be discarded merely on the ground that the Medical Officer did not find any injury other than the stab wound on the body of the victim at the time of medical examination. The possibility of slaps and first blows having not fallen or leaving no external marks of injuries on the person of the victim cannot be ruled out. Hence, the evidence of the eye-witnesses cannot be brushed aside merely on this score1 while the medical evidence fixes the number of assailants it cannot fix their identity.2 If the nature of injuries proved by medical evidence does not fit in with the prosecution version, it cannot be said that the prosecution case is free from very serious infirmity.8

(m.I). Expert witness. Sir Gerald Burrard in his book 'The Identification of Firearms and Forensic Ballistics' in Chapter VIII observed; under the head of Photo Micrography at page 175:

"As has already been stated in evidence of identification which is unsupported by photograph cannot be regarded as being any thing more than an expression of opinion, photographs are accordingly essential, such must be taken through microscope".

These observations are quoted with approval by the Supreme Court in the State of Gujarat v. Adam Fatch Mohammed Umatiya and others.2-1 In that case ballistic expert did not take any photograph of the misfired cartridge or of misfired test cartridges for comparison. Yet, he gave an opinion that bold face impressions and striker scrape of misfired cartridge were similar to those of test fired cartridges. In spite of the fact that he gave reasons for his opinion the Supreme Court discarded the evidence of identification as it was not supported by the photographs. It was held that it was nothing more than an expression of opinion. The evidence according to their Lordships did not establish that the test-cartridges were fired from the same weapon and that the misfired cartridge was also fired from that very gun In another case where there was no material on record to verify if the opinion given by the expert is correct. He even failed to mention points of similarities in the six empty cartridges. It was held that the opinion given by the Ballistic Expert is not sufficient to establish conclusively that the empty cartridges recovered from the place of occurrence were fired from the 12 bore gun recovered from the possession of the accused.4

When the Ballistic Expert could not connect the two pieces of the bullet with the rifle but nonetheless he opined that a shot was fired from this rifle and the weapon was a fit one and could be utilized for firing, the inability of the Expert to connect the two fragments of the bullet with the rifle could not be a circumstance necessarily leading to the inference that the said bullet was not

^{25.} Bajwa v. State of U. P., 1973 Cri. L. J. 769 at 778; (1973) 1 S.C.C. 714: 1973 S.C.C. (Cri.) 596: 1973 S.C.D. 498; 1973 Cri. App. R. 243 (S.C.): 1973 S.C. Cri. R. 256: 1973 Cri. L.R. (S.C.) 350; (1973) 3 S.C.R. 571: 1975 Mad.L.J. (Cri.) 54: 1973 M.L.W. (Cri.) 203: A, I. R. 1973 S. C. 1204.

Poosa Ram and others v. State of Rajasthan, 1976 W.L.N. 135 at 142;

¹⁹⁷⁶ Raj. Cr. C. 138; 1976 Raj. L. W. 129.

Phool Ghand v. State of Rajasthan, (1976) 4 S.C.C. 405: 1976 S.C.C. (Cri.) 682 at 688; 1976 C.R.A.R. (S.C.) 363.

^{3.} Piyare Lal v. Shankar Das, 1972 Cri. L. J. 135 at 187; 1971 Sim. L. J. (H.P.) 364. 3-1. 1971 U. J. (S.C.) 466. 4. Hanuman v. State, 1974 W.L.N. 95 at 99, 100; 1974 Raj. L. W. 159.

shot from the rifle. Any Expert, may be Ballistic or otherwise, can only give an opinion evidence. In a case where eye-witnesses are reliable and testify definitely to the weapon of attack, any opinion of an Expert even if it indicates a circumstance which does not exactly fit in the prosecution story, would be of no avail and can easily be ignored.5

I. S. Hatcher in his Text Book of Fire Arms Investigation, (1946 Print) at page 255 has referred to the rifling marks on bullet and has said that such identifying marks are caused by its passage over surface irrgularities and rough spots on the interior of the gun barrel that got there principally during the machining operations of reaming the bore and rifling the grooves". But the learned author has pointed out at page 256:

"It should be understood by the reader that some guns have the barrels smoothed up after machining by a process known as lapping. A rod is inserted into the barrel, and a lead plug is cast on the end of this rod, so that it exactly fits the lands and grooves. This lead plug is then covered with oil and emery flour, and passed back and forth through the barrel a number of times, until the most noticeable roughnesses are removed. This operation makes the inside of the barrel much smoother than it would otherwise be, and adds somewhat to the difficulty of bullet identification."

Unless there were rifling marks on the bullets and which were not defaced by the entry in the bodies of the victims, no Expert could ordinarily and generally give an opinion. Where none of the accused had a licenced pistol, in all probability, therefore, they would use country-made pistols. In such a situation it cannot be assumed that the Ballistic Expert could have found identifying marks on the bullets and his opinion would have gone against the prosecution.6

Where eye-witnesses gave direct evidence of the crime of murder and ident fication of accused was not in doubt, the discrepancy between the opinion of the expert and the prosecution story regarding the distance from which shots were fired loses much of its strength.7

(n) Tape Recorder. A tape recording and a photograph do not differ in principle. The Court must not deny to the law of evidence advantages to be gained by new techniques and new devices; provided the accuracy of the recording can be proved and the voices recorded are properly identified; provided also that the evidence is relevant and otherwise admissible. Indeed a tape recording is admissible in evidence. Such evidence should always be regarded with some caution and assessed in the light of all the circumstances of each case. There can be no question of laying down any exhaustive set of rules by which the admissibility of such evidence should be judged.8 These principles have been approved by the Supreme Court in the undernoted cases,9 and it has been held that tape record of speeches are documents under this section and stand on no different footing than photographs. A contemporaneous tape

^{5.} State v. Ram Singh, 1973 Cri. L.J.

^{5.} State v. Ram Singh, 1973 Cri. L.J.
150 at 153 (Him. Pra.).
6. Chatar Singh v. State of Haryana,
1976 S.C. C. (Cri.) 285: A.I.R.
1976 S.C. 2474 at 2477, 2478.
7. Karnail Singh v. State of Punjab,
1971 Cri. L. J. 1463 at 1467;
1971 Cri. App. R. 383 (S.C.):
(1971) 3 S. G. C. 616; A. I. P.

¹⁹⁷¹ S.C. 2119.

^{8.} R. v. Maqsud Ali, (1965) 2 All E.R. 464, 469.

^{9.} Sri N. Rama Reddy v. V. V. Giri, (1970) 2 S.C.C. 340; R.M. Malkani v. State of Maharashtra, A.I.R. 1973 S.C. 157; Z.B. Bukhari v. B. P. Mehra, A.I.R. 1975 S.C. B.R. Mehra, A.I.R. 1975 S.C.

record of a relevant conversation or speech would be part of res gestae. The use of tape record is not confined to purposes of corroboration and contradiction only but, when duly proved by satisfactory evidence of what was found recorded and of absence of tampering, it could, subject to the provisions of this Act, be used as substantive evidence. Where a witness hears incriminating conversation shouted by accused persons in separate cells the evidence of the conversation is admissible.¹⁰

Tape recordings are not inadmissible on grounds of possibility of their being tampered with. Tape recorded conversation can be corroborative evidence. Weight to be given to such evidence depends on the other factors which may be established in a particular case.¹¹

(o) Demeanour of witnesses. The witness-box is a test of credibility. A consideration of the demeanour of the witness upon trial and the manner in which he gives his evidence, both in chief and upon cross-examination, is no less material than the testimony itself. From the way in which a witness gives his evidence, one can often discover whether the witness is a liar, is a partisan or has a bias, or whether he is a truthful witness, struggling to tell an honest tale, in spite of physical or mental disabilities and of his unusual surroundings. In Powell's book in the Introduction, the importance of paying attention to demeanour, both under the Hindu and Mohammedan Law of Evidence, has been indicated. If the witness is overforward and overzealous in giving answer in favour of one side, but reluctant to make any admissions that would go against that side, if his memory is clear and precise on all points that tell in favour of one party, but hazy and obscure when the truth would benefit the other party, then it may safely be concluded that he is a liar or a partisan.12 On the other hand, the witness's promptness and frankness in answering questions without regard to consequences and especially his unhesitating readiness in stating all the circumstances, attending the transaction, by which he opens a wide field in contradiction if his testimony be false are strong internal indications of his sincerity. In fact, it is not too much to say that unless the witness is a skilled actor, his demeanour frequently furnishes a clue to the probity of his testimony. That is why Paul Brown's first rule for the examination of a witness is:

"Have your eyes always on the witness—except in indifferent matters, never take your eye from that of the witness; this is the channel of communication from mind to mind, the loss of which nothing can compensate. Truth, falsehood, hatred, anger scorn, despair, and all the passions, or all the soul is there. For instance, witness of a low grade of intelligence when they testify falsely, usually display it in various ways; in the voice, in a certain vacant expression of the eyes, in a nervous twisting about in the witness stand, in an apparent effort to recall to mind the exact wording of the story and especially by the use of language not suited to their station in life."

Since the demeanour of a witness is a very important test of his credibility, the judge is empowered by the Civil Procedure Code (see Order 18, Rule 12) and the Criminal Procedure Code (Section 280) to record remarks about wit-

R. v. Mills, (1962) 3 All E.R. 298 (tape recorded to check and improve note from money).

Partap Singh v. State of Punjab, A.I.R. 1964-S.C. 72.
 9th Edition, 506-7.

ness's demeanour in the witness-box. That is why, it is also enjoined that the appellate court should not, ordinarily, interfere with a trial court's opinion as to the credibility of a witness, as the trial judge alone knows the demeanour of the witness; he alone can appreciate the manner in which the questions are answered, whether with honest candour or with doubtful plausibility, and whether after careful thought or with reckless glibness; and he alone can form a reliable opinion as to whether, the witness has emerged with credit from a cross-examination.13

It has also been laid down that the most careful note (that is to say, record) may often fail to convey the evidence fully in some of its most important elements to those for which the open oral examination of the witness in presence of prison judge and jury is justly prized. It cannot give the look or manner of the witness; his hesitation, his doubts, his variations of language, his confidence or precipitancy, his calmness or consideration; it cannot give the manner of the prisoner, when that has been important, beyond the statement of anything of particular moment. It is, in short, or it may be, the dead body of the evidence without its spirit, and which is supplied only when given openly and orally by the ear and eye of those who receive it.14

But, at the same time, demeanour consisting in confusion, embarrassment, hesitation in replying to questions and even vacillating or contradictory answers are not necessarily a proof of dishonesty in witness, because this deportment may arise from bashfulness or timidity and may be a natural and inevitable effect upon examination by a skilful, practised, perhaps unscrupulous, advocate, whose aim in his question is to entangle, entrap and confuse the witness and make him contradict himself hopelessly. In addition, though when the question of credibility depends upon the demeanour in the box, the manner in which the witness answers and how he seems to be affected by the question put, and so on, the trial judge has an advantage. When the view upon credibility, on the other hand, are founded upon argumentative inferences, from facts not disputed, the court of appeal is really in as good' a situation as a trial judge. 15 In fact the impression as to the demeanour of a witness ought not to be too readily adopted by a trial judge without testing it against the whole of his evidence and, if this is not done, it is open to the appellate court to find that the view of the trial judge as to demeanour was ill-founded.18 In Sitalakshmi v. Venkata17 it has been said that the absence of a separate note regarding demeanour of a witness is immaterial, especially when judgment is written before the recollection of the judge has become dim.

A judge's observation regarding the demeanour of a witness recorded under Order XVIII, Rule 12, C. P. C., will not justify the discarding of the evidence of that witness when, the judge has not properly appreciated the evidence.18

When no note is made about the demeanour of a witness, and the judge

Valarshak Seth Apean v. Standard Co. Ltd., A. I. R. 1943 P. C. 159, 161: 209 I. C. 132.
 Per Sir John Coleridge in R. v. Bertrand, 1867 L. R. I. P. C. 520

at 533.

^{15.} Palchur Sankarareddi v. P. Mahalakshmamma, 70 I.C. 749; A.1.R.

¹⁹²² P.C. 315. Yuill v. Yuill, (1945) 1 All. E.R 183 (C.A.). 34 C.W.N. 593 (P.C.): 123 I.C. 557; A.I.R. 1930 P.C. 170. Francis, M.V. v. Dr. Ammu Amma, 1968 Ker. L.J. 123,

could not have remembered what the demeanour of the witness was at the time when he writes his judgment, it would not be correct to think that the evidence of the witness, by reasons of such demeanour, is not entitled to credence.19

(p) Acceptability of evidence. In judging the acceptability of evidence, the absence of contrary evidence is also a factor to be taken into consideration. But, the falsity of unrebutted evidence may be so patent or the evidence may be unworthy of credence or so unsatisfactory that the court cannot regard the fact, which is sought to be proved by such evidence, as proved. Evidence may be destroyed or, it may be said, sufficiently rebutted by its inconsistencies, improbabilities and inherent defects and thus cease to be a fit basis for a finding. For the rejection of such evidence, no evidence in opposition is necessary.20

In assessing the value to be attached to oral evidence judges are bound to call in aid their experience of life and to test the evidence on the basis of probabilities. The court is not bound to accept the oral evidence of one party only, even if unrebutted by the other party.21

(1) Respectable witnesses of the locality. Section 100(4) of the Cr. P. C., and other statutes, making provisions relating to searches, provide for the presence and participation of two or more respectable inhabitants of the locality, and a considerable amount of case-law has grown around it, which may be summed up as follows from the undernoted cases.22

The respectability of a witness does not connote any particular status or wealth or anything of the kind. Any person is entitled to claim respectability, provided he is not disreputable in any way. The words "respectable inhabitants of the locality" must be construed in the light of the object of the section in accordance with the maxim ut res magis valeat quam pereat that an act prevail rather than perish.

The Legislature has made this provision to ensure fair dealing and a feeling of confidence and security amongst the public in regard to a sometimes necessary invasion of a private right regarded as almost sacred under the British system.

In order to give effect to this object, it is necessary that the persons selected should be absolutely unprejudiced and uninterested in the result of what they have to take part in. The selection of the officers connected with the police or persons who are not impartial is not contemplated by this section. Having

Shivamurthiswamy,

19. Sangappa v. Shivamurthiswamy, A.I.R. 1961 Mys. 106.
20. Krishna Kumar Sinha v. Kayastha Pathashala, I.L.R. (1965) 1 All 483; A. I. R. 1966 All, 570, 584; A.C. Agarwal v. Union of India, 1962 A.L.J. 28, 30; A.I.R. 1962 All. 436, 437 (uncontradicted allegations improbable of belief can be tions, improbable of belief, can be disbelieved).

Chaturbhuj Pande v. Collector, Raigarh. (1969) 1 S. C. J. 344; (1969) 1 S. C. W. R. 320; 1969 A. L. J. 159; 1969 B. L. J. R. 196;

1969 Jab. L. J. 495; 1969 Ker. L. J. 212; 1969 M. P. L. J. 346; 1969 Mah. L. J. 367; A. I. R. 1969 S. C. 255, 257; 1975 Cr. L. J. 3.

22. Sunder Singh v. State of U. P., A. I. R. 1956 S. C. 411; 1956 Cr. L. J. 801; State v. Raoji, A. I. R. 1956 Bom. 528; Lal Bahadur v. The State, A. I. R. 1957 Assam 74; 1957 Cr. L. J. 502; Bhanu v. State of Tripura, A. I. R. 1958 Tripura 40; 1958 Cr. L. J. 1549; In re Raja Bather, A. I. R. 1959 Mad. 450,

been a prosecution witness is not sufficient to deprive one of one's title to respectability. Only respectable persons of the locality are to be selected as witnesses for the search. The provision as to locality is directive and not mandatory. It is impossible to define locality precisely. In a densely populated town, it means persons in the immediate vicinity. Locality must also include villages within 3 or 4 miles. In short, the words "of the locality" do not mean that they should be within a stone's throw of the place searched nor are the words restricted to the same quarter.

Sometimes, the attitude of men nearby does not make it worthwhile calling them as search witnesses. It is only independent search witnesses who may be available who have to be called. The mere fact that witnesses are taken from another locality should not be looked upon as a factor militating against their respectability.

The gist is that honest effort should be made to secure the presence of respectable persons of the locality but if no such witness is available outsiders might be indented upon. The burden of explaining why it was not possible to procure respectable witnesses from the locality will be upon the prosecution and when no such attempt is made, the evidence of the search witnesses will be viewed with a great amount of caution.

The emphasis of the section is on the word "respectable" and not on the word "locality".

At the highest, the irregularity of the search and the recovery, in so far as the terms of Section 103 had not been fully complied with would not affect the legality of the proceedings. It only affects the weight of evidence which are matters for courts of fact, and the Supreme Court would not ordinarily go behind the findings of fact concurrently arrived at by the courts below.

- (r) Discrepancies. The constant theme on the appreciation of evidence in our Courts is the discrepancies in the testimony of various witnesses. In regard to these discrepancies two extremes have to be steered clear from, namely,—
 - (a) summarily brushing aside discrepancies characterising them, as representing the untutored veracity of the witnesses and that they suggest that the witnesses have not learnt the same story off by heart; or
 - (b) lay too much stress on discrepancies without any attempt to appraise their real value and effect, thereby leading to serious failure of justice.

The proper course is it is not enough merely to speak about the discrepancies in the evidence but there should be a fitting comment on the quality of the evidence coming from the witnesses. Discrepancies in the statements of witnesses on material points should not be lightly passed over as they seriously affect the value of the testimony. Trifling discrepancies should be ignored because several persons, giving their versions of the transactions witnessed by them, are naturally liable to disagree on material points, their powers of observation, exhibition of memory being not the same and honest differences

being possible. There can be discrepancies of truth as well as discrepancies of falsehood. It is common experience that discrepancies do occur, even in the statements of perfectly honest witnesses; they are really due to differences in individual faculties with regard to observation, recollection and recital of details; and unless there is any good ground to think that they are due to a deliberate attempt to suppress or depart from the truth, it is unfair to discard the direct testimony of witnesses, merely on account of such discrepancies, when there is a general agreement as to material circumstances. It is the broad facts of a case, and not the minor details, that have to be considered in weighing evidence.

Paley has well said, "I know not a more sure or unphilosophical conduct of the understanding than to judge the substance of the story by reason of some diversity in the circumstances with which it is related." The usual character of human testimony is substantial truth and of circumstantial variety. This is what the daily experience of courts of justice teaches. When accounts of transactions come from the mouths of different witnesses, it is seldom that it is not possible to pick out apparent or real inconsistencies between them. These inconsistencies are studiously displayed by an adverse pleader but oftentimes with little impression upon the minds of the Judges. On the contrary, a close and minute agreement induces the suspicion of confederacy and fraud. In weighing the prosecution evidence, it has to be borne in mind that unfortunately in this country, as repeatedly pointed out in various decisions, there is a tendency generally among police officers to try to remove all discrepancies in the evidence of witnesses with the object plausibly of presenting the court, trying the case, with a picture of witnesses making consistent coherent statements throughput. This is futile and does not convince any court with any intelligence. In assessing discrepancies, due weight should be given to this pernicious habit of police officers.

Discrepancy as to time cannot be a ground for rejecting the evidence of a witness who, being a villager or illiterate cannot be expected to be precise as to time.²³

In an election case witnesses are not to be disbelieved only because the particulars regarding distribution of a pamphlet are at variance with their evidence. But the fact should be borne in mind while appreciating their evidence.²⁴ If evidence led before trial court is at variance with pleadings and interested witnesses have put forward conflicting versions the conclusion of court that witnesses are unreliable is justified.²⁵

Persons giving their testimony of an occurrence may disagree on minor points for it is only the broad facts that matter in weighing evidence.\(^{1-2}\) Minor discrepancies are natural. The eye-witnesses may not be able to remember the details which are too minor in nature about an incident at which time they were excited. Hence, these omissions and contradictions cannot affect the truth of

Rati Pal v. State, I. L. R. (1967)
 All. 360; 1968 A. L. J. 423, 426;
 Bishwanath Gosain v. Dulhin Laltumi V. L. R. 1968 Pat. 481, 486.

Shiv Kripal Singh v. V. V. Giri, A. I. R. 1970 S.C. 2097, 2118.

Prabodh Chandra v. Mohinder Singh, A. I. R. 1971 S. C. 257 at 260.

^{1-2.} Rama v. State, 1969 Cr. L. J. 1393; A. J. R. 1969 Goa 116, 120,

the prosecution case.3 Discrepancies in matters of detail pertaining to the precire number of blows given by the assailant, the standing or lying posture of the victim at the time of assault,4 as to the weapons possessed by the accused in a dacoity case,⁵ or discrepancy of minor character in describing weapons of assault⁶ difference to some extent as to the exact abusive words used by the accused,⁷ or as to the difference in the estimate of the distance of the quarter of the accused from that of the witness,8-10 are such which occur even in the testimony of truthful witnesses, and this is no ground to reject the evidence when there is consensus as to the facts of the case.11

Discrepancies in evidence as to the colour of a motor cycle which knocked down a person are not significant, particularly when mistakes might have arisen, may be, due to the faulty English translation of evidence given in the vernacular. In the same case discrepancies as to the density of the traffic were explicable as it was not clear whether they related to the time of the accident or a time after the accident.12

When parties give evidence after a lapse of over eight years some allowance must be made to forgetfulness and lapse of memory.13 Therefore, it would not be appropriate to test the veracity of the evidence by giving undue emphasis on minor discrepancies. It is human experience that close relations have as anxiety to see that the true culprit is punished. Therefore, it is unnatural that daughter would falsely implicate her mother as the author of the murders. 13-1

When large number of accused are involved in the occurrence, it is quite natural that the witness who receives injuries, naturally gets a bit confused and his statement should not be rejected on the ground of contradictions.14

The fact that the complainant stated at one place in the course of his deposition that he did not know the accused but stated at another place that

3. In Re Thippanna, 1971 Cri. L. J. 1640 at 1645: 1971 Mad. L. J. (Cri.) 200; Sheo Darshan v. State of U. P., 1971 Cri. App. R. 299 (S.C.): (1972) 3 S. C. C. 74: 1971 U. J. (S.C.) 630: 1972 S. C. C. (Cri.) 394: 1971 Cri. L. J. 1306: A. I. R. 1971 S. C. 1794: Manchuda v. State (S.C.) 630; 1972 S. C. C. (Cri.)
394; 1971 Cri. L. J. 1306; A. I. R.
1971 S. C. 1794; Manchuda v. State,
1972 W. L. N. 867 (Raj.); S.
Donganna v. State, (1973) 39 Cut.
L. T. 769; (1973) 52 Ele. L. R.
407; Kuruchiyan Kunhaman v. State
of Kerala, 1974 Ker. L. T. 328
(Goa); State of Assam v. U. N.
Rajkhowa, 1975 Cri. L. J. 354;
(1975) 2 Cri. L. T. 119; 1975 Cut.
L. R. (Cri.) 52.
4. Sampat Tatyada Shinde v. State of
Maharashtra, 1974 Cri. L. J. 674
at 677; 1974 U. J. (S.C.) 177; 1974
Cri. L. R. (S.C.) 221; 1974 S.C.C.
(Cri.) 382; (1974) 4 S. C. C. 213;
1974 S. C. Cri. R. 210; A. J. R.
1974 S. C. 791.
5. Bharat Singh v. State of U. P.,
1972 Cri. L. J. 1704 at 1706; A. I.
R. 1972 S. C. 2478.
6. Radha Kishan v. State. 1973 Cri.
L. J. 481 at 483 (Raj.).

L. J. 481 at 483 (Raj.).

- 7. Brajbandhu Das v. Guni Bewa, (1973) 39 Cut. L. T. 1034 at 1035, 1036.
- 1035, 1036.

 8-10. State of U. P. v. Samman Dass, 1972 Cri. L. J. 487 at 493: 1972 U. J. (S.C.) 526: (1972) 2 Um, N. P. 262: (1972) 3 S. C. C. 201: 1972 S. C. Cri. R. 511: 1972 S. C. C. (Cri.) 275: (1972) 3 S. C. R. 58: 1973 Mad. L. J. (Cri.) 504: 1973 All L. J. 489: (1973) 2 S. C. J. 345: 1973 M. P. W. R. 452: A. I. R. 1972 S. C. 677.

 11. Veeramuthu v. State of Madras, 1971 Cr. App. R. 264 at 267, 268 (S.C.)

(S.C.).

12. T. P. Gnanavelu v. D. P. Kan-nayya, 1969 A. G. J. 435; A. I. R. 1969 Mad. 180, 182 (claim for com-

1969 Mad, 180, 182 (claim for compensation for death caused).

13. Mohammad Yusuf v. D., I. L. R. 1966 Bom, 420; 68 Bom, I. R. 228; 1967 Mah, L. J. 65; A. I. R. 1968 Bom, 112, 122.

13-1. Shanti v. State, A. I. R. 1978 Orissa 19 at page 23 (F.B.).

14. Har Prasad v. State of M. P., 1971 Cri. L. J. 1135 at 1138; (1971) 3 S. G. C. 455; A. I. R. 1971 S.C. 1450. 1450.

he knew them for about three years, his evidence as to actual assault on him does not become unworthy of credence for that reason.15 Where there were discrepancies in the evidence of all the material witnesses which created confusion firstly on the point whether both appellants 1 and 2 struck, and if so, which of the two injuries was caused by appellant 1 and 2, and secondly, whether both of them were armed with sticks. That being the situation, the Supreme Court disagreed with the High Court's view that it was not possible to make a distinction between the case of appellant 3 and that of appellants I and 2. This was so because whereas there was definiteness and unanimity amongst all the witnesses in regard to the part played by appellant 3, there was no such consistency and preciseness in regard to the parts appellants 1 and 2 individually played.16

But when one set of prosecution evidence condemns the other set of evidence produced by the prosecution,17, or the prosecution story was that three accused produced four receptacles containing about 100 packets of opium, but in the court PWs I and 3 stated that all the receptacles were produced by one accused, the story becomes absolutely unreliable.18 There was inconsistency in regard to the accused persons getting armed, the arms used by the accusedappellants; the place of occurrence; the manner of infliction of injuries; and while one eye-witness had stated in the committing Court that he was not able to say who inflicted which of the injuries, at the trial he had tried to be very specific. The availability of light to see the details of the occurrence was also very much doubtful; 19-21 conviction may not be based on such evidence.

Where the evidence is conflicting and it is impossible to reconcile the conflicting statements on any theory of defective memory, or failing powers of observation, or any other explicable hypothesis to account for their contradictions, the only safeguide to follow is that afforded by the acts and conduct of the principal parties concerned and the contents of the documents produced. In cases, where there is a conflict of evidence, the court of appeal should have special regard to the fact that the trial judge saw the witnesses.22

Where some of the prosecution witnesses have contradicted their earlier statements under Section 164 of the Code of Criminal Procedure, 1973 and the contradictions suggested that the defence version might be true. There were also certain other contradictions on material points in the evidence of some of the prosecution witnesses.

The trial Court and the High Court both failed to take note of the serious

35 Cr. L. J. 1180.

Emperor, A. I. R. 1935 Lah 230:

Dharam Vir v. State of M. P., 1974 Cri. L. J. 812 at 813: 1974
 C. G. (Cri.) 352: (1974) 4
 C. C. 150; A. I. R. 1974 S.C. 1156.

^{16.} Nagappan v. State of Tamil Nadu, 1971 U. J. (S.C.) 880 at 885.

17. Harchand Singh v. State of Haryana, 1974 Cri. L. J. 366 at 369: (1973) 2 S. C. W. R. 341: 1973 S. C. C. (Cri.) 962: 1973 S. C. Cri. R. 458: 1974 S. C. D. 81: 1973 Cri. App. R. 372 (S.C.), 1973 1973 Cri. App. R. 372 (S.C.): 1973 B. B. C. J. 741: (1974) 3 S. C. C. 397: 1973 Cri. L. R. (S.C.) 628: (1975) 1 S. C. J. 102: (1974) 1 S. C. R. 583: 1975 Mad. L. J.

⁽Cri.) 34; 1975 Mad. L. W. (Cri.) (Cri.) 34: 1975 Mad. L. W. (Cri.) 216: A. I. R. 1974 S.C. 344.

18. Ahmed Noor Khan v. State of Assam, 1972 Cri. L. J. 779 at 784: A. I. R. 1972 Gauhati 7.

19-21. Pandaka Narayana v. State of Orissa, (1975) 41 Cut. L. T. 848 at 852: 1975 Cut L. R. (Cri.) 245.

at 852: 1975 Cut L. R. (Cri.) 245. Bir Bahadur v. The State, A. I. R. 1956 Assam 15; I. L. R. (1954) 6 Assam 428; Brijlal v. Inda Kunwar, 36 All. 187 (P.C.): 18 C. W. N. 649: 23 I. C. 715; A. I. R. 1914 P. C. 38; Anam v. The State, A. I. R. 1954 Orissa 38; Jahangirilal v. Emperor. A. I. R. 1985 Inh. 280

infirmitis in the prosecution case. These infirmities cast a legitimate doubt on the truth of the prosecution story. Accordingly the accused were acquitted.22-1 Similarly where the story narrated by the witness in his evidence before the Court differed substantially from that set out in his statement before the police and having regard to the large number of contradictions in his evidence-contradictions not on mere matters of detail, but on vital points-it was held unsafe to rely on his evidence and such evidence was excluded from consideration in determining the guilt of accused.22-2 Where the case against the accused hinges to a very large extent on the testimony of a witness and his evidence is neither "wholly unacceptable" nor wholly impeccable, the Court should be on its guard not to rely on his bare word, without some assurance from independent sources, about the identity and connection of the accused with the commission of the serious offence of murder.22-3

Minor 'contradictions are bound to appear when ignorant and illiterate' women are giving evidence. Even in case of trained and educated persons, memory sometimes plays false and this would be much more so in case of ignorant and rustic women. It must also be remembered that the evidence given by a witness would very much depend upon his power of observation and it is possible that some aspects of an incident may be observed by one witness while they may not be witnessed by another though both are present at the scene of offence. It would not, therefore, be right to reject the testimony of eye-witnesses merely on the basis of minor contradictions.28

Absence of discrepancies in oral evidence may make it unacceptable. Thus, if oral evidence of an adoption is given 18 years after the event and there are no discrepancies in the evidence of the witnesses, such evidence must be one prepared for the case and cannot be accepted in proof of the adoption.24 The testimony of a witness who testifies to minute recollections of circumstances when the transaction was such that he must have paid momentary attention cannot be accepted at its face value.25 The witnesses watched the occurrence from a close distance in an electric light. The assault was so dastardly and gruesome that it must have made a definite and lasting impact on the memory of the witnesses that made them remember the assault with its grotesque details. Human memory is like a camera which takes snapshots of striking incidents and then transmits the same through word of mouth faithfully with absolute accuracy and precision. Moreover, it is not a question of giving photographic details at all, but the witnesses have merely described what they actually saw. It is manifest that in view of the electric blub burning, the witnesses were bound to observe the weapons with which the accused were armed, the main parts of the body where the blows were given and the like.1

Govinda v. Chimabai, 13 Law Rep. 681; A. I. R. 1968 Mys. 309, 314.

Mst. Dalbir Kaur v. State of Pun jab. (1976) 4 S.C.C. 158 at 175: 1976 Cr. L. R. (S.C.) 417: 1976 S.C.C. (Cri.) 527.

^{22-1.} Bhajan Singh v. State of Punjab, A. I. R. 1977 S.C. 674 at page 677: 1977 Cri. L. J. 439: 1977 Punj. L. J. (Cri.) 23.
22-2. N. D. Dhayagude v. State of Maharashtra, A. I. R. 1977 S.C. 381 at page 382: 1977 Cri. L. J. 238: 1977 S. C. C. (Cri.) 10.

page 382: 1977 Cri. L. J. 238; 1977 S. C. C. (Cri.) 10.

22-3. Phool Chand v. State of Rajasthan, A. I. R. 1977 S.G. 315 at page 319, 320; 1977 Cri. L. J. 207; 1977 S. C. Cri. R. 142.

23. Boya Ganganna v. State of A. P., 1976 Cri. L. J. 1158 at 1161; (1976) 1 S. C. C. 584; 1976 S.

C. C. (Cri.) 102; 1976 C. R. A. R. 83; 1976 M. L. J. (Cri.) 503; (1976) 2 S. C. J. 284; A. I. R. 1976 S. C. 1541.

^{25.} Kalyani Amma Chilamma v. Padmavati, I. L. R. (1972) 2 Ker. 240: 1972 Ker. L. R. 726: 1973 Ker. L. T. 1030.

(s) Contradictions and omissions. In regard to appreciation of evidence regarding the contradictions and omissions, they generally arise under Section 162 of the Criminal Procedure Code. In Ponnusami Chetty v. Emperor,² Burn, J., of the Madras High Court took an extreme position and observed:

"Whether it is considered as a question of logic or of language, 'omission' and 'contradiction' can never be identical. If a proposition is stated, any contradictory proposition must be a statement of some kind, whether positive or negative. To contradict means to 'speak against' or in one word to 'gainsay'. It is absurd to say that you can contradict by keeping silence. Silence may be full of significance, but it is not 'diction' and therefore it cannot be 'contradiction' The same conclusion follows from a consideration of Section 145, Evidence Act. If it is intended to contradict the witness by the writing, his attention must be called to those parts of the writing which are to be used to contradict him. It would be sheer misuse of words to say that you are contradicting a witness by the writing, when what you really want to do is to contradict him by pointing out omissions from the writing A witness cannot be confronted with the unwritten record of an unmade statement It is impossible to state a case in which an omission amounts to a contradiction Section 162 can only be used in order to show that the witness in the box is contradicting something he had said before It is not permissible to use such statements in order to show 'development' of the prosecution case: it is only permissible to use them to prove contradictions"

In In re Guruva Vannan,3 it was held that if the point is of such importance that no police officer would omit to record it, if it had been made, the omission may be treated as a contradiction. Horwill, J., observed:

"All that investigating officers are expected to do is to make a short record of what the witnesses examined by them have said. They are not expected to record the unimportant details given by the witnesses; and so the absence of such details in the case-diary is no proof at all that the statements were not made by the witnesses. A court should permit a statement recorded under Section 162 to be used for the purpose of proving an omission only when it is sure that the omission would not have occurred if the statement had really been made."

In the same case Mockett, J., observed:

"It is not the duty of the investigating officer to do more than record a gist of the statements made to him It is not the duty of the police when investigating a crime to record a long and detailed deposition. Their business is to make a note of such facts and statements as then seem to them important and useful for the purpose of the case An omission from the record in a case-diary of a statement is only of value, if it is of such importance that the witness would almost certainly have made it and the police officer would almost certainly have recorded it, had it been made. So much of the cross-examination in the Sessions Court seems now to be directed to irrelevant omissions in the case-diary, that I think the above observations are necessary. An immense amount of unnecessary writing is

^{2.} A. I. R. 1933 M. 372, 373: 56 M. 475: 143 I. C. 424: 37 M. L. W.

A. I. R. 1944 Mad. 385; 57 M. L. W. 171: I. L. R. 1944 Mad. 897; 217 I. C. 275.

imposed upon the Sessions Judge The recording of this cross-examination, a complete waste of time, must have occupied the learned Sessions Judge several minutes"

In State v. Ram Bali,4 the Allahabad High Court observed:

"A statement recorded by the Police under Section 162 can be used for one purpose and one purpose only and that of contradicting the witness. Therefore, if there is no contradiction between his evidence in Court and his recorded statement in the diary, the latter cannot be used at all. If a witness deposed in court that a certain fact existed but had stated under Section 162 either that that fact had not existed or that the reverse and irreconcilable fact had existed, it is a case of conflict between the deposition in the court and the statement under Section 162 and the latter can be used to contradict the former. But if he had not stated under Section 162 anything about the fact, there is no conflict and the statement cannot be used to contradict him. In some cases an omission in the statement under Section 162 may amount to contradiction of the deposition in Court; they are the cases where what is actually stated is irreconcilable with what is omitted and impliedly negatives its existence. If the statement under Section 162 can be reconciled with the deposition in court and can stand with it, there is absolutely no conflict. An omission is not a contradiction unless what is said actually contradicts what is omitted to be said. The test to find out whether an omission is a contradiction or not is to see whether one can point to any sentence or assertion which is irreconculable with the deposition in the Court. It would be quite meaningless to say that the entire statement under Section 162 contradicts the deposition; therefore one can lot point to the entire statement as being irreconcilable with the deposition."

The latest pronouncement of the Supreme Court is in Tahsilaar Singh v. State of U. P.,5 wherein a majority of the judges held:

"The procedure prescribed in contradicting a witness by his previous statement made during investigation is, that if it is intended to contradict him by the writing, his attention must before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him. The second part of Section 145, Evidence Act clearly indicates the simple procedure to be followed. The contradiction under the section should be between what a witness asserted in the witness-box and what he stated before the police officer and not between what he said he had stated before the police officer and what he actually made before him. In such a case, the question could not be put at all; only questions to contradict can be put and the question here posed does not contradict. It leads to an answer which is contradicted by the police statements."6

A witness who spoke in the Session Court about the deceased being equipped with pistol and cartridges, had not spoken about it to anyone else or the police or in the first information report. Such omission amounts to

Cr. App. No. 1086 of 1949.
 A. I. R. 1959 S. C. 1012; 1959 Cr. L J. 1231; 1959 S. C. J. 1042.

^{6.} Tahsildar Singh v. Gate of U. P., A. I. R. 1959 S. C. 1012; 1959 Cr. L. J. 1231: 1959 S. C. J. 1042.

material contradiction within the meaning of Section 162, Criminal Procedure Code and is an obvious improvement.7

Version of prosecution witness in the Court being inconsistent with his version before the Police, conviction cannot be sustained on such evidence.8

In evaluating discrepancies, contradictions and omissions, it is undesirable for a court to pick out sentences and consider them in isolation from the rest of the statements. The entire statement shou'd be taken into consideration to find out whether they are due to a deliberate attempt to suppress or depart from the truth. Witnesses should not be disbelieved on basis of triffing discrepancies and omissions.9-11

Mere contradictions in the evidence of witnesses, who are illiterate and uneducated, would not be the basis of an acquittal if on a thorough scanning the prosecution case is found to be substantially established.19

When the discrepancy is minor,13-14 the statement can be relied upon after careful scrutiny.15 A witness who gives one version in chief examination, another in cross-examination and a third version in re-examination cannot be relied on for any purpose and no conclusion could be formed from such evidence.16-17 An eye-witness should not, however, be disbelieved on the ground that there is slight discrepancy in his version given in Court with that given by him to village Munsif. 18

In cases where the transaction consists of a single act of payment of money, contradictions on the main issue like payment of money, cannot be elicited. Even false witnesses never falter on the principal question i.e., the payment of the sum and its quantum. It is therefore, usual to attack the credibility of such witnesses by eliciting their answers on minor details related to the alleged transaction. It is only by questioning the witnesses on the various details that the seemingly solid wall of falsehood can be breached.19

(t) Corroboration: Necessity of. Where the evidence is isterested, it should not be relied upon without independent corroboration.20 But this proposition, according to the Supreme Court, is not of universal application.21 It is enough if the circumstances corroborate the testimony of the interested witnesses.22 The fact that the first information report was lodged within 35 minutes of the occurrence at the police station at a distance of two miles from

7. Guljara Singh v. State, 1973 Cri. L. J. 498.

Tri. 54.

12. Bansidhar v. State, (1969) 35 Cut. L. T. 278, 284.

13-14. Arjuna Pradhan v. State of Orissa, (1975) 41 Cut. L. T. 186 at 198.

 State v. Hadibandhu Mati, (1973)
 Cut. L. T. 619 at 625; I. L. R. 1973 Cut. 601: 1973 Cut. L. R.

(Cri.) 241. 16-17. Narayana Pillai v. State, 1971 Cri. L. J. 168 at 169: (1974) 1 Cri

L. T. 233 (Delhi). Veeramuthu v. State of Madras, 1971 Cri. App. R. 264 at 267, 268 (S. C.).

Visvonate Raghunath Andi v. Mariano, A. I. R. 1976 Goa 60 at 61,

 Manik Chand v. Bhagwan Das, A.
 I. R. 1964 Pat. 353; (1971) 2 Cut. W. R. 797.

Mangal Singh v. State of Madhya Bharat, 1957 Cr. L. J. 325; A. I.

R. 1957 S. C. 199, 202. 22. Ibid; State N. Bhola Singh, 1969 Cr. L. J. 1002: A. J. R. 1969 Raj, 219, 224.

^{8. (1975) 2} Cr. L. T. 119 (H.P.); State of Haryana v. Gurdial Singh, (1974 Current L. J. 317 relied on). 5-11. Dashiraj v. State, A. I. R. 1964

the place of occurrence and the fact that in the aforesaid report the names of the accused as the culprits as well as the names of the eye-witnesses were mentioned lends considerable corroboration to the testimony of prosecution witness regarding the participation of the accused appellants in the occurrence.23 Prosecution evidence should not be disbelieved on the ground that father and brother of deceased were not examined to corroborate as to what witnesses said after incident was over.24 The corroboration required of a witness who is a relation of the deceased in a murder case, is not that kind of corroboration which would be necessary to support the evidence of an approver or an accomplice, but only such corroboration as would be sufficient to lend assurance to the evidence before the court and satisfy the court that the particular persons were really concerned in the offence.25 Where the evidence is neither wholly reliable nor wholly unreliable, the Court should seek corroboration from some independent evidence or from circumstances. But there can be no corroboration of a false or doubtful witness by another witness of the same character.1 Evidence of hostile witnesses is not sufficient to corroborate evidence of partisan witnesses.2

Where the witness in question is an accomplice, or in a position which can be considered somewhat analogous to that of an accomplice, though not exactly the same, the Court should want corroboration on material particulars.3 The tainted evidence of one accomplice cannot corroborate that of another.4 But where the witness is neither an accomplice nor anything analogous to an accomplice, a Court can act on his testimony though uncorroborated. Unless corroboration is insisted upon by statute, Court should not insist on corroboration except in cases where the nature of the testimony of the single witness itself requires, as a rule of prudence, that corroboration should be insisted upon. The question, whether corroboration of the testimony of a single witness is or is not necessary, must depend upon the facts and circumstances of

of U. P., 1973 23. Dargahi v. State Cri. L. J. 1828 at 1832: 1973 S. C. C. (Cri.) 928: (1973) 2 S. C. W. R. 357: 1973 S. C. D. 1057: (1974) 3 S. C. C. 302: 1973 S. C. Cri. R. 465: 1973 Cri. L. R. (S. C.) 634; A. I. R. 1973 S. C.

^{24.} State of Bihar v. Ram Balak Singh, 1966 Cri. App. R. 409 (S.C.).
25. Lachhman Singh v. State, 1952 S. C. J. 230; 1952 A. L. J. 437; (1952) 2 M. L. J. 100: 65 M. L. W. 429: 1952 Cr. L. J. 363; A. I. R. 1952 S.C. 167, 169; Karnail Singh v. State of Punish 1954 S. Singh v. State of Punjab, 1954 S. C. R. 904: 1954 S.C.A. 339: 1954 A. L. J. 209: 1954 B. L. J. R. 179: 1954 M. W. N. 319: A. I. R. 1954 S.C. 204, 206; State v. Bhola

Singh, 1969 Cr. L. J. 1002; A. I. R. 1969 Raj. 219, 224.

1. State v. Tula Ram, A. I. R. 1960 All. 585; 1960 A. L. J. 361; Yudhishtir v. State of Madhya Pradesh. (1971) 5 S. C. C. 436; 1971

S. C. C. (Cri.) 684; 1971 S. C. D. 374; (1971) 2 S. C. Cr. R. 592; 1971 Cr. App. R. (S. C.) 247.

2. Harnam Singh v. State of H. P., 1974

Harnam Singh v. State of H. P., 1974
 S. C. C. (Cri.) 951: 1975 Cri. L.
 J. 276: 1975 S. C. Cri. R. 177: 1975 A. Cri. C. 159: 1975 Cri. App. R. (S.C.) 18: (1975) 1 S. C. W. R. 78: I. L. R. 1974 H. P. 1078: 1975 Cri. L. R. (S.C.) 68: (1975) 3 S. C. C. 343: (1975) 1 An. L. J. (S.C.) 19: 1975 Punj. L. J. (Cri.) 98: A. I. R. 1975 S.C. 236.
 See Vimireddy Satyanarayan v. State of Hyderabad, 1956 S. C. R. 247:

of Hyderabad, 1956 S. C. R. 247: 1956 Cr. L. J. 777: 1956 All, L. J. 389: I. L. R. 1956, Hyd. 386: 1956 All, W. R. Sup. 75: 1956 S. C. J. 382: A. I. R. 1956 S. C. 379, avalained in Parastan v. State of explained in Ramratan v. State of Rajasthan, A. I. R. 1962 S.C. 424; (1962) 3 S. C. R. 590; (1962) 1 S. C. J. 371: 1962 M. L. J. (Cri.) 263: 1962 All, W. R. (H. C.) 268.

4. Bhulu Mia v. State, 1969 Cr. L. J. 1558.

^{1553:} A. I. R. 1969 Cal. 416. 418.

each case.5 Thus, if there are reasons to think that a witness is not entirely disinterested and may have been exaggerating things, the court may rightly insist on corroboration of his evidence.8 One can easily conceive cases of recovery of unlicensed weapons by members of the police force in circumstances in which it is not possible to lead corroborative evidence. In such cases it may very well be that a finding of conviction may legitifately be recorded on the evidence given by members of the police force without corroboration from members of the public. But where, according to the prosecution itself, members of the public were present at the time of the alleged recovery and they are examined at the trial to support the version given by the police force but, far from supporting that version, they contradict it, it would not be proper to record a finding of conviction merely on the basis of the statements made by members of the police force.7 Testimony of witness swerving from the path of truth and suppressing or embellishing facts requires independent corroboration.8-9 Again, in a matrimonial dispute, for instance, when the relations between the spouses have become bitter, there may be some exaggeration in their respective versions by the spouses. In such cases, the matrimonial offence must be established to the satisfaction of the Court beyond reasonable doubt, and, though not as a matter of law, as a rule of prudence, independent corroboration of the versions of the parties should be made. Such corroboration, however, need not be by direct testimony; it may be obtained from the conduct of the parties and the surrounding circumstances.10 But where in an application by the husband against the wife for restitution of conjugal rights under Section 9 of the Hindu Marriage Act, 1955 (25 of 1955), they alone are the witnesses, the husband's evidence can be sufficient corroborative evidence of general character having probative value, of that given by the wife on cruelty.11 The Indian Evidence Act does not require corroboration of a party in civil cases. The rule of corroboration is generally a rule of prudence and practice to be applied reasonably having regard to all surrounding circumstances. 12 Mere publication of the report of a meeting in local newspaper is not sufficient to corroborate evidence of witnesses who depose that the offending statement was made by particular speaker at the meeting.18

Independent corroboration of the evidence of witnesses, who are relations of the victim of a murder, is required to lend assurance to the conviction that they are witnesses of truth.14

In a petition by the husband for dissolution of marriage on the ground of the wife's adultery, the husband alone gave evidence which was not corroborat-

Vadivelu v. State of Madras, 1957
 S. C. R. 981; A. I. R. 1957
 S. C. R. 981; A. I. R. 1957
 S. C. 614: 1957
 Cr. L. J. 1000: 1956
 M. P. C. 711; 1957
 All L. J. 898; (1957)
 All. W. R. (H. C.) 640
 cited with approval in Ramratan v. State of Rejection

Rajasthan, A. I. R. 1962 S.C. 424.

6. Vaikuntam Chandrappa v. State of Andhra Pradesh, A. I. R. 1960 S. C. 1340: 1960 Cr. L. J. 1681.

7. Jasrath v. State, 1971 All. Cr. R.

³³⁴ at 335.

^{8-9.} State v. Dewari Behora, 1976 Cr. L. J. 262; 42 C. L. T. 726.

Meena v. Lachman, I. L. R. 1960
 Bom. 365: A. I. R. 1960 Bom. 418:
 61 Bom. L. R. 1549.
 Siddagangiah v. Lakshamma, 11

Siddagangiah v. Lakshamma, 11
 Law Rep. 486: (1967) 2 Mys. L. J.
 185: A. I. R. 1968 Mys. 115.
 Shakila Banu v. Gulam Mustafa,
 A. I. R. 1971 Bom. 166 at 169; 72
 Bom. L. R. 623: 1970 Mah. L. J.
 904: I. L. R. 1971 Bom. 714.
 Babu Rao Bagaji Karemore v. Govind, A. I. R. 1974 S. C. 405 at
 421: (1974) 3 S. C. C. 719: (1974)
 2 S. C. R. 429.

² S. C. R. 429. State v. Dhusa Kandy. 35 Cut. L. T. 152; 1970 Cr. L. J. 1322, 1323.

ed, the respondents remaining ex parte. Merely because the respondents did not care to contest the proceeding, the court will not be justified in coming to the conclusion that the evidence of the husband is true and worthy of credit.15

When the only eye-witness, a child, at one stage the victim of tutoring, gives two conflicting versions and on the evidence the witness stands condemned as a liar, the court needs corroboration in support of the statement on which the conviction is to be sustained.16

In order to accept the bare statement of the prosecutrix in a criminal case for an offence under Section 366, I. P. C., that she was compelled, threatened or otherwise induced to go with the accused, when she had made several divergent statements, and the medical evidence was that she had been used to sexual intercourse, there should be corroboration of some material particulars before the statement can be considered sufficient to sustain the accused's conviction.17 A witness does not need corroboration on all material particulars. Corroboration on some important and material particulars is sufficient.18 For other cases, when corroboration of women witnesses is required or not, the following cases may be seen.19

Any fact which renders it more probable that the witness's testimony is true on any material point can amount to corroboration, but facts which are equally consistent with the truth of the testimony or the reverse are not corroborative. In order to be corroborative, evidence must be independent testimony which connects or tends to connect the accused with the offence.20

Where the question is, whether a Hindu has become converted to Buddhism, the evidence of conversion may be corroborated by evidence of subsequent conduct.21 In the absence of independent corroboration, defendant's evidence is not trustworthy when it is at variance with the written statement and proof.22

Evidence of opportunity does not amount to corroboration, nor does defendant's not giving evidence amount to corroboration.22

Where a witness in a criminal case may be regarded as having some purpose of his own to serve, whether he be a fellow-prisoner or a witness for prosecution, a conviction should not be based on that witness's evidence unless it is corroborated; but, if there be such clear and convincing evidence, as satisfies

Antoniswamy v. Anna Manickam, (1969) 2 M. L. J. 457; 82 M. L. W. 459; A. I. R. 1970 Mad. 91 (the court can refuse to give relief on the uncorroborated testimony of the husband-see section 7, Divorce Act, 1869).

^{16.} Jogi Sahu v. State, I. L. R. 1968 Cut. 748: 1970 Cr. L. J. 637, 638. 17. Ram Murti v. State of Haryana, 1970 S. C. D. 663 at pp. 671. 672.

^{18.} Ramdhani Pandey v. State of M. P., 1973 Cri. L. J. 1880 at 1884: 1973 Jab. L. J. 504; 1973 M. P. W. R. 326; 1973 M. P. L. J. 570. 19. Madho Ram v. State of U. P., A. I. R. 1973 S.C. 469 (case under section 366 & 376 I. P. C.); Garage Rout v. The State (1975) 41 Cut.

Rout v. The State, (1975) 41 Cut.

L. T. 1301 (Prior to her examination in Court a girl of tender years stayed in police station for four days and she admitted that she was deposing as per instructions of police, credibility held seriously police,

affected). 20. Senat v. Senat, (1965) 2 All E. R.

^{21.} See Punjabrao v. D. P. Meshram, A. I. R. 1965 S. C. 1179: 1965 M. P. L. J. 257: 67 Bom. L. R. 812: (1965) 2 S. C. A. 85: (1965) 2 S. C. J. 725: 1965 Mah. L. J

^{22.} Jyotirmoyee v. Durga Das, A. I. R. 1976 Cal. 238 at 241, 242. 28. Cracknell v. Smith, (1960) 3 All

E. R. 569.

the conscience of the Court, corroboration is not necessary.²⁴ Offences can be committed in the dead of night inside a house where no independent witness would be available and the only witnesses who can depose are the inmates of the house. In such cases the evidence of the inmates or the injured would be examined critically and the prosecution case may be accepted on their testimony without independent corroboration if it is reliable.²⁵ But where a witness shifts his stand, so that his evidence is no better than that of an accomplice, corroboration by other independent reliable evidence is required in material particulars.¹

(u) Rejecting and accepting part of the testimony. The maxim "false in one false in all-falsus in uno falsus in omnibus" is based on the concept that when the witness makes a false statement, it affects his entire credibility. If a person lies as to one fact, he is a liar as to others. In other words, his veracity is so undermined as to render it uncertain as to when he is telling the truth.² As the credit due to a witness is founded in the first instance on a general experience of human veracity, it follows that a witness who gives false testimony as to one particular cannot be credited as to any. The presumption that the witness will declare the truth ceases as soon as it manifestly appears that he is capable of perjury. Failure in a witness's reputation cannot be partial or fractional. But this rigid interpretation has come to be doubted and is now applicable in a modified form as the following extracts and decisions will show

The maxim falsus in uno falsus in omnibus is in itself worthless; first, in point of validity and secondly, in point of utility, because it merely tells the jury what they may do in any event, not what they must do or must not, and therefore it is a superfluous form of words. It is also in practice pernicious.³

In fact the function of the jury in drawing inferences from the evidence is set out by Underhill's Criminal Evidence, page 1379, summing up the American case-law on the subject as follows:

"The jurors determined the weight to be given to the testimony of the witnesses by the demeanour in the stand, their interest in the case, the probability or improbability of their testimony, its corroboration, the facts bearing on their credibility, their intelligence and knowledge and not by the mere number of witnesses. Conflicting evidence should be reconciled by the jury, if possible, and, if they cannot reconcile it, they may base their verdict on that part of the testimony which they consider worthy of credit and reject that which they deem to be unworthy of belief. Inconsistencies and contradictions in the testimony of a witness do not make it inherently improbable. The jury cannot arbitrarily reject the evidence but the testimony of a witness which is wilfully and corruptly false may be totally disregarded by the jury. The jury may believe the testimony of one witness or any part of his testimony as against a great number of witnesses. They may regard the testimony of an unimpeached witness

^{24.} See R. Prater, (1960) 1 All. E. R. 298.

Patis alias Abdul Satar Khan v. State, 1975 Cut. L. T. 349 at 351, 352.

State of Karnataka v. K. S. Ram Das, 1976 Cr. L. J. 228 at 233.
 Starkie on Evidence, p. 873.

^{3.} Wigmore on Evidence, Vol. III, para. 1008.

and they are not bound to believe uncontradicted evidence which is incredible. But if the jurors disbelieve all the witnesses because their testimony seems improbable, they cannot adopt an equally improbable theory which is grounded on mere suspicion. In short, the present day tendency is that we must weigh evidence carefully in each case and not adopt any arbitrary formula or yardstick in measuring its worth or worthlessness."

There is almost always a fringe of embroidery to a story however true in the main. The falsehood should be considered in giving the evidence; and it may be so glaring as utterly to destroy confidence in the witness altogether. But, when there is reason to believe that the main part of the deposition is true, it should not be arbitrarily rejected because of want of veracity in perhaps some minor point.

In Gur Charan Singh v. State of Punjab,4 the Supreme Court held:

"Merely because two of the four accused have been acquitted, though the evidence against all of them so far as the defence testimony went was the same, it does not necessarily follow that the other two must be similarly acquitted. Where the lower court had differentiated the case of the accused who had been acquitted from the other two on the ground of absence of motive in the former case and in addition to that the evidence of the witnesses as against the convicted accused was consistent and not shaken by cross-examination, there is no sufficient reason for the appellate court to go behind the finding which was based by the lower court on that evidence."

In In re P. Ramulu,5 it was said that the appreciation of oral evidence by a court cannot conform to certain set formula, or be measured by the yardstick common to all cases. Ordinarily, a court should not convict an accused on the basis of evidence not accepted by it in connection with other accused, unless the evidence is corroborated otherwise; but this is not an inflexible rule of law but a rule of prudence in the appreciation of the evidence, and is not intended to prevent a judge of fact from appreciating the evidence, that is placed before him, having regard to the circumstances of each case. In State of Punjab v. Hari Singh,6 the Supreme Court held that Courts in this country do not act on the maxim "falsus in uno falsus in omnibus". When the effect of an allegation proved to be incorrect or which may be true or untrue has to be considered, it has to be viewed in the setting of facts in each particular case.

In Nisar Ali v. State of U. P.,7 the Supreme Court held that the maxim

^{4.} A. I. R. 1956 S. C. 460: 1956 Cr.

^{4.} A. I. R. 1956 S. C. 460: 1956 Cr. L. J. 827.

5. A. I. R. 1956 Andhra 247: 1956 Cr. L. J. 1389.

6. 1974 Cri. L. J. 822 at 827: 1974 Cur. L. J. 307: 1974 Punj. L. J. (Cri.) 128: (1974) 3 S. C. R. 725: 1974 S. C. D. 553: 1974 Cri. L. R. (S. C.) 389: 1974 S. C. C. (Cri.) 588: 1974 S. C. Cri. R. 268: (1974) 4 S. C. C. 552: 1974 Mad. L. J. (Cri.) 519: (1974) 2 S. C. J. 302: 1974 S. C. D. 793: 1974 B. B. C. J. 526: 1975 All. Cri. C. 115: C. J. 526: 1975 All. Gri. C. 115: A. I. R. 1974 S. C. 1168. 7. A. I. R. 1957 S. C. 366: 1957 Cr.

L. J. 550: 1957 S. C. J. 392: 1957 M. P. C. 346; (1957) I Mad. L. J. Cr. 314; 1957 B. L. J. R. 352: 1957 All, L. J. 447: I. L. R. (1957) I All. 361; 1957 A. W. R. (H.C.) 461; Bishwanath Gosain v. Dulhin Lalmuni, A. I. R. 1968 Pat. 481, 485 (maxim po longer appears of the control of the cont Pat. 481, 485 (maxim no longer applied unqualifiedly even to criminal cases); Wahengham Nimai Singh v. Manipur Administration, 1968 Cr. L. J. 1237; see Wigmore on Evidence, para. 1008 (the maxim is worthless); Md. Ayub Khan v. Abdus Samad Khan, 1969 B. L. J. R. 932, 937; Ram Kishore v. Ambika

falsus in uno falsus in omnibus has not received the general acceptance in different jurisdictions in India; nor has this maxim come to occupy the status of a rule of law. It is merely a rule of caution. All that it amounts to is that the testimony may be disregarded and not that it must be disregarded. The doctrine merely involves the question of weight of evidence which a court may apply in a given set of circumstances, but it is not what may be called a mandatory rule of evidence. And in Ugar v. State of Bihar,8 Subba Rao, J., observed that the maxim falsus in uno falsus in omnibus (false in one thing, false in everything) is neither a sound rule of law nor a rule of practice. Hardly one comes across a witness whose evidence does not contain a grain of untruth or at any rate exaggerations, embroideries or embellishments. It is, therefore, the duty of the Court to scrutinise the evidence carefully and separate the grain from the chaff. But, it cannot obviously disbelieve the substratum of the prosecution case or the material parts of the evidence and reconstruct a story of its own out of the rest. Therefore, the court's duty in cases where a witness has been found to have giver unreliable evidence in regard to certain particulars is to scrutinise the rest of his evidence with care and caution. If that part of the evidence takes away the very substratum of his case, the court cannot disbelieve the substratum and reconstruct a story of its own out of the rest. The same view has been taken in the following cases.9

Therefore the court's duty in cases where a witness has been found to have given unreliable evidence in regard to certain particulars, is to scrutinize the rest of his evidence with care and caution. If that part of the evidence takes away the very substratum the court cannot reconstruct a story of its own out of the rest. io In Ranbir v. State of Punjab, 11 the Supreme Court held that in cases of party factions there is generally a tendency on the part of prosecution witnesses to implicate some innocent persons along with the guilty persons. In such cases the evidence has to be scrutinised with care and caution and if the substratum of the prosecution case remains unaffected, and the remaining evidence is trustworthy, the prosecution case should be accepted to the extent it is considered safe and trustworthy.

Where one part of the evidence of a witness is disbelieved, judges of fact have the right to act on the rest of his testimony if it inspires complete reli-

Prasad, 1966 A. W. R. (H.C.) 57: A. I. R. 1966 All. 515, 516; Nathu A. I. R. 1966 All. 515, 516; Nathu
v. The State of Rajasthan, 1970 W.
L. N. (Part I) 361; I. L. R. 1971
(21) Raj. 400; Dharam Pal v.
State, A.I.R. 1971 Himachal Pradesh 17; 1971 Cr. L. J. 1750: 1971
Sim. L. J. (H. P.) 211.
8. A. I. R. 1965 S. C. 277; 1964 B.
L. J. R. 615: 1965 (1) Cr. L. J.
256; 1965 Mad. L. J. Cr. 105: 1965
All. W. R. (H.C.) 90; 1964 Cur.
L. J. (S.C.) 220: 1964 S. C. D.

L. J. (S.C.) 220: 1964 S. C. D.

^{9.} Sohrab v. State of Madhya Pradesh, 1972 Cri. L. J. 1302; (1972) 3 S. C. C. 751; (1972) 2 Um. N. P. 481; (1972) 2 S. C. W. R. 294; (1973) 1 S. C. J. 308; 1973 U. J. (S.C.) 43; 1973 Mad. L. J. (Cri.) 192; (1973) 1 S. C. R. 472; 1972 S. C. C. (Cri.)

^{819:} A. I. R. 1972 S.C. 2020; Ram Sarup v. State, 1972 W. L. N. 507: 1972 Raj. L. W. 325; Sri Ram v. State, 1973 Raj. L. W. 495: 1973 W. L. N. 401: 1973 Cri. L. J. 1448; Ghisa v. State of Rajasthan, 1975 W. L. N. 213: 1976 Cri. L. J. 39; Babu Lal v. State of Rajasthan, (1977) 83 Gri. L. J. 59 (F.B.); Harsarup Dass v. Padanabhajah.

than, (1977) 85 Gri. L. J. 59 (F.B.);
Harsarup Dass v. Padanabhaiah,
1972 Cri. L. J. 956: 1971 Sim.
L. J. (H.P.) 1.

10. Deep Chand v. State, 1970 C. A. R.
(S. C.) 62, 67: 1970 S. C. D. 123.

11. (1973) 2 S. C. W. R. 25: 1973
Cri. L. J. 1120: 1973 S. C. C.
(Cri.) 858: 1973 Cur. L. J. 721:
1973 S. C. D. 723: 1973 Cri. L.
R. (S.C.) 488: 1973 B. B. C. J.
505: (1974) 1 S. C. R. 102; A. I.
R. 1973 S. C. 1409. R. 1973 S. C. 1409.

ance.12 Even the statements of witnesses who are not totally reliable can be acted upon where they are corroborated by other reliable evidence.18 The maxim falsus in uno falsus in omnibus should not be mechanically applied in India in appraising evidence.14

If part of statement of a witness is incorrect or doubtful, the statement is not to be rejected outright but acceptable truth is to be separated from falsehood.15 If the evidence of some witnesses is unsafe for convicting some accused, that by itself is no ground for rejecting the evidence of those witnesses against the other accused.16 The duty of Courts in such cases is to disengage truth from falsehood and to accept what it finds to be true.17 There is no rule of law that if the court acquits one accused on the evidence of a witness finding it to be doubtful against him, the remaining credible evidence cannot be used to convict other accused whose complicity is certain.18

If truth and falsehood in the evidence of a witness (for the prosecution) are so intermingled as to make it impossible to separate them, the evidence should be rejected in its entirety.19

A court has the right to disbelieve part of a witness's evidence and believe a part thereof.20 It can accept the testimony of some of the witnesses against

Jagdish v. State, 1967 A. L. J. 82;
 1967 A. W. R. (H.C.) 109; 1967
 Cr. L. J. 1467; A. J. R. 1967 All.
 532, 535.

13. Mangal v. State, 1967 Cr. L. J. 598: A. I. R. 1967 All, 204, 207; Jabbar v. State, 1966 A. L. J. 1046: 1966 A. W. R. (H.C.) 254: 1966 Cr. L. J. 1363: A. I. R. 1966 All, 590, 591.

- 590, 591.

 14. Bhagwan Tana Patil v. State of Maharashtra, (1973) 2 S. C. W. R. 554: 1974 Cri. L. J. 145: 1974 Mad. L. J. (Cri.) 258: (1974) 1 S. C. J. 571: 1974 Cr. App. R. 15 (S.C.): 1974 S. C. C. (Cri.) 11: (1974) 3 S. C. C. 536: A. I. R. 1974 S. G. 21; Bawa Haji Hamsa v. State of Kerala, 1974 S. C. D. 449: 1974 Cri. L. J. 755: 1974 Cri. L. R. (S.C.) 317: 1974 S. C. C. (Cri.) 515: (1974) 4 S. C. C. 479: A. I. R. 1974 S. C. 902; Laxman v. State of Maharashtra, 1974 M. P. L. J. 227: 1974 S. C. C. (Cri.) v. State of Maharashtra, 1974 M.
 P. L. J. 227: 1974 S. C. C. (Cri.)
 228: (1974) 3 S. C. C. 704: 1974
 Mah. L. J. 229: 1974 Cri. L. R.
 (S. C.) 36: (1974) 2 S. C. J. 371:
 1974 Chand L. R. (Cri.) 234: 1974
 Mad. L. J. (Cri.) 571: 1975 Mad.
 L. W. (Cri.) 87: 1974 Cri. L. J.
 369: (1974) 2 S. C. R. 505: A. I.
 R. 1974 S. C. 308; Narasing Naik,
 In re, (1971) 2 Mys. L. J. 552:
 1972 Mad. L. J. (Cri.) 38: 1972
 Cri. L. J. 1150; 1973 Cut. L. R.
 (Gri.) 320; I. L. R. (1976) 2 Punj.
 362: 1975 Punj. L. J. (Cri.) 261.
 15. Laxman v. State of Maharashtra,
 1974 M. P. L. J. 227.
 16. Bawa Hazi Hamsa v. State of Kerala Supra; State v. Jittu, 1972 A.

- W. R. (H. C.) 861 at 864; 1972 A. C. R. 558; Patia alias Abdul Satar Khan v. State, (1975) 41 Cut. L. T. 349; Ahmad Sulaiman Bharat v. State of Gujarat, A. I. R. S. C. 991.
- Bhagwan Tana Patil v. State of Maharashtra, Supra; Ramjan Ganai v. State, 1973 Cri. L. J. 1378: 1974 J. & K. L. R. 58: 1973 (1) Chand L. R. 101: Guljara Singh v. State,
- L. R. 101; Guljara Singh v. State, 1970 W. L. N. (Part 1) 265; 1971 Cri. L. J. 498; A. I. R. 1971 Raj. 68; Md. Yusuf Khan v. Mst. Zarina, 1975 Raj. L. W. 322; 1975 W. L. N. 281.

 18. Mst. Dalbir Kaur v. State of Punjab, A I. R. 1977 S. C. 472 at 488; (1977) 1 S. C. J. 54; (1977) M. L. J. (Cri.) 50; (1976) 4 S. C. G. 158; (1976) S. C. C. (Cri.) 527; Somabhai v. State of Gujarat, 1975 Cr. L. J. 1201; 1975 S. C. C. (Cri.) 515; 1975 Cri. L. R. S. C. 421; A. I. R. 1975 S.C. 1453. 1453.

19. Kambi Nanji Virji v. State of Gu-jarat, 1970 S.C. Cr. R. 311: 1970 S. C. D. 244: 1970 Cr. L. J. 363; A. I. R. 1970 S. C. 219, 221; Bhagwan Tana Patil v. State of Maharashtra, Supra; Balaka Singh v.

Manarashtra, Supra; Balaka Singh v. State of Punjab, 1975 S.C. 1962.

20 Sukha v. State of Rajasthan, 1956 S. C. R. 288: 1956 S. C. A. 781; 1956 S. C. C. 355: 1956 S. C. I. 503: 1956 Andh. L. T. 583: 1956 A. W. R. (Sup.) 83: 1956 Cr. L. J. 923; A. I. R. 1956 S. C. 513; Jagdip Singh v. State of Haryana, A. I. R. 1974 S. C. 1978.

one and not accept the same against another.21

A witness who tells lies on one point may be believed on another point, provided there is corroboration.22

In Chhotan Mahton v. The State,23 it has been held that where the court accepts the story of the prosecution in respect of the crime in essential particulars, that is to say, the manner in, and the circumstances under which, it was committed, and also that some of the persons, alleged to have taken part in it, had actually been participants in the crime, the court should endeavour to find out which of them were the actual participants, and should not throw out the case, merely because the prosecution partly had embellished the actual occurrence by making false embroideries to it, and there were discrepancies in the evidence of the prosecution witnesses, the doctrine of separating the grain from the chaff applies to such a situation. So:

- (1) Where the prosecution account of the occurrence is not acceptable in material particulars forming the core of the happening, the court will not ordinarily be justified in such a situation to act upon any rival theory of the defence, attempted to be proved or suggested during the trial in such a way as to take out one part of it to supplement the prosecution evidence or to add strength to the case or to the evidence adduced by the prosecution in support thereof, and reject the other part of it, and then come to the conclusion that the prosecution had proved its case.
- (2) Where the case of the prosecution regarding the occurrence is sought to be proved by evidence which is wholly unacceptable, e.g., witnesses are unreliable, by reason of enmity, by telling an extravagant story, by reason of inconsistencies in their evidence, want of corroboration in suitable cases on material parts of the story, and other like infirmities, the case of the prosecution must be rejected outright.
- (3) Where the facts proved beyond loubt, or admitted, indicate that some sort of occurrence must have taken place, there is no rule of law preventing a judge from arriving at a theory of actual happenings, if this can be fairly done on all the evidence. But this is not permissible, when the prosecution story about the occurrence is found to be false in its fundamental aspects.

The rule that evolves itself out of a discussion of the decided cases is: that the courts are called upon to very carefully scrutinise the evidence adduced before them and separate the grain from the chaff and sift out the truth from falsehood. The case will, however, be different, if the essential circumstances of the story put forward by the witness or witnesses are seen to be clearly unfounded. This, to use the philosopher Hallam's expression, is "to pull a stone out of an arch, the whole fabric must fall to the ground." Otherwise, where the evidence is substantially correct, simply because there are falsehoods in it, it should not be totally rejected. In Abdul Gani v. State of M. P.,24 their

Gallu Sah v. State of Bihar, 1959
 C. R. 861: A. I. R. 1958 S.C. 813, 815; Dalim Kumar v. Smt. Nandarani Dassi, 73 C. W. N. 877; A.I.R. 1970 Cal. 292; Ajit Singh v. State of Punjab, 1970 U. J. (S.C.) 388; 1971 S.C.G. (Cr.) 15.

Fattiya v. State, 1967 Jab. L. J. 504, 506: 1967 M. P. L. J. 680.
 A. I. R. 1959 Pat. 362: 1959 Cr.

L. J. 1009.

^{24.} A. I. R. 1954 S.C. 31; 1954 Cr L. J. 323.

Lordships have said that every effort should be made by a court to discover the core of truth in the evidence and to separate the grain from the chaff.²⁵

(v) Judge adopting intermediate theory. A judge cannot adopt an intermediate theory. In Meethun Bebee v. Busheer Khan, it was held—

"But between these two cases lies the theory adopted by the Principal Sudder Ameen If this case had been established by satisfactory evidence, the Principal Sudder Ameen, in dealing with the second issue, might properly have adopted and acted upon it If the Principal Sudder Ameen thought that his hypothesis was according to the truth of the case, and the real rights of the parties, he should have established it by pursuing the enquiry, and by calling for the production of proper proof And the conclusion of the Principal Sudder Ameen seems to rest principally on his own knowledge and belief or public rumour—grounds upon which no judge is justified in acting."

The court, however, is not tied down, in a criminal case, as it is in a civil case, to the pleadings of the parties. It can uphold what it considers to be the correct version by partially discarding both the prosecution and the defence versions. The only limitation on the powers of the court to arrive at a version of its own in a criminal case is that it must rely on facts proved on the record from either side and not on bare conjecture, unsupported by evidence, as a basis for conviction.²

- (w) Party should put his case in cross-examination of witnesses. A counsel, when cross-examining, must put to the opponent's witnesses so much of his own case as concerns that particular witness, or in which that witness had any share. If he asks no question with regard to this, then he must be taken to accept the plaintiff's account in its entirety, such failure leads to miscarriage of justice, first by springing surprise upon the party, when he has finished the evidence of his witnesses and when he has no further chance to meet the new case made which was never put, and secondly, because such subsequent testimony has no chance of being tested and corroborated. The law is clear that wherever the opponent has declined to avail himself of the opportunity to put his essential and material case in cross-examination, it may be taken that he believes that the testimony given could not be disputed at all.²
- (x) Confession of co-accused. A confession cannot be treated as evidence which is substantive evidence against the co-accused. In dealing with a criminal case, where the prosecution relies upon the confession of one accused person

^{25.} See also Sukha v. The State of Rajasthan, A. I. R. 1956 S. C. 513: 1956 Cr. L. J. 923: 1956 An. L. T. 583: 1956 All. W. R. S.C. 83: 1956 B. L. J. R. 511; Gallusah v. State of Bihar, A. I. R. 1958 S. G. 813: 1958 Cr. L. J. 1352: 1958 All. W. R. (H.C.) 766: 1958 All. L. J. 716: 1958 M. P. C. 670: 1958 B. L. J. R. 762: 1958 Mad. L. J. Cr. 970: I. L. R. 37 Pat. 1122; Barisa Mudi v. The State, A. I. R. 1959 Pat. 22: 1959 Cr. L. J. 71; Surajmal v. The State,

¹⁹⁵⁹ Raj, L. W. 881; Chellappan Nair v. The State of Kerala, 1960 Ker. L. T. 965; Ch. Razik Ram v. Ch. J. S. Chauhan, (1975) 4 S. C. C. 769; A. I. R. 1975 S.C. 667; Kayumuddin Mian v. Abdul Gafoor, 1972 Cri. L. J. 182 (Assam). 1. 11 Moore's Indian Appeals, 243 at pages 220-221.

^{2.} Sheolor v. State, 1971 All W.

R. (H. C.) 92 at 96.
3. A. E. G. Carapiet v. A. Y. Derderian, A. I. R. 1961 C. 359.

against another accused person, the proper approach to adopt is to consider the other evidence against such an accused person, and if the said evidence appears to be satisfactory and the Court is inclined to hold that the said evidence may sustain the charge framed against the said accused person, the Court may turn to the confession with a view to assure itself that the conclusion which it is inclined to draw from the other evidence is right. A confession can only be used to lend assurance to other evidence against a co-accused.4-5

A confession of a co-accused is evidence of a very weak type. It does not come within the definition of "evidence" contained in this section. It is not required to be given on oath, nor in the presence of the accused, and it cannot be tested, therefore, by cross-examination. It is a much weaker type of evidence than the evidence of an approver, which is not subject to any of these infirmities. Section 30 of this Act however provides that the court may take the confession into consideration and thereby make it evidence on which the Court may act but that section does not say that the confession is to amount to proof. Clearly, there must be other evidence. The confession is only one element in the consideration of all the facts proved in the case; it can be put into the scale and weighed with the other evidence.6

In dealing with a case against an accused person, the Court cannot start with the confession of a co-accused. It must begin with other evidence adduced by the prosecution and after it has formed its opinion with regard to the quality and effect of the said evidence, then it is permissible to turn to the confession in order to receive assurance to the conclusion of guilt which the judicial mind is about to reach on the said other evidence.7

- (y) Examination of witnesses through interrogatories. An examination through interrogatories cannot be as thorough and as satisfactory as a viva voce examination.8
- (z) Presumptions. Courts have to be extremely caution in scrutinizing and accepting evidence, particularly where presumptions arise under special provisions of law.9
- 10. Appreciation of evidence by Appellate Court. (a) General. In adjudicating upon the rival claims brought before the Court, it is not always easy to decide where truth lies. Evidence is adduced by the respective parties in support of their conflicting contention, and circumstances are similarly pressed into service. In such cases, it is the duty of the Judge to consider the evidence objectively and dispassionately, examine it in the light of probabilities

evidence as defined by section 3).
7. Haricharan v. State of Bihar,
Supra; Kasmira Singh v. State of

8. Lakshmi Insurance Co., Ltd. v. Padmawati, I. L. R. (1961) 1 Punj. 553; A. I. R. 1961 Punj. 253; 63 P. L. R. 251.

9. Ramlobhoya v. The State of Gujarat, (1967) 8 Guj. L. R. 145, 162 [presumption under section 7 of the Bombay Prevention of Gambling Act (IV of 1897)].

^{4-5.} Haricharan v. State of Bihar, (1964) 2 S. C. J. 454: 1964 B. L. J. R. 510; A. I. R. 1964 S. C. I184: 1964 (2) Cr. L. J. 344: 1964 M. L. J. (Cr.) 535: 1964 Cur. L. J. (S.C.) 208; Rafeeq v. State of Rajasthan, 1974 W. L. N. 214: 1974 Raj. L. W. 213.
6. Bhuboni v. The King, L. R. 76 I. A. 147, 155; A. I. R. 1949 P.C. 257, 260; Suresh Chandra Das v. State of Meghalaya, 1971 Cri. L. J.

State of Meghalaya, 1971 Cri. L. J. 1232 (confession of co-accused is not

Madhya Pradesh, 1952 S. C. R. 526: A. I. R. 1952 S. C. 159: 1952 Cr. L. J. 839: 1952 M. W. N. 402: 1952 All W. R. (Sup.) 64: 1952 Mad. L. J. 754; Budu v. State, A. I. R. 1965 Orissa 170: 31 Cut. L. T. 401.

and decide which way the truth lies. The impression formed by the judge, about the character of the evidence, ultimately determines the conclusion which he reaches. It should not be overlooked that all judicial minds do not react in the same way to the evidence and it is not unusual that evidence which appears to be respectable and trustworthy to one judge does not appear to be respectable and trustworthy to another judge. This explains why in some cases Courts of appeal reverse conclusions of facts recorded by the trial courts on their appreciation of oral evidence. The knowledge that another view is possible on the evidence adduced in a case, acts as a sobering factor. The appellate Court must examine all the pros and cons carefully and scrupulously, and make a conscientious effort not to regard evidence which appears to be unreasonable or improbable as being false and perjured.10

Where a case turns entirely on questions of facts and the credibility of witnesses, the court of appeal should hesitate before it disturbs the findings of the trial judge based on verbal testimony of conflicting witnesses whom he has seen and heard. In such a case, a heavy burden is of necessity, thrown upon those who challenge those findings. Where findings, as regards facts, have been drawn from argumentative inference drawn from the testimony-oral and documentary-and depend upon the weight of the evidence and the inherent probability of the story, and not merely on the credibility of witnesses induced by their demeanour of the manner in which they answer questions and where the documentary evidence has to be taken into consideration and weighed, the trial court is in no better position than the Court of appeal in discovering the truth.11

Where there is a mass of conflicting oral testimony, it is always desirableand indeed safe-to let the documents speak for themselves.12

(b) Civil appeals. As regards appreciation of evidence, the appellate court has, under Section 107 of the Civil Procedure Code, the same powers and duties as the trial court. On appeal the whole case, including the facts, is within the jurisdiction of the appeal court. But generally speaking, it is undesirable to interfere with the findings of fact of the trial Judge, who sees and hears the witnesses and has an opportunity of noting their demeanour, especially in cases where the issue is simple and depends on the credit which attached to one or other of conflicting witnesses.13 "The burden of showing that the judgment appealed from is wrong lies upon the appellant. If all he can show is nicely balanced calculations which lead to the equal possibility of the judgment on either the one side or the other being right, he has not succeeded."14 In practice two conflicting viewpoints have to be reconciled, namely, on the one hand, the indoubted duty of the court of appeal to review the recorded evidence to draw its own inferences and conclusions, and, on the other hand, the unquestionable weight which must be attached to the opinion of the judge of the primary court who has the advantage of seeing

^{10.} Ishwari Prasad v. Mehammad Isa,

A. I. R. 1963 S. C. 1728; 1963 B. L. J. R. 226.

11. Meena v. Lachman, I. L. R. 1960 Bom. 365; A. I. R. 1960 Bom. 418; 61 Bom. L. R. 1549.

^{13.} Bembay Cetten Manufacturing Co.

v. Metilal Shivlal, 42 I. A.
110: 29 J. C. 229: A. I. R. 1915
P. C. 1; Ramakka v. K. Muniappa, A. I. R. 1973 Mys. 205 at
207: (1973) 1 Mys. L. J. 164.
14. Naba Kishore v. Upendra Kishere,
1922 P. C. 39, 40: 65 I. C. 305:
24 Bem. L. R. 346.

the witnesses and noticing their look and manner.15 "If the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at in the trial and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate Court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the Judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given."16 Where the issue is simple and straightforward and the only question is which set of witnesses is to be believed, the verdict of a judge trying the case should not be lightly disregarded.17 Where the question of credibility does not depend on the light thrown upon it by the demeanour of the witness in the box and the manner in which the witness answers and how he is affected by the question put to him, but the views on credibility are founded upon the argumentative inferences from facts not disputed, the court of appeal is really in as good a situation as the trial judge 18 But there may obviously be other circumstances, quite apart from manner and demeanour, which may show whether a statement is credible or not; and these circumstances may warrant the Court in differing from the Judge, even on questions of fact turning on the credibility of witnesses whom the Court has not seen.19 The uniform practice in the matter of appreciation of evidence has been that if the trial Court has given cogent and detailed reasons for not accepting the testimony of a witness the appellate Court in all fairness to it ought to deal with those reasons before proceeding to form a contrary opinion about accepting the testimony which has been rejected by the trial Court.25 But, it has been laid down in a decision of the Privy Council that it is always difficult for judges who have not seen or heard the witnesses to refuse to adopt the conclusions of those who have done so, and that the difficulty is all the greater when the latter have formed an opinion adverse to the witnesses in question.21 In a later case, in the Allahabad High Court, it was said that, as a general rule, a trial Pudge in India has not as much opportunity of attaching importance to the demeanour of witnecesses as a judge in England, because in this country many trials are not heard

15. Prasannamayi Debi v. Baikuntha Nath, 1922 Cal. 260: I. L. R. 49 Cal. 132: 66 I. C. 782. 16. Per Viscount Simon in Watt v.

Mahalakshmana, 1922 P. C. 315: 27 C. W. N. 414; Sara Veeraswami v. Talluri Narayya, 1949 P. C. 32: 75 I. A. 252: I. L. R. 1949

Bombay Cotton Manufacturing Co. v. Motilal Shiwlal, 1915 P. C. 1; 42 I. A. 110; I. L. R. 39 Bom. 386; 29 I. C. 229; Surjan Singh v. The State, 1971 W. L. N. 360.
 Palchur Sankara Reddi v. Palchur Mahalakshmamma, 1922 P. C. 315; 27 C. W. N. 414; 70 I. C. 949; M. Nagendramma v. M. Rama Kotayya, 1954 M. 713; (1955) 1 M. L. J. 25. L. J. 25.

Per Barnes, J., in Coghlan v. Cumberland, (1898) L. R. 1 Ch. 705; Bombay Cotton Manufacturing Co. v. Motilal, 1915 P. C. 1; 42 I. A. 110: 29 I. C. 229.
 T. D. Gopalan v. Commissioner of Hindu Religious and Charitable Endowments, Madras, A. I. R. 1972 S. C. 1716 at 1719; (1972) 2 S. C. W.R. 69; (1972) 2 S. C. C. 329; 1972 S.C.D. 685; (1972) 3 Um. N. P. 572; (1973) S. C. J. 169; (1973) 1 Mad. L. J. (S.C.) 43; (1973) 1 Andh. W. R. (S.C.) 43; 1973 U. J. (S.C.) 135; (1973) 1 S. C. R. 584.
 Shunmugaroya v. Manikka, (1909)

Shunmugaroya v. Manikka, (1909)
 M. 400 (P.C.) and Imdad v. Pateshri, (1909) 32 A. 241 (P.C.).

continuously and judgments are often written some time after the evidence is heard,22

In determining the compensation payable in land acquisition proceedings, the appellate Court cannot, after the conclusion of arguments look into documents which were not part of the record. If the appellate Court wanted to take into consideration any fresh evidence it should have admitted the same in accordance with law and give the parties opportunity to rebut the evidence.23-24

The endorsement on a document by court prescribed by Order XIII, Rule 4, C. P. C., means that the document is admitted in evidence as proved. But if the objection is taken only to the mode of proof, it should be taken at the trial before the document is marked as an exhibit and admitted. A party cannot lie by until the case comes before the court of appeal and then complain for the first time of the mode of proof.25

(c) Criminal appeals. In an appeal from conviction it is for the prosecution to establish that the judgment of the trial court is right. The presumption of innocence of the accused still persists and the appellate Court has to satisfy itself that judgment of the trial court is right.1 It is for the appellate court, as it is for the first court, to be satisfied affirmatively that the prosecution case is substantially true, and that the guilt of the appellant has been established beyond all reasonable doubt. To hold that, unless reasonable ground is given to the appellate court for differing from the lower court, the appellate court mu t accept its findings of fact, is to approach the case from a wrong standpoint.2 "The sound rule to apply, in trying a criminal appeal where questions of fact are in issue, is to consider whether the conviction is right, and, in this respect, a criminal appeal differs from a civil one. In the latter case, the court must be convinced, before reversing a finding of fact by a lower Court, that the finding is wrong." The Court is bound in forming its conclusions as to the credibility of the witnesses to attach great weight to the opinion which the Judge who heard them has expressed upon that matter.4 Accordingly, the High Court would be slow in disturbing in appeal a finding of fact based on the appreciation of evidence by the trial court.5

The sufficiency of evidence in proof of the finding by a domestic tribunal is beyond scrutiny. Absence of any evidence in support of a finding is certainly available for the court to look into because it amounts to an error of law apparent on the record.5-1

22. Mauladad v. Abdul, (1917) I. L.
R. 39 A. 426: 39 I. C. 666; A. I.
R. 1917 A. 35.

23-24. Chaturbhuj Panda v. Collector,
Raigarh, (1969) 1 S. C. J. 344:
(1969) 1 S. C. W. R. 320: 1969 A.
L. J. 159: 1969 B. L. J. R. 196:
1969 Jab.L.J. 495: 1969 M. P. L. J.
346: 1969 Mah. L. J. 367: 1969 Ker.
L. J. 212: A. I. R. 1969 S. C.
255, 256.

 255, 256.
 Gobardhan Gountia v. Labanyanidhi Bhoj, 33 Cut. L. T. 960, 965.
 Per Sen, J. in Abdul Gani v. Emperor, 1943 Cal. 465: I. L. R. (1943) 1 Cal. 423: 209 I. C. 105.
 Kanchan Mallik v. Emperor, 1915 Cal. 187: I. L. R. 42 Cal. 374: 26 I. C. 134; Mohammad Hussain v. Emperor, 1945 Nag. 116: I. L. R. Emperor, 1945 Nag. 116: I. L. R.

1945 Nag. 441; 219 I. C. 320.
3. Protap v. R., (1882) 11 C. L. R.
25, per White, J. referred to in
Rohimuddi v. R., (1892) 20 C.
353, 357; but see R. v. Ramlochun,
(1872) 18 W. R. Cr. 15. The case
of Protap v. R., (1882) 11 C. L.
R. 25 was followed in Millan v. R. 25 was followed in Millan v. Sagai, (1885) 23 C. 347, 349; Laljee v. Guzdar, I. L. R. 43 C. 833; 34 I. C. 807; A. I. R. 1916 C. 964.

4. R. v. Madhub, (1874) 21 W. R. Cr. 13.

State v. Anand Lakshiman Chari, 1969 Cr. L. J. 467; A. I. R. 1969 Goa 40, 42.

5-1. State of Haryana v. Rattan Singh, A.I.R. 1977 S.C. 1512 at page 1513: (1977) 2 S. C. C. 491: (1977) 2 S. C. J. 140.

Where all the three witnesses were named as eye-witnesses in the first information report which was lodged without loss of time the concurrent finding of both the courts that they are reliable witnesses was accepted by the Supreme Court. 5-2

If the material part of the prosecution story is disbelieved, as a rule of prudence it will not be safe to rely on another part of the story for convicting the accused.6

In State v. Murli,7 it has been said that the weight to be attached to the appraisal of evidence by the trial Court would depend on several factors. But. the court of appeal is not at all in an inferior position in that regard. If, for instance, the statement of a witness is inherently improbable, as when he says that he identified the accused by face whilst it was pitch dark, or had recognised his voice whilst in fact he had then been a mile away from him, or imputes to a lathi an injury done by a bullet, or when he gives mutually contradictory or inconsistent statements, or when he is found to be a bitter enemy of the opposite party, the court of appeal could exercise its own discretion in accepting the testimony. Therefore, it is only when the demeanour of the witness is found abnormal or unsatisfactory, that the trial Court could be deemed to be in a more favourable position. But then the demeanour of a witness is often deceptive, since the most brazen liar deposes impeccably.

Where vital improvements and embellishments have been made in the prosecution story or there is unexplained suppression of facts, it is impossible for the court to reconstruct for itself the occurrence on its notion of probabilities.8

If, in a murder case, a pistol alleged to have been recovered at the instance of the accused, is not sent to the ballistic expert, the recovery will not link the accused with the crime.9 Where the murders were not only pre-planned and cold-blooded, but were acts of treachery of the "worst kind" as stated by the High Court. The appellant was not an immature person as he was 60 years old at the time of the commission of the murders, and there were special reasons for imposing the extreme penalty of death under Section 302, I. P. C.9-1 Where no recovery of any weapon was made from the accused and he did not cause any injury to any person. The only evidence against him was that he was present at the time of occurrence armed with a double barrelled gun, but he did not participate in the crime nor cause injuries with gun-shots to the prosecution witnesses or the deceased. The possibility of his false implication alongwith his nephews in this case could not be excluded. Therefore, by way of abundant caution the presence of accused at the time of occurrence was held to be highly doubtful. Giving him the benefit of doubt, his conviction and sentence under Sections 323 34, Indian Penal Code were set aside and he was acquitted.10

(1974) 76 Punj. L. R. 84 at 97.

^{5-2.} Natthu v. State of U.P. A.I.R. 1977 S.C. 2096 at page 2099: 1977 Cri. L. J. 1578; (1977) -4 S.C.C.

Kuer, 1969 Pat. L. J. R. 360: 1970 Cr. L. J. 64: A. I. R. 1970 Pat. 20; Awadh Singh v. The State, A. I. R. 1954 Pat. 483. 7. A. I. R. 1957 All, 53: 1956 Cr. L. J. 32. 6. Rageshwar Misser v. Mst. Khandari

Bachan Singh v. State, (1969) '71
 Pun. L. R. 393, 399.
 State v. Bhola Singh, I. L. R.
 (1969) 19 Raj. 273; 1969 Cr. L. J.
 1002; A. I. R. 1969 Raj. 219, 223.
 Rau Chima v. State of Maharakara,

A.I.R. 1977 S.G. 2407 at pages 2410, 2411: 1977 Cri, L, R, 444: 1977 U. J. (S.C.) 677. Tarlok Singh v. State of Punjab,

Where in a criminal case there was a significant omission in the First Information Report as to all the weapons and the individual acts of the accused and there was no reference in the inquest report to any specific overt acts alleged to have been committed by three of the accused who were brothers but the prosecution in the Sessions Court attributing the overt acts to the three brothers and giving no part to the fourth accused in the attack on the deceased, it would be unsafe to rely upon the improved version as to the parts played by the accused and convict them.11

If the materials on record justify a finding in favour of the accused, no matter whether the accused made a defence of a specified type or not the court would be justified in finding the accused not guilty even though he did not take the specific ground of defence at the trial.12

In the matter of appreciation and credibility of witnesses, the opinion of the trial judge has necessarily to be given due weight.13

If trivial discrepancies in evidence have been duly noticed and considered by the lower court, its finding will not be interfered with by the High Court in revision.14

- (d) Appeals against acquittals. Even in appeals against acquittals, the powers of the High Court are as wide as in appeals from conviction. But there are two points to be borne in mind in this connection. One is that, in an appeal from an acquittal, the presumption of innocence of the accused continues right up to the end; the second is that great weight could be attached to the view taken by the Sessions Judge before whom the trial was heard and who had the opportunity of seeing and hearing the witnesses.15 "It cannot be disputed that the High Court in hearing an appeal against an order of acquittal has full powers to review and ceases the evidence on the record and reach its own conclusion upon its estimate of the evidence. But, in exercising these powers, the High Court should and must always give proper weight and consideration to such matters as-
 - (1) the views of the trial Court as to the credibility of wit-
 - (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at the trial;
 - (3) the right of the accused to the benefit of any doubt;
 - (4) the slowness of the appellate Court in disturbing the findings of fact arrived at by a Judge who had the advantage of seeing the witnesses."16

11. Bova Hanurappa v. State, (1969) 2 Andh. L. T. 200.

12. Corporation of Calcutta v. Cal. cutta Wholesale Consumers Co-operative Society, Ltd., A. I. R. 1970 Cal. 120 at pp. 123, 124; 1970 Cr. L.

13. Rama v State, 1969 Cr. L. J. 1393; A. I. R. 1969 Goa 116, 120.

Uma Charan Chand v. Charan Das, 1969 Cr. L. J. 1086, 1087 (Orissa).
 Wilayat Khan v. The State of U.P.,

1958 S. C. 122; I. L. R. (1953) 1 All. 189: 54 Cr. L. J. 662. 16. Madan Mohan Singh v. State of

Madan Mohan Singh v. State of U. P., 1954 S. C. 637; 55 Cr. L. L. J. 1656; see also Sheo Swarup v. Emperor, 1934 P. C. 227; 61 I.A. 398; 36 Cr. L. J. 786; C. M. Narayan Ittiravi v. State of Travancore, 1953 S. C. 478; 1954 Cr. L. J. 102; 1953 Ker. L. T. 173; I. L. R. 1953 T. C. 181; Prandas v. State, 1954 S. C. 36; 55 Cr. L. J. 331.

It is well settled that it is not enough for the High Court to take a different view of the evidence; there must also be substantial and compelling reasons for holding that the trial court was wrong17 and, if the trial court takes a reasonable view of the facts of the case, interference under Section 417 is not justifiable unless there are really strong reasons for reversing that view.18 The appellate Court must start with the realisation that an experienced Judicial Officer (with four assessors) had concluded that there was clearly reasonable doubt in respect of the guilt of the accused on the evidence put before the court. It, therefore, requires good and sufficiently cogent reasons to overcome such reasonable doubt before the appeal court comes to a different conclusion,19 The presumption of innocence of the accused is further reinforced by his acquittal by the trial court, and the findings of the trial court which had the advantage of seeing the witnesses and hearing their evidence can be reversed only for very substantial and compelling reasons.20 Where the case turns on oral evidence of witnesses, the estimate of such evidence by the trial Court is not to be lightly set aside. General suspicions are not by themselves enough to dispute the credibility of witnesses whom a trial Magistrate was inclined to accept.21 An Appellate Court is bound precisely in the same way as the Court of first instance to test evidence extrinsically as well as intrincically.22

(e) Supreme Court appeal. The assumption that, once an appeal has been admitted by special leave under Article 136 of the Constitution, the entire case is at large and the appellant is free to contest all the findings of fact and raise every point which could be raised in the High Court or the trial Court is entirely unwarranted. The exercise of its extraordinary jurisdiction by the Supreme Court is not justifiable in criminal cases unless exceptional and special circumstances are shown to exist or substantial and grave injustice has been done,23 The accused was a cousin of one H and attempted to develop illicit connection with his wife and the latter resisted it. There was accordingly enmity between husband of deceased and accused. Death was caused by throwing acid over the body of deceased. Sessions Court and High Court believed dying declaration of deceased that acid was thrown over her body by accused. The Supreme Court held that it had no reason to take a different view.24 Having once formed the erroneous opinion that the F.I.R.

17. Ajmer Singh v. State of Punjab, 1953 S. C. 76 at 77, 78: 1935 S. C. R. 418: 54 Cr. L. J. 521: (1953) 1 M. L. J. 73: 1953 All W. R. (H.C.) 207.

Tulsi Ram Kanu v. State, 1954 S. C. 1: 1953 S. C. J. 612: 55 Cr. L. J. 225.

⁽H.C.) 207.

18. Suraj Pal Singh v. State, 1952 S.C.
52 at 54; (1952) 1 M. L. J. 426;
1952 A. L. J. 190; 54 Punj. L. R.
168: 1952 S. C. R. 193; 53 Cr. L.
J. 331; Aher Raja Khima v. State
of Saurashtra, 1956 S. C. 217 at
220: 1957 Andh. L. T. 92; 1956
Cr. L. J. 421; (1956) 1 Mad. L. J.
S.C. 135; 1956 All W. R. (Sup.)
60: 1956 S. C. A. 440; (1955) 2 S.
C. R. 1285. C. R. 1285

Suraj Pal Singh v. State, 1952 S.C. 52 at 54: 1952 S. C. R. 193: 53 Cr. L. J. 331; (1952) 1 M. L. J. 423;

¹⁹⁵² A. L. J. 190: 54 Punj. L. R.

S. A. A. Biyabani v. State of Mad-ras, 1954 S. C. 645; 55 Cr. L. J.

^{22.} In re Goomance, (1872) 17 W. R. Cr. 59.

^{23.} Pritam Singh v. State, 1950 S. C. 169; 1950 S. C. R. 453; 51 Cr. L. J. 1270; 86 C. L. J. 120; 63 M. L. W. 875; 1950 M. W. N. 605; 53 P. L. R. 1; 5 D. L. R. (S.C.) 89; Kaur Sain v. The State of Punjab. 1974 Cr. L. J. 358; A.I.R. 1974 S. C. 329 S. C. 329.

Keshav Dev v. State of U. P., 1972 Cri. L. J. 1196 at 1196, 1197; (1972) 2 S. C. C. 77; 1972 S. C. C. (Cri.) 644; 1973 S. C. Cri. R. 93; 1972 Cri. App. R. 320 (S.C.); 1973 U. J. (S.C.) 54; A. I. R. 1973 S.C. 482.

must not have been recorded at 8.25 p.m. the trial Judge had no other alternative but to discard the evidence of eye-witnesses; and this the trial Judge has done by attaching undue importance to minor details in the evidence of the witnesses. The High Court was, therefore, justified in its criticism of the judgment of the trial Judge as unreasonable and palpably wrong and coming to its own conclusion as to the guilt of the accused.25 In the case of an order of acquittal, where the presumption of innocence of an accused person is reinforced by that order, the exercise of this jurisdiction would not be justified for merely correcting errors of fact or law of the High Court. An occasion for interference with an order of acquittal may arise, however, where a High Court acts perversely or otherwise improperly or has been deceived by fraud.1

In a charge under Sections 302 and 307 read with Sections 148 and 149, I.P.C. the injured persons had not informed the names of assailants to anyone, and in the complaints, names of injured persons were not mentioned as eye witnesses but they were examined as Court witnesses. It was held by the Supreme Court that High Court was correct in disbelieving their evidence.2

In Sheo Swarup v. King Emperor,2-1 the Privy Council has laid down the circumstances which should be kept in view in dealing with an appeal from an order of acquittal. Lord Russel of Killowen made the following observations:

"Sections 417, 418 and 423 of the Code (Sections 378, 385, 386 of 1973 Code) give the High Court full power to review at large the evidence upon which the order of acquittal was founded, and to reach the conclusion that upon that evidence the order of acquittal should be reversed. No limitation should be placed upon the power unless it be found expressly stated in the Code. But in exercising the power conferred by the Code and before reaching its conclusions upon fact, the High Court should and will always give proper weight and consideration to such matters as: (1) the views of the trial Judge as to the credibility of the witnesses; (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at his trial; (3) the right of the accused to the benefit of any doubt; and (4) the slowness of an appellate Court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses". A legitimate inference drawn by the High Court from the nature of injuries that each of these was sufficient, in the ordinary course of nature to cause death keeping in view the aforesaid circumstances while appreciating the evidence in the case was upheld by the Supreme Court.3

Onkar v. State of U. P., 1972 Cri.
 A. P. R. 67 (S.C.): 1972 S.C. Cri.
 R. 260: 1972 Cr. L. J. 1059 at 1067.
 The State Govt. of Madhya Pradesh

v. Ram Krishna Ganpat Rao Limsey, 1954 S. C. 20; 55 Cr. L. J. 244; Aher Raja Khima v. State of Saurashtra, 1956 S.C. 217; as to the practice of the Privy Council before the Abolition of Privy Council Jurisdiction Act. V of 1949, see Dal Singh v. King-Emperor, 1917 P. C. 25; 44 1. A. 137; I. L. R. 44 Cal. 876; Smt. Bibhabati Devi v. Ram-endra Narayan Roy, 1947 P.C. 19;

⁷³ I. A. 246: I. L. R. (1947) 1 Cal. 85: 227 I. C. 177.

^{2.} Basdeo Singh v. Boota Singh, 1966

Basdeo Singh v. Boota Singh, 1966 Cr. App. R. 322 (S.C.).
 61 Ind. App. 398 at page 404: A. I. R. 1934 P. C. 227.
 Dappiti Vema Reddy v. State of Andh. Pra., 1973 Cri. L. I. 223 at 227: (1972) 1 S. C. W. R. 939: 1972 Cur. L. J. 647: 1972 Cr, App. R. 389 (S.C.): 1973 U. J. S. C. 130: 1973 S.C.C. (Cri.) 151: (1973) 3 S. G. C. 89: A. I. R. 1973 S.C. 153.

11. Additional evidence in appeals. The provision of Section 107, Civil Procedure Code, as elucidated by Order 41, Rule 27 are clearly not intended'to allow a litigant who has been unsuccessful in the lower Court to so patch up the weak points in his case as to fill up omissions in the court of appeal. Under clause (1) (a) of the rule, additional evidence may be proved and admitted in the appellate court if the court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted. Under clause (1) (b) it is only where the appellate court "requires" it (i.e. finds it needful) that any additional evidence can be admitted. It may be required to enable the court to pronounce judgment or for any other substantial cause, but in either case, it must be the court that requires it. The legitimate occasion for the exercise of this discretion is not whenever, before the appeal is heard, a party applies to adduce fresh evidence, but "when examining the evidence as it stands some inherent lacuna or defect becomes apparent".4 It may well be that a defect may be pointed out by a party or that a party may move the court to supply the defect, but the requirement must be the requirement of court upon its appreciation of the evidence as it stands. Whenever the court adopts this procedure, it is bound by rule 27 (2) to record its reasons for so doing, and, under Rule 29, must specify the points to which the evidence is to be confined and record on its proceedings the points so specified. The power so conferred upon the court by the Code ought to be sparingly exercised, and one requirement at least of any new evidence to be adduced should be that it should have a direct and important bearing on a matter in issue in the case.5 The discretion, given to the appellate court by the rule to receive and admit additional evidence, is not an arbitrary one, but is a judicial one circumscribed by the limitations specified in the rule. If the additional evidence is allowed to be adduced contrary to the principles governing the reception of such evidence, it will be a case of improper exercise of discretion, and the additional evidence so brought on the record will have to be ignored and the case decided as if it is non-existent.6

It is well settled that though an Appellate Court has power to take additional evidence in a suitable case yet the discretion should not be exercised to fill up gaps or lacunae in the prosecution evidence. Where the prosecution was not serious about the matter and did not examine the witness before the Sessions Court, the prosecution appeared to have accepted the plea of the Investigating Officer and left it at that. In these circumstances the High Court was held not to be correct in exercising its discretion in examining the witness in its appellate jurisdiction. The Supreme Court carefully perused the evidence of the witness given before the High Court and took the view that the witness was an utterly unreliable witness on whom no reliance could be placed at all. The question whether F.I.R. was sent to Public Prosecutor and concerned Magistrate was not however a matter of which judicial notice could be taken but had to be proved like any other fact.⁶⁻¹

Lord Robertson in Kessowji Issur v. G. I. P. Ry., (1907) 31 Bom. 381: 34 I. A. 115 at 122; 9 Bom. L. R. 671 (P.C.); Parsotim v. Lal Mohar, I. L. R. 10 Pat. 654; 1931 P. C. 143: 58 I. A. 254.

^{143: 58} I. A. 254.

5. Parsotim v. Lal Mohar, 1931 P.C. 143: 58 I. A. 254: I. L. R. 10 Pat. 654; see also Sir Mohammad Akbar Khan v. Mt. Motai, 1948 P. C. 36:

⁷⁴ I. A. 285; I. L. R. 1947 Lah.
727: 1948 A. L. J. 20; Arjun Singh v. Kartar Singh, 1951 S. C. 193; 1951 S. C. I. 274; 1951 A. L. J. (S.G.) 78: 1951 M. L. J. 78; 1951 M. L. J. 243.
6. Arjun Singh v. Kartar Singh, supra.

^{6-1.} Bir Singh v. State of U. P., A.I.R. 1978 S.C. 59 at page 64.

The ordinary rule is, that a court should give its decision on the facts and circumstances as they existed at the date of the institution of the suit or at the date of any subsequent amendment of the pleadings, and should not take notice of events or decisions which have happened after such date. But the court has power, in a proper case, to take, notice of events subsequent to the suit in order to shorten litigation, avoid unnecessary expense and do complete justice between the parties. Where the facts are not in dispute and the accrual of a cause of action subsequent to the suit is under the terms of a statute of which the court must take notice, a formal amendment of the plaint is unnecessary, for, the court is bound to administer the law of the land at the date when it gives its decision on a dispute. An appeal being in the nature of rehearing of the cause, even the court in second appeal can consider the effect of legislation which came into force after the disposal of the suit by the trial court and during the pendency of the appeal in the appellate Court.7

- 12. Review. "Strict proof". It is provided by Order 47, Rule 4, proviso (b), C. P. Code that no application for review should be granted on the ground of discovery of new matter without strict proof of the allegation of such discovery. The words 'strict proof' mean anything which may serve directly or indirectly to convince a court and has been brought before it in strict compliance with the formalities of law. The word "strict" here refers to the formality and not to the sufficiency of the evidence.8
- 13. 'Proved'. From the microscopic examination of hairs it is possible to say whether they are of the same or different colours or sizes and the examination may help in deciding where the hairs came from. In the instant case hairs of the victim of murder as well as of the accused were (according to the High Court) found on the scarf of the accused in which the dead body was taken.9

Rent receipts by themselves will not prove title but only possession.10 Just as the fact that a murder was committed by an accused may be inferred from circumstantial evidence, it is also permissible in law to infer the authorship and genuineness of a document from circumstantial evidence.11 During the course of proceedings before the Magistrate, the original documents were produced before him and he happened to make a note on each of those documents that they had been compared with the original and found correct. In addition there were affidavits of a large number of persons that all these documents had been duly made in their presence. Accordingly the documents were held to

v. Tulsi Ram, (1820) 47 Cal. 568: 56 I.C. 734: 31 C.L.J. 134 (F.B.): A.I.R. 1920 C. 467.

9. Kanbi Karsan Jadav v. State of Gujarat, (1962) Supp. 2 S.C.R. 726: 1962 S.C.D. 618: (1963) 2 S.C.J. 364; (1962) 1 Ker. L.R. 511: (1963) M.L.J. (Cr.) 465: 1965 Cr. L.J. 605: A I.R. 1966 S.C. 821, 823.

Makhea Kumbhar v. Fagu Kumbhar, I.L.R. 1966 Cut. 483: 32 Cut. L. T. 1041, 1045.

11. In re Rayappa Asari, 1972 Cr. L.J. 1226 at 1228; 1972 Mad. L. W. (Cri.) 48,

^{7.} Lakshmi Ammal v. Narayana Swami Naicker, 1950 M. 321; (1950) 1 M. L. J. 63; 1950 M. W. N. 7; see also Lachmeshwar Prasad v. Kesh-war Lal, 1941 F. C. 5: I. L. R. 20 Pat. 42; 191 I. C. 659; Doorga 20 Pat. 42: 191 I. C. 659; Doorga Chamaria v. Secy. of State, 1945 P. C. 62; 80 C. L. J. 13; Padam Singh v. Ram Kishan, 1954 M. B. 6; Ram Udit v. Smt. Shyamkali, 1954 All. 751: 1954 A. L. J. 271. 8. Ahed v. Mohendar, 42 Cal. 830: 29 I.C. 282; A.I.R. 1916 C. 521; Bai Nemathu v. Bai Nematulla, (1918) 42 Bom. 295: 46 I.C. 14: A.I.R. 1918 B. 228; Chiranji Lal

have been properly proved.¹² In disciplinary proceedings onus is on department to prove charges and mere conjectures and surmises cannot take place of positive proof.¹³

When the legal presumption of gratification being received as a motive or reward such as is mentioned in Section 161, I. P. C., arises under Section 4(1) of the Prevention of Corruption Act, 1947, the accused cannot discharge the burden on him to rebut the presumption, it is not enough for the accused to put forth a reasonable or probable story: the explanation of the accused must be supported by 'proof' within the meaning of Section 3 of the Evidence Act.¹⁴

The presumption under Section 7 of the Bombay Prevention of Gambling Act (IV of 1887) cannot extend to Section 4. Section 7 only raises the presumption that the place which was raided and from which the instruments of gaming were seized was a common gaming house. In order to hold a person guilty under Section 4, the prosecution has also further to establish that the common gaming house was either kept or used by the accused on the date of the raid.¹⁵

Where the offence is highly anti-social and revolting and therefore likely to rouse emotional prejudice in the mind of the court, greater care in the scrutiny of the evidence is called for.¹⁶

If pursuant to the information given by the accused a part of the stolen thing is recovered and the circumstances irresistibly lead to the conclusion that the place of concealment was known only to him who concealed it and the accused does not explain as to how he came to know about the concealment and merely denied the statement to the police, it is fair to presume that he committed theft.17 No doubt in any particular case where the alleged weapons of offences are not produced before the Court, it is open to the Court to infer that there is an element of exaggeration in the evidence of the witnesses in regard to the weapons used in an occurrence, but such inference can be made only judiciously for valid reason. In the absence of reasonable material, it would not be proper to suppose a billet for a bill-hook or a pen-knife for a butcher's knife. When the witnesses have deposed that a bill-hook and butcher's knife were used, and the Court believes the witnesses, it is not proper for the Court to surmise that the bill-hook and the butcher's knife are not of normal size, merely because they were not seized and produced before the Court; the long sword spoken to by the witnesses cannot become a short sword just because it could not have

 Harmander Singh v. G.M. Northern Railway, 1974 Lab. I. C. 755 at 756 (Punj.). 358: 65 Bom, L.R. 332: (1968) 2 Lab. L.J. 415: 1964 M.L.J. (Cr.) 65: A.I.R. 1964 S.C. 575. 15. Ramlobhoya Thakordas v. The

 Ramlobhoya Thakordas v. The State of Gujarat, (1967) 8 Guj. L. R. 145 at pp. 161, 162.

R. 145 at pp. 161, 162.

16. Petta v. The Food Inspector, 1966
Ker. L.J. 1060: 1966 Ker. L.T.
788: 1966 M.L.J. (Cr.) 773:
A.I.R. 1967 Ker. 192, 193.

 State of Kerala v. K. Chekkoothy, 1966 Ker. L.T. 843: 1967 M.L.J. (Cri.) 47: 1967 Cr. L. J. 1332: A.I.R. 1967 Ker. 197, 198.

T. Munal Singh v. Karam Iboyaima Singh, 1971 Cr. L. J. 62 at 67: A. I. R. 1971 Manipur 1.

at 756 (Punj.).

14. Deonath Dudhnath Mishra v. The State of Maharashtra, 1965 Mah. L.J. 565: 1967 Cr. L.J. 21: A.I.R. 1967 Bom. 1 at pp. 6, 7, relying on Dhanwantrai v. State of Maharashtra, (1963) Supp. 1 S.C.R. 485: (1963) 1 S.C.J. 133: (1963) 1 S.C. W.R. 178: 1963 A.W.R. (H.C.)

been seized by the police nor produced before the Court.19 Where the occurrence in the case was said to have taken place inside the jungle, the only three witnesses who had seen either the whole or a part of the occurrence were suffering from a sense of fear for the appellants. It was only after the Police arrived at the village that these witnesses were emboldened to come forward to speak what they had seen. In these circumstances the subsequent testimony given by them in the trial Court could not be discarded merely on the ground that at an earlier stage their statements were recorded under Section 164, Criminal Procedure Code. 19-21 Where neither the prosecution nor the defence had, in the case, come out with the whole and unvarnished truth, so as to enable the Court to judge where the rights and wrongs of the whole incident or set of incidents lay or how one or more incidents took place in which so many persons were injured, courts can only try to guess or conjecture to decipher the truth if possible. This may be done, within limits, to determine whether any reasonable doubt emerges on any point under consideration from proved facts and circumstances of the case.22

Adultery cases generally turn upon evidence of a circumstantial character. Thus, if an unrelated person is found alone with a young wife after midnight in her bedroom in actual physical juxtaposition, unless there is some explanation forthcoming which is compatible with an innocent interpretation, the only interpretation that a court of law can draw must be that the two were committing adultery together.23

The mere fact that K's estate was mutated in favour of his reversioners by the revenue officer on the same day that W's land was mutated in K's favour does not prove that K had necessarily died.24

Where the defendant pleaded that the plaintiff transferred only the tenancy and not the goodwill, in the context of the facts that the business run by both the parties was the same and the premises are situate in a famous business locality, it must be held that the goodwill must have necessarily passed to the defendant.20

The quantum of assessment on the basis of the figure of escaped turnover by the assessing authority itself to the best of its judgment on the material before it, though not admitted by the assessee would be one "proved in the judgment of the assessing authority."1

The definition of 'proved' is wide enough to include, besides direct and circumstantial evidence, opinion evidence made relevant by Section 50 of the Act.2

- 18. Public Prosecutor v. G. Venkatesee, (1975) 2 Andh. W. R. 413 at 417: 1975 Mad. L. J. (Cri.) 671: (1975) 2 Andh. Pra. L.J.
- 19-21. State v. Raja Parida, 1972 Cri. L. J. 198 et 196; 37 Cut. L. T. 667: 1972 Cut. L. R. (Cri.) 130.
 - 22. Jamuna v. State of Bihar, 1974 Cri. L. J. 890 at 893; A. I. R. 1974 S. C. 1822.
 - 23. Subbarama v. Saraswathi, I. L. R. (1968) I Mad. 205; (1966) 2 M.I. J. 263; 79 M.I. W. 382; A.I.R. 1967

- Mad. 85, 89; (1972) 1 C.W.R.
- Mohanlal v. Jit Singh, 70 Punj. L.
 R. 1047, 1051; 1968 Cur. L. J. 268.
 Kanhailal v. Kantilal, 1968 Raj.
 L.W. 163; A.I.R. 1968 Raj. 278,
- H. M. Esufali v. Commissioner of Sales Tax, M.P., 1969 Jab. L.J. 293: 1969 M. P. L. J. 228; A.I.R. 1969 Madh. Pra. 134, 137.
- Rabindra Kumar v. Smt. Prativa.
 A. I. R. 1970 Tripura 30, 35 (proof of ceremonies essential Hindu marriage).

Proof of lessor's knowledge of alterations, substitutions, etc., in leased property is proof of consent thereto. The court will not totally put aside the inference flowing from probabilities, the normal course of conduct and the actings of parties for a long period.2-4

The conclusion reached in an assessment proceeding will not by itself be enough to hold that the assessee concealed his income or deliberately furnished inaccurate particulars of his income under Section 28 (1) (c) of the Income Tax Act, 1922 [see the corresponding provision in Section 271 (1) (c) of the Income Tax Act, 1961]. The decision in the assessment proceeding may be taken into consideration in the penalty proceedings but by itself it would not be enough to establish the necessary ingredients. Other evidence de hors the conclusion in the assessment proceeding would be relevant and admissible and on the basis of such evidence it may be held that there was concealment of income. The Income-tax department must establish the necessary ingredients and the failure of the assessee to prove that he did not conceal any income cannot mean that the department has succeeded in establishing its case that there was concealment of income or furnishing inaccurate particulars of such income.5

The import of basic concepts 'proved', 'disproved' and 'not proved' even when incorporated in a comprehensive Code like the Act cannot be adequately understood unless one examines the sources, the context in which they were given statutory form, the purposes they were designed to serve and the functions they actually fulfil.6

- 14. "Disproved" and "not proved.". The Evidence Act has drawn a clear distinction between the words "disproved" and "not proved". A fact is said to be disproved when after considering the matters before it, the court either believes that it does not exist or considers its non-existence so probable that a prudent man ought under the circumstances of the particular case, to act upon the supposition that it does not exist. On the other hand a fact is said to be not proved when it is neither proved nor it is disproved.7
- 15. Miscellaneous. When the section speaks of matters before it (the Court) it means of course the matters properly before it. In deciding a matter of fact, no judge is justified in acting on his own knowledge and belief or public rumour without proper proof of it.8 A written statement filed by an accused should be given due consideration, but it is not legal evidence within Section 3.9 A writing obtained by court from the accused under Section 73 does not come within the expression "evidence" as it is not a docu-

^{3-1.} M.s. Isherdas Sahni and Bros. v. Rajah V. Rajeswara Rao, (1968) 2 M.L.J. 233, 253; (1968) 81 M.L. W. 531.

^{5.} Bhajuram Ganpatram v. C. I. T., Bihar and Orissa, 75 I.T.R. 285; 36 Cut. L. T. 346; A.I.R. 1970 Orissa 38, 40; Commissioner of Income-tax v. Raja Mohamed Amir Ahmed Khan, 1971 U. P. T. C. 390 (All). 6. Rishikesh Singh v. The State, I.L. R. (1969) 2 All. 289: 1969 A.L.J.

^{657: 1970} Cr. L.J. 132: A.I.R. 1970 All, 51 (F.B.) at p. 82 (per M. H. Beg, J.).

Shukishan v. Bhanwarlal, A. I. R. 1974 Raj. 96 at 99; Emperor v. Shafi Ahmed, (1929) 31 Bom. L. R.

^{8.} Meethun v. Busheer, 11 M.I.A. 213.

^{9.} R. v. Tuti, A.I.R. 1946 Pat. 373; I.L.R. 25 Pat. 33: 226 I.C. 404.

ment produced for the inspection of the court.10 Confessions of co-accused are not evidence as defined in Section 3; they can be referred to as lending assurance to the conclusion founded on oral evidence and fortified by it.11 The statement under Section 342, Cr. P. C., is not evidence as defined in Section 3.12 Statement in inquest report is not evidence by itself and it certainly cannot be pitted against the evidence of the medical witness produced in court.18

No adverse inference can be drawn from a confused statement made by a witness regarding the date of her statement recorded under Section 164, Cr. P. C., when it is clear that such statement was recorded only once and the same has been filed in court.14

An inference of illicit connection between two villagers, a man and a married woman cannot be drawn because they were talking in a field as villagers usually do.15

The mere fact that some male relation writes improper letter to a married woman, does not necessarily prove illicit relationship between the two.16

News item by itself is not evidence which can be admitted.17

An allegation as to bad faith or indirect motive or purpose cannot be held established except on clear proof thereof.18

Mere suspicion cannot amount to proof. In case of evidence of general repute, prosecution evidence despite defence evidence in rebuttal may be accepted if defence evidence is not fit to be acted upon or if prosecution evidence is supported by evidence of specific instances of commission of offences or by evidence of previous convictions.19

A vague and indefinite allegation in a suit for partition by a coparcener against the Karta of the family will not render the Karta liable to back accounting. A specific allegation of fraud or misappropriation should be made and. proved before the account of the joint family properties is re-opened.20

The clandestine method of carrying liquid in rubber tubes may create suspicion but this is not enough to determine whether the particular liquid was

^{10.} Rama Swarup v. State A.I.R. 1958 All. 119.

Nathu v. State of U.P., A.I.R. 1956 S.C. 56: 1956 Cr. L.J. 152.

Moral Majhi v. State, A. I. R. 1958
 Cal. 616: 1958 Cr. L.J. 1390.

 Surjan v. State of Rajasthan, A.I. R. 1956 S.C. 425: 1956 Cr. L.J. 815.

State of U.P. v. Ch. Laiq Singh, 1968 Cr. L.J. 584: A.I.R. 1968 All. 170, 176.

Bandha v. State, 1967 A.W.R.
 (H.C.) 352, 354.

^{16.} Chandra Mohini v. Avinash Prasad, (1967) 1 S.C.R. 864; (1967) 2 S. C.A. 49; 1967 S.C.D. 584; (1967) 1 S.C.W.R. 907; 1967 A. L. J. 167; 1967 A.W.R. (H.C.) 284; A.I.R. 1967 S. C. 581, 584.

^{17.} Niranjan Lal Ratan Kumar v. River Steam Navigation Co., Ltd., I. L. R. (1964) 16 Assam 395: A. I. R. 1967 Assam 74, 77 (news item of severe storm; published in the Assam Tribune).

^{18.} Barium Chemicals, Ltd. v. Company Law Board. (1966) Supp. S. C. R. 311: (1966) 1 S. C. A. 747: (1966) 2 S. C. J. 623: (1966) 2 S. C. W. R. 567: A. I. R. 1967 S. C. 295.

^{19.} Jagan Nath v. State, 1966 A. W. R. (H.C.) 729.

^{20.} Appalanarasimha v. Mahadevalla, (1967) l Andh. W. R. 29: A. I. R. 1967 Andh. Pra. 247, 252; Bappu Ayyar v. Renganayaki (1952) 2 M. L. J. 302; Mohideen v. V. O. A. Mohomed, A. I. R. 1955 Mad, 294.

liquor or not. The prosecution must prove beyond doubt that the liquid which was seized was liquor or prohibited liquor.21

Mere entries in a record of rights cannot be taken as conclusive evidence of self-acquisition especially in face of evidence that the property even where separately recorded continues to be joint family property.22

For proof of adultery there must be some evidence showing opportunity and desire to commit the offence or access by the man to the woman.23

A subordinate officer cannot influence a superior officer in giving a finding against a person in a departmental inquiry and making an order regarding the transfer of that person. The impugned order, or transfer was, therefore, not shown to be mala fide.24

The evidence of a witness, who has signed the statement to the police under Section 162, Cr. P. C., given in open court at the trial does not on that account only become inadmissible. There are no words for such prohibition in the Criminal Procedure Code or in the Evidence Act nor can it be said that the entire proceedings and investigation yet vitiated by taking signed statements. The effect of signature on a statement may in most cases seriously impair the evidence of the witness.25 Where a person writes a letter to the police officer and hands over to the investigating officer in course of the investigation, that being so, manifestly, it could not be used by the prosecution in support of its case. Under proviso to Section 162(1) of the Code of Criminal Procedure it can be used with the permission of the Court by the prosecution only to contradict the witness in the manner provided under Section 145 of the Indian Evidence Act. The two expressions, that is, "the period of investigation" and "course of investigation" are not synonymous and the statements made and sought to be excluded from evidence must be ascribable to the enquiry conducted by the investigating officer and not one which is dy hors the enquiry. The letter given to the investigating officer in course of investigation and not during the period of investigation is clearly hit by proviso of subsection (1) of Section 162 of the Criminal Procedure Code and the evidence given by reference to such letter is also inadmissible.1

There is warrant for proposition that even if evidence is illegally obtained it is admissible. Over a century ago it was said in an English case where a constable searched the appellant illegally and found a quantity of offending article in his pocket that it would be a dangerous obstacle to the administration of justice if it were held, because evidence was obtained by illegal means, it could not be used against a party charged with an offence.¹⁻¹ The Judicial committee in Kuruma, son of Kanju v. R.,1-2 dealt with the conviction of an accused of being in unlawful possession of ammunition which had been discovered

section 66 (1) (b)]. 22. Kalandi Farida v. Sadhu Parida, 33 Cut I. T. 768; A. I. R. 1967 Orissa 74.

23. Madan Mohan Rai v. Niludri Dei, 32 Cut. L. T. 827, 832; see Jodhan Sahu v. Mt. Kulwanti Kuer. A. I. R. 1948 Pat. 285.

24. Lachman Dass Shiveshwarkar. V.

A. I. R. 1967 Punj. 76, 77.

25. P. Sirajuddin v. Government of Madras, I. L. R. (1967) 3 Mad. 659; (1968) 1 M. I. J. 480; 1968 Cr. L. J. 493; A. I. R. 1968 Mad. 117 at pp. 128, 129.

State of Bihar v. S. Haque, 1973
 B. L. J. R. 304 at 306, 307.

1-1. See Jones v. Owen, (1870) 34 J. P. 759

1-2. 1955 A. C. 197.

State v. Madhukar Gopinath Lolge,
 I. R. 1965 Bom. 257; 67 Bom. I. R. 226: 1967 Cr. L. J. 167: A. I. R. 1967 Bon., 61, 64. [See Bombay Prohibition Act 25 of 1949,

either on the connection, usually found by experience to exist between certain things, or on natural law, or on the principles of justice, or on motives of public policy. Conclusive presumptions of law are:

"rules determining the quantity of evidence requisite for the support of any particular averment, which is not permitted to be overcome by any proof that the fact is otherwise. They consist chiefly of those cases in which the long experienced connection, just alluded to, has been found so general and uniform as to render it expedient for the common good that this connection should be taken to be inseparable and universal. They have been adopted by common consent, from motives of public policy, for the sake of greater certainty, and the promotion of peace and quiet in the community; and therefore, it is that all corroborating evidence is dispensed with, and all opposing evidence is forbidden."11

The Evidence Act notices two cases of conclusive presumptions (Sections 112 and 113). It is a question, however, whether the presumption mentioned in Section 112 is not after all a rebuttable presumption; for the section permits of evidence being offered of non-acce s,12 and Section 113 has been held to be ultra vires. 13

Rebuttable presumptions of law are, as well as the former,

"the result of the general experience of a connection between certain facts or things, the one being usually found to be the companion or the effect of the other. The connection, however, in this class is not so intimate or so uniform as to be conclusively presumed to exist in every case; yet, it is so general that the law itself, without the aid of a jury, infers the one fact from the proved existence of the other in the absence of all opposing evidence. In this mode, the law defines the nature and the amount of the evidence which is sufficient to establish a prima facie case, and to throw the burden of proof upon the other party; and if no opposing evidence is offered, the jury are bound to find in favour of the presumption.14 A contrary verdict might be set aside as being against evidence. The rules in this class of presumptions as in the former, have been adopted by common consent from motives of public policy and for the promotion of the general good; yet not as in the former class forbidding all further evidence, but only dispensing with it till some proof is given on the other side to rebut the presumption rasied. Thus, as men do not generally violate the Penal Code,

Taylor, Ev., s. 71: Best, Ev., p. 317, s. 304.
 Norton, Ev., 97.

Whitley Stokes, 885; see also Steph; Introd., 174, and notes to Ss. 112-3, post; and proceedings of the Legislative Council, 12th March, 1872, pp. 234, 235 of the Supplement to the Gazette of India, 28th March 1872.

^{14.} Ch. VII of the Act deals with this subject of presumptions, as follows: First, it lays down the general principles which regulate the burden of proof (Ss. 101-106). It then enumerates the cases in which the burden of proof is determined in parti-

cular cases not by the relation of the parties to the cases but by prcsumptions (Ss. 107-111). Such presumptions affect the ordinary rule as to the burden of proof that he who affirms must prove. He who affirms that a man is dead must usually prove it, but if he shows that the man has not been heard of for seven years, he shifts the burden of proof upon his adversary, who must displace the presumption which has arisen. Steph. Introd., 173, 174; see Norton Ev., 97 and proceedings of the Legislative Council cited ante.

necessarily mean that the evidence of more than one customer should be adduced. It would be enough if the facts established entitle the court to raise an inference that she carries on prostitution as contemplated under Section 7 (1) of the Suppression of Immoral Traffic in Women and Girls Act, 1956 (104 of 1956).8

Account slips seized during a search under the Foreign Exchange Regulation Act, 1947, which were part of the things discovered during search, are evidence and if the entries therein are carried out in the account books, these things can be looked at.9

4. "May presume." Whenever it is provided by this Act that the court may presume a fact, it may either regard such fact as proved, unless and until it is disproved; or may call for proof of it;

"Shall presume". Whenever it is directed by this Act that court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved;

"Conclusive proof." When one fact is declared by the Act to be conclusive proof of another, the court shall, on proof of the one fact, regard the other as proved, and shall not allow evidence to be given for the purpose of disproving it.

SYNOPSIS

- 1. Presumptions:

 - (a) General.
 (b) Of Law.
 (c) Of fact.
 (d) Distinction between presumptions of law and presumptions of fact.
- (e) Mixed presumptions. Classification in the Act.
 Scope of the Section.

- Inference.
 "May presume".
 "Shall presume".
- 7. Conclusive proof.
- 8. Rule when one of evidence, and when of substantive law?

 9. Distinction between "evidence con-
- clusive as to the existence of fact" and "evidence which is made conclusive".
- 1. Presumptions. (a) General. Inferences or presumptions are always necessarily drawn, whenever the testimony is circumstantial; but presumptions, specially so called, are based upon that wide experience of a connection existing between the facta probantia and the factum probandum which warrants a presumption from the one to the other, wherever the two are brought into contiguity.10 Presumptions, according to English text-writers, are either (a) of law, or (b) of fact.
- (b) Of law. Presumptions of law, or artificial presumptions, are arbi trary inferences which the law expressly directs the Judge to draw from particular facts, and may be either conclusive or rebuttable. They are founded

Bai Shanta v. State of Gujarat. I. L. R. 1966 Guj. 100; (1966) 7 Guj. L. R. 1082; 1967 Cr. L. J. 473; A. I. R. 1967 Guj. 211.
 Girdhari Lal Gupta v. D. N. Mehta, 1971 Cr. L. J. 1; A. I. R. 1971 S. C. 28, 39.

^{10.} Norton, Ev., 97, Best, Ev., ss., 299, 42, 43, 296, et., seq. and Wills Circ. Ev., 22: Powell; Ev., 385—387. See S. 114, post; Sita Ram v., Nanku, 1928 A., 16; 25, A. L., J., 833; 106 I., C., 250.

in consequence of a search of his person by a police officer below the rank of those who were permitted to make such searches. The Judicial Committee held that the evidence was rightly admitted. The reason given was that if evidence was admissible it matters not how it was obtained. There is of course always a word of caution. It is that the Judge has a discretion to disallow evidence in a criminal case if the strict rules of admissibility would operate unfairly against the accused. That caution is the golden rule in criminal jurisprudence.

In Yusufalli Esmail Nagree v. State of Maharashtra1 2 the appellant offered bribe to Sheikh a Municipal Clerk. Sheikh informed the police. The police laid a trap. Sheikh called Nagree at the residence. The police kept a tape recorder concealed in another room. The tape was kept in the custody of the Police Inspector. Sheikh gave evidence of the talk. The tape record corroborated his testimony. Just as a photograph taken without the knowledge of the person photographed can become relevant and admissible so does a tape-record of a conversation unnoticed by the talkers. The Court will take care in two directions in admitting such evidence. First, the Court will find out that it is genuine and free from tampering or mutilation. Secondly, the Court may also secure scrupulous conduct and behaviour on behalf of the police. The reason is that the Police Officer is more likely to behave properly if improperly obtained evidence is liable to be viewed with care and caution by the Judge. In every case the position of the accused, the nature of the investigation and the gravity of the offence must be judged in the light of the material facts and the surrounding circumstances.2

A document produced from proper custody is 'proved.'3. The fact that a document was procured by improper or even illegal means will not be a bar to its admissibility if it is relevant and its genuineness proved. But while examining the proof given as to its genuineness the circumstances under which it came to be produced into court have to be taken into consideration.4

Court is entitled to look into not only such documents as are formally proved in accordance with the rules of proof of documents contained in the Evidence Act but is bound to consider and peruse such materials which have been put into evidence by the parties before the Court. Even under the Evidence Act, formal proof of documents can be waived. Therefore, a document cannot cease to be a piece of evidence unless it has been formally proved.5-7

In order to prove that a woman carries on prostitution, plural and indiscriminate sexuality on her part has got to be established but that does not

^{1-3. (1967) 3} S.G.R. 720; A. I. R. 1968 S.C. 147.

S.C. 147.

2. R. M. Malkani v. State of Maharashtra, 1973 Cri. L. J. 228 at 233: (1972) 2 S. C. W. R. 776; 1973 Mah. L. J. 92: 1973 Cri. App. R. 31 (S.C.): 1973 M. P. L. J. 224: (1973) 1 S. C. C. 471: 1973 S. C. C. (Cri.) 399: (1973) 2 S. C. R. 417: 1974 Mad. L. W. (Cri.) 121: A. I. R. 1978 S.G. 157.

Kumari Babbi, 69 3. Mohan Lal v.

Mohan Lal v. Kumari Babbi, 69 Pun. L. R. 578, 583.
 Maghraj Patodia v. R. K. Birla, A. I. R. 1971 S. C. 1295 at 1303; (1970) 2 S. C. C. 888; 1975 U. J. (S.C.) 905; (1971) 2 S. C. R. 118; 1970 W. L. N. (Part III) 29; 45 E. L. R. 2921.
 R. L. Kothari v. B. Singh, 1971 Cr. L. J. 623 at 629; A. I. R. 1971 Pat, 115.

Pat. 115.

the law presumes every man innocent; but some men do transgress it; and therefore evidence is received to repel this presumption.15

A statutory presumption cannot operate and prevail against res judicata. Hence, a presumption of law in favour of the accuracy of the entry in the record of rights cannot arise when the point in issue has already been decided on evidence between the interested parties by a decision of the civil court.16

- (c) Of fact. Presumptions of fact, or natural presumptions, are inferences which the mind naturally and logically draws from given facts, irrespective of their legal effect. They are always rebuttable.17 "Such inferences are formed not by virtue of any law but by the spontaneous operation of the reasoning faculty; all that the law does for them is to recognise the propriety of their being so drawn, if the Judge thinks fit."18 They can hardly be said with propriety to belong to that branch of the law which treats of presumptive evidence.19 "They are in truth but mere arguments of which the major premiss is not a rule of law; they belong equally to any and every subject-matter, and are to be judged by the common and received tests of the truth of propositions and the validity of arguments.20 They depend upon their own natural efficacy in generating belief, as derived from those connections which are shown by experience, irrespective of any legal relations.
- (d) Distinction between presumptions of law and presumptions of facts. The presumptions of fact differ from presumptions of law in this essential respect, that while those are reduced to fixed rules, and constitute a branch of the system of jurisprudence, these merely natural presumptions are derived wholly and directly from the circumstances of the particular case by means of the common experience of mankind, without the aid or control of any rules of law. Such, for example, is the inference of guilt drawn from the discovery of a broken knife in the pocket of the prisoner, the other part of the blade being found sticking in the window of a house which, by means of such an instrument, had been burglariously entered. These presumptions remain the same under whatever law the legal effect of the facts, when found, is to be decided.21 So, when from certain set of facts, a Court infers a lost grant, the process is one of inference of fact and not of legal conclusion.22 Presumptions

post; see Taylor, Ev., s. 111.

21. Taylor, Ev., s. 214; see Wills' Circ.
Ev., passim; see also other instances of this class of presumptions
s. 114, post; and Best, Ev., s. 315.

22. Kasinath v. Murari, 31 C. L. J.
501: 57 I. C. 350, where it is stated

^{15.} Taylor, Ev., ss. 109, 110: Best, Ev., s. 314. See observations as to the treatment of rebuttable presumptions by this Act in Whitley Stockes, 835.

^{16.} Kazi Mohammad Hussain v. Sibram Bondapadhyaya, 70 C., W. N. 1066; A. I. R. 1967 Cal. 10, 12.

17. Phipson, Ev., 11th Ed., 10.

18. Cunningham, Ev., 84; Wills' Circ. Ev., 6th Ed., ss. 29-30.

19. Taylor, Ev., S. 214.

20. Sir James Fizzjames Stephen divides presumptions of fact in English law

presumptions of fact in English law into two classes: (1) Bare presum-ptions of fact which are nothing but arguments to which the Court attaches whatever value it pleases; (2) certain presumptions which though liable to be rebutted, are regarded as b ing something more than mere

maxims; though it is by no means easy to say how much more, instance of such a presumption is to be found in the rule that recent possession of stolen goods unex-plained raises a presumption that the possessor is either the thief or a receiver, Steph Introd., 174. In this Act presumptions of fact partake of the character of class (1), v.

that the gist of the principle upon which a lost grant is presumed, is that the state of affairs is otherwise un-explained.

and there are others to be found in the Indian Statute Book.10 The third clause of this section embraces those presumptions described by these textwriters as conclusive presumptions of law. The Evidence Act appears to create two such presumptions by Sections 112 and 11311 and there are some others to be found in the Indian Statute Book.12 Where, under a given rule of law, extreme evidential value is to be assigned to a given piece of evidence, the probative force of such piece of evidence cannot be extended to collateral matters. Where one fact is declared by law to be conclusive proof of another, the court cannot allow evidence to be given in rebuttal.13

English text-writers have, it has been said, in treating of the subject of presumptions, engrafted upon the Law of Evidence many subjects which in no way belong to it, and numerous so-called presumptions are merely portions of the substantive law under another form.14 "All notice of certain general legal principles, which are sometimes called presumptions but which in reality belong rather to the Substantive Law than to the Law of Evidence was designedly omitted" (from this Act) "not because the truth of those principles was denied, but because it was not considered that the Evidence Act was the proper place for them. The most important of these is the presumption, as it is some times called, that everyone knows the law. The principle is far more correctly stated in the maxim, that ignorance of the law does not excuse a breach of it, which is one of the fundamental principles of Criminal Law." Of such a kind also is the presumption that everyone must be held to intend the natural consequences of his own acts.15 The like presumptions and others of a similar character belong to the province of substantive law, and have been dealt with by statute16 or have gradually come to be recognised as binding rules through the course of judicial decision.17 In this sense, the subject of presumption is coextensive with the entire field of law, and each particular presumption must, in each case, be sought under the particular head of law to which it refers.18

The term "shall presume" means that the Court is bound to take the fact as proved until evidence is adduced to disprove it; and the party interested in disproving it must produce such evidence if he can.19

10. See also King-Emperor v. Ali Husain, (1901) 23 All, 306. Every man is to be regarded as legally innocent until the contrary be proved and criminality is never to be presumed. Shoo Prakash Singh v. Rawlins, (1901) 28 Cal. 594.

v. Rawlins, (1901) 28 Cal. 594.

11. But see Norton's Ev., 97.

12. See for example, Act XI, VII of 1947, S. 6 (2) (Foreign Jurisdiction and Extradition); Cr. Pr. Code S. 82 (Proclamation for person absconding); (Land Acquisition Act 1 of 1894, S. 6 (3); Act IX of 1856, S. 3 (Bills of lading); see Nicol & Co. v. Castle, (1872) 9 B. H. C. R. 321; see notes to Sec. 35, post.

13. Parbhu Narain v. Jang Bahadur, 1932 All. 35; 131 I. C. 555; 1931 A. L. J. 360; Collector of Moradabad v. Equity Insurance Co. Ltd., 1948 Oudh 197; 1948 O. W. N. 172; see also Jagatchandra N. Vora v. Province of Bombay, 1950 B. 144; 5; Bom. L. R. 997, No distinction between "conclusive evi-

dence" and "conclusive proof"

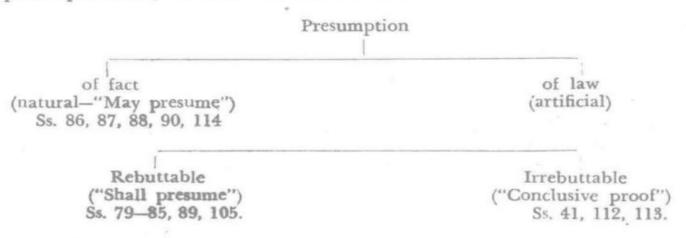
Sir Fitzjames Stephen, Proceedings of the Legislative Council, ante. 15. Steph., Introd., 175; Powell, Ev.,

16. See for example Specific Relief Act, 1953, Sec. 10, Explanation, Presumption that breach of contract to transfer immovable property cannot be adequately relieved by compensation in money). For an instance of the conversion of presumption of the substantive law into statutory rules. See S. 45, XXXIX of 1925 (Succession Act). In England the rule as to substantial or cumulative gifts are treated as rules of presumption; the above-mentioned section deals with these rules without any reference to presumption. See G. S. Henderson: The Law of Wills in Henderson: India, p. 192.

17. See notes to S. 114, post.

18. See Cunningham, Ev., 301, 303.
19. Public Prosecutor v. A. Thomas, A. I. R. 1959 Mad. 166.

2. Classification in the Act. The following tabular classification of presumptions may be of assistance to the reader:



Scope of the section. The section appears to point at two classes of presumptions, those of fact and those of law. The first clause points at presumptions of fact, the second at rebuttable presumptions of law, and the third, at conclusive presumptions of law.4 As has been already mentioned, presumptions of fact are really in the nature of mere arguments or maxims. The sections which deal with such presumptions have been noted above.5 Of these Sections, Section 114 is perhaps the most important. "The terms of this section are such as to reduce to their proper position of mere maxims which are to be applied to facts by the Courts in their discretion, a large number of presumptions to which English law gives, to a greater or less extent, an artificial value. Nine of the most important of them are given by way of illustration."6 Of course others besides those specified may be, and are in fact frequently, drawn.7 In respect of such presumptions Court of Justice are enjoined to use commonsense and experience in judging of the effect of particular facts and are subject to no technical rules, whatever. This section renders it a judicial discretion to decide in each case whether the fact which under Section 114 may be presumed has been proved by virtue of that presumption. Circumstances may, however, induce the Court to call for conformatory evidence.8 The prosecutor must prove that the required step had been duly taken or the required condition had been duly fulfilled, before the final official act can be presumed to have, been regularly performed. In the instant case the steps necessary to be taken before a Public Analyst's report can be said to be a regularly performed official act are those which are laid under Section 11 (1) of the Prevention of Food Adulteration Act, 1954, and Rules 7 and 18 of the Rules framed under that Act. Each of these steps must be proved to have been taken before the presumption under Section 114 of the Evidence Act can be applied for the benefit of the prosecutor.9

Sections 79-85, 89 and 105 of this Act create presumptions corresponding to those described by English text-writers as rebuttable presumptions of law,

Norton, Ev., 96.
 Ss. 86, 87, 88, 90, 114, in fact all the sections from Ss. 79 to 90 and 114 inclusive are illustrations of, and founded upon, the maxim,
Omina esse rite acta. Norton, Ev.,
260: Powell, Ev., 9th Ed., 386.
6. Steph. Introd., 174, 175, Proceed-

ings of the Legislative Council, cited in App. B. See s. 114, post.

7. See notes to S. 114, post.

8. Raghunath v. Hoti, (1904) 1 A.

L. J. 121.

District Board Patna v. Baijoo Sao, 1975 Pat. L. J. R. 70 at 76; 77: 1974 B. B. C. J. 772.

of law are based, like presumptions of fact on the uniformity of deduction which experience proves to be justifiable; they differ in being invested by the law with the quality of a rule, which directs that they must be drawn; they are not permissive, like natural presumptions, which may or may not be drawn.23

The distinction between presumption "of law" and presumption "of fact" is in truth the difference between things that are in reality presumptions and things that are not presumptions at all.24 Presumptions of law are true presumptions sometimes rebuttable, sometimes irrebuttable, which courts are bound by statute and sometimes by other binding authority to set up, positions which they are bound to take up beforehand, a priori, before they ever consider the evidence in the case or the part of the case to which the presumptions apply. These presumptions are correctly called presumptions, positions which a court must take up beforehand. The use of the word presumption, in what are spoken of as presumptions of fact, is a little unfortunate. Presumptions of fact are not necessarily taken up at the beginning of the consideration of a case or of any particular part of it. They are really assumptions of fact which may be made at any stage of a case. They are assumptions of fact for which courts do not ask any proof. These presumptions are always presumptions or inferences of fact, based upon our ideas and experience of the course of nature, the course of human business and the course of human conduct. They are the presumptions or assumptions of a reasonable man. There is no special-magic about such presumptions or assumptions of fact as they are used in courts of law; and no Full Bench, however numerous and however distinguished, can lay down by ruling that courts shall make certain inferences of assumption of a fact in future cases.25

A presumption of fact means a fact otherwise doubtful which may be inferred from a fact which is proved.1

(e) Mixed presumptions. English text-writers also deal with a third class of "mixed presumptions" or, as they are sometimes called, "presumptions of mixed law and fact," and "presumptions of fact recognised by law". These hold an intermediate place between presumptions of fact and presumptions of law, "and consist chiefly of certain presumptive inferences which, from their strength, importance, or frequent occurrence, attract, as it were the observation of the law and from being constantly recommended by Judges and acted on by juries, became in time as familiar to the courts as presumptions of law, and occupy nearly as important a place in the administration of justice. Some also have been either introduced or recognised by statute. They are, in truth, a sort of quasi-presumptionis juris.2 These "mixed presumptions of law and fact" are chiefly confined to the English law of real property. The Indian practitioner need not give them much study; nor is it necessary to pursue the subject further here. The Act provides only that a few of the ordinary presumptions recognised by law may or shall be drawn.3

^{24.}

Norton, Ev., 97. Wigmore, s. 2491. Sri Raja Bommadevara Chayade-vamma v. Sana Venkataswami, 1932 M. 343; 138 I. C. 40: 62 M. L. J.

^{511; 1932} M. W. N. 264. 1. Bir Singh v. Bachni, I. L. R. 1956

Punj. 800. 2. Best, Ev., s. 324. 3. Norton, Ev., p. 97.

The expression 'shall presume' in Section 4 of the Prevention of Corruption Act has the same meaning as that expression has in the Evidence Act, as the former Act is in pari materia with the latter Act. The presumption under Section 4 of the Prevention of Corruption Act thus is a presumption of law and therefore it is obligatory on the Court to raise this presumption.20

- 4. Inference. This Chapter, as originally drafted, contained the following section: "Courts shall form their opinions on matters of fact by drawing inferences: (a) from the evidence produced to the existence of the facts alleged; (b) from facts proved or disproved to facts not proved; (c) from the evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it;21 (d) from the admissions, statements, conduct and demeanour of the parties and witnesses, and generally from the circumstances of the cases." "The Select Committee decided to omit this section 'as being suitable rather for a treatise than an Act'. The object of its introduction was originally stated to be to point out and put distinctly upon record the fact that to infer and not merely to accept or register evidence is in all cases the duty of the Court." Further, as has been already observed, a distinction must be drawn between the general act of inferring facts in issue from relevant facts, and those inferences which for the reasons above given, are specifically known as presumptions.22
 - 5. "May presume". Having regard to the definition of "may presume" in the first para. of the section, the trial court has a discretion to presume a fact or to call for proof of it.23
 - 6. "Shall presume". The section enacts that whenever it is directed by this Act that the Court shall presume a fact, it must regard such fact as proved, unless and until it is disproved. Thus, an accused is presumed to be innocent. Therefore, the burden rests on the prosecution to prove the guilt of the accused beyond reasonable doubt. Thus, in a case of homicide, the prosecution must prove beyond reasonable doubt that the accused caused death with the requisite intention described in Section 299 of the Penal Code. This general burden never shifts, and it always rests on the prosecution. But, Section 84 of the Penal Code provides that nothing is an offence if the accused, at the time of doing that act, by reason of unsoundness of mind was incapable of knowing the nature of his act, or that what he was doing was either wrong or contrary to law. This being an exception, under Section 105 of this Act, the burden of proving the existence of circumstances, bring the case within the said exception, lies on the accused, and the Court shall presume the absence of such circumstances. Under Section 105 of this Act, read with the definition of "shall presume" in this section, the Court must regard the absence of such circumstances as proved unless, after considering the matters before it, it be lieves that the said circumstances existed or that their existence was so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that they did exist. In other words, the accused will

Rangu Vithoba v. Rambha Dana, 69 Bom. L. R. 559: A. I. R. 1967 Bom. 382.

State of Madras v. Vaidyanatha Iyer, A. I. R. 1958 S. C. 61; 1958 S. C. R. 580: 1958 Cr. L. J. 232; (1958) Mad. L. J. (Cr.) 299; 1958 All W. R. (H.C.) 371; (1958) 1 Andh. W. R. (S.C.) 136.
 See S. 114, ill, (g), post.

^{22.} As to the ambiguity attending the use of the term "presumption", see Best, Ev., p. 306; ib., s. 299 (v.

have to rebut the presumption that such circumstances did not exist, by placing material before the Court sufficient to make it consider the existence of the circumstances so probable that a prudent man would act upon them. The accused has to satisfy the standard of a "prudent man". If the material placed before the Court, such as oral and documentary evidence, presumptions, admissions or even the prosecution evidence, satisfies the test of "prudent man", the accused will have discharged the burden. The evidence so placed may not be sufficient to discharge the burden under Section 105 of the Act, but it raises a reasonable doubt in the mind of the Judge as regards one or other of the necessary ingredients of the offence itself, e.g., whether the accused had the requisite intention laid down in Section 299 of the Penal Code. If the Judge has such reasonable doubt, he has to acquit the accused. There is no conflict between the general burden which is always on the prosecution and which never shifts, and the special burden that rests on the accused to make out the defence of insanity.²⁴

A 'Promissory note' is an unconditional undertaking and a 'bill of exchange' is an unconditional order to pay a certain sum of money. The law required that both should be signed by the maker. But the law does not require that a negotiable instrument should recite the consideration for which it is made or drawn. The law does not also require the person suing on the instrument to allege the consideration for which it was made or drawn. Irrespective of any recital in the instrument or any allegation in the plaint regarding consideration, the law presumes that the instrument was made or drawn for consideration. The presumption is that there was consideration and not that there was any particular consideration, that which might be recited in the instrument or that which might be alleged in the plaint. The presumption arises as soon as the execution of the instrument is proved and the presumption continues until the contrary is proved; that is, until it is proved that there was no consideration. It must be proved that there was no consideration at all for the instrument. Mere proof that the particular consideration recited or alleged did not exist may not suffice, though such proof must naturally be a circumstance to be considered in deciding whether there was no consideration at all. Thereforce, a plaintiff, who quite unnecessarily adduces evidence to prove a certain consideration but is unable to prove that consideration need not necessarily lose his action for that reason. The burden of proving that there was no consideration is on the defendant and the burden has to be discharged irrespective of the failure of the plaintiff to prove a particular consideration which he sets out to prove a particular consideration may itself probabilise the defendant's version and lead to the conclusion that there was no consideration at all, on the other hand, it may not. Where the failure of the plaintiff to prove a particular consideration does not tend to probabilise and lead to the acceptance of the defendant's version as in a case where the defendant's version is found to be false; the presumption under Section 118, Negotiable Instruments Act still operates and the plaintiff is entitled to get a decree.25

Presumption under Sections 3 and 4 of the Commercial Documents Evidence Act that until the contrary is proved the documents shall be presumed to

Dahyabhai v. State, A. I. R. 1964
 S. C. 1563; (1964) 1 S. C. W. R. 831; (1964) 2 Cr. L. J. 472; (1964) 1 Guj. L. R. 911.

Manyam Janakalakshmi v. Manyam Madhawa Rao, 1978 Mer. L. R. 161.

be correct whether can arise in respect of certified copies tendered by the Railway authorities under Section 139 of Railways Act, was left open in the undernoted case after pointing out that Section 139 of the Railways Act, 1890, undoubtedly authorises the Railway authorities to tender certified copies of their records in evidence. That Section, however, nowhere provides that the contents of such Certified Copies would be presumed by the Court to be correct unless there is evidence to the contrary.¹

The basic electoral roll and its amendments and corrigenda being public record prepared and maintained by the Government functionaries in exercise of statutory duty in the prescribed form, and having been produced from proper custody under the authority of the Chief Electoral Officer, the Court is bound to presume the genuineness of these documents, and the burden of rebutting the presumption lies on the petitioner in view of this section.²⁻⁸

An entry in the school register stating the fact in issue or relevant fact and made by a public servant in the discharge of his official duty or by any other person in performance of a duty specially enjoined by the law upon him is relevant under Section 35 of the Evidence Act. But the question as to how such weight should be attached to the entries contained therein is a pure question of fact.⁴

- 7. Conclusive proof. The section lays down that when one fact is declared by this Act to be conclusive proof of another, the Court must, on proof of the one fact,—
 - (a) regard the other as proved, and
 - (b) not allow evidence to be given for the purpose of disproving it.

Thus, the statement in an order of the Court has been said to be conclusive of what happened before the Presiding Officer of that Court.⁵

The element of carrying on a business is present in the definition of partnership in Section 4 of the Partnership Act, 1932 (4 of 1932). And if this element is lacking, mere registration under that Act will not be conclusive on the point that a partnership was really in existence.⁶

The voter's list is conclusive on the question of age of a voter and the Election Tribunal is not permitted to hold an inquiry on the question of minimum age as required by Article 326 of the Constitution of India.⁷

I. S. P. Trading Co. v. Union of India, A. I. R. 1973 Cal. 74 at 77.

^{2-3. (1972) 49} E. L. R. 545 (Pun. Har.).

^{4.} Abdullah v. State of Rajasthan, A. I. R. 1972 Raj. 272 at 274; 1972 W. L. N. 245; 1972 Raj. L.

<sup>W. 573.
M. M. B. Catholicos v. M. P. Athanasius, (1955) 1 S. C. R. 520; A. I. R. 1954 S.C. 526: 1954 Ker. L. J. 385; I. L. R. (1954) T. C. 567; Ratan Lal v. Nathu Lal, A. I. R. 1961 M. P. 108 (Rule 3 in Schedule 3 of the Rules made under</sup>

Section 18 of the Citizenship Act, 1955 makes the passport conclusive proof).

Sunil Krishna Pal v. C. I. T., W. Bengal. (1966) 59 I. T. R. 457.

Mohammad Husain v. Onali Fidaali, (1967) 10 Guj. L. R. 925: Kantilal v. Village Panchayat of Shivrajour.
 I. L. R. (1963) Guj. 1172: (1963)
 4 Guj. L. R. 929: Roop Lal Mehta v. Bhan Singh. A. I. R. 1968
 Punj. 1 (F.B.): Ghulam Mohiudeen v. Town Area. Sakit, A. I. R. 1959 All. 357 (F.B.).

The court cannot ignore the provisions of Section 31 and assume that whatever was written down in the form of admissions was conclusive proof of the words and happenings mentioned therein.8

8. Rule when one of evidence and when one of substantive law. In Izhar Ahmad Khan v. Union of India,9 the question arose whether the Citizenship Rules, 1956, prescribing irrebuttable presumptions were rules of evidence or of substantive law. Gajendragadkar, J., with whom Wanchoo and Rajagopala Ayyangar, JJ., concurred, observed that in deciding the question as to whether a rule about irrebuttable presumption is a rule of evidence or not, the proper approach to adopt is to consider whether fact A from the proof of which a presumption is required to be drawn about the existence of fact B is inherently relevant in the matter of proving fact B and has inherently any probative or persuasive value in that behalf or not. If fact A is inherently relevant in proving the existence of fact B, and to any rational mind it would bear a probative or persuasive value in the matter of proving the existence of fact B, then a rule prescribing either a rebuttable presumption or an irrebuttable presumption in that behalf would be a rule of evidence. But, if fact A is inherently not relevant in proving the existence of fact B, or has no probative value in that behalf, and yet a rule is made prescribing for a rebuttable or an irrebuttable presumption in that connection, that rule would be a rule of substantive law and not a rule of evidence. He held that the question can be answered only after examining the rule and its impact on the proof of facts A and B. He observed further that this section recognises three rules of evidence, the rules which prescribe (1) for a presumption which may be drawn, (2) for a presumption which shall be drawn subject to rebuttal, and (3) for a presumption which shall be conclusively drawn. He concluded that it has been accepted in India that a conclusive presumption is a part of the law of evidence.

Das Gupta, J. with whom A. K. Sarkar, J. concurred, observed, that whenever the question arises whether a particular rule is one of substantive law, or of evidence, we have to ask ourselves-does it reek to create, or extinguish or modify a right or liability, or does it concern itself with the adjective function of reaching a conclusion as to what has taken place under the substantive law? In the first case, the rule is a rule or substantive law; in the other case, it is a rule of evidence when the rule goes further and says that a particular relevant fact will be conclusive proof of a fact in issue so that a specified right or liability may arise from it, what is being done is to directly affect a substantive right or liability, and it is not providing for evidence only. A rule of conclusive presumption made with a view to affect a specified substantive right is a rule of substantive law, as it is intended to affect a substantive right. and does not cease to be so because the conclusive presumption, that its, conclusive proof of the existence of another fact, is rested on a fact which is relevant to it. The point is whether the rule is intended to affect a specified substantive right or to provide a method of proof. Where the purpose of a rule of conclusive presumption is that the Judge should, on that basis, hold that a specified right or liability exists, or does not exist, the rule is really

Dr. N. G. Dastane v. Mrs. Sucheta, I. L. R. 1969 Bom. 1024:
 71 Bom. L. R. 569: 1969 Mah. L. J. 789: A. I. R. 1970 Bom. 312, 319.

^{9. (1963) 1} S. C. A. 136; A. I. R. 1962 S.C. 1052; 1962 (2) Cr.L.J. 215; 1963 B. L. J. R. 99; (1963) 1 S. C. A. 136.

saying that this particular relevant fact will create, or extinguish or modify the right or liability. A rule of conclusive presumption as to the existence of a certain fact only for establishing or disestablishing a specified substantive right results in affecting that right and ceases to be a rule of proof.

9. Distinction between "evidence conclusive as to the existence of fact" and "evidence which is made conclusive". When the law says that a particular kind of evidence would be conclusive as to the existence of a particular fact, it implies that that fact can be proved either by that evidence or by some other evidence which the Court permits or requires to be adduced. Where such other evidence is adduced, it would be open to the Court to consider, whether, upon that evidence, the fact exists or not. Where, on the other hand, evidence which is made conclusive is adduced, the Court has no option but to hold that the fact exists. Once the law says that certain evidence is conclusive, it shuts out any other evidence which would detract from the conclusiveness of that evidence. In substance, therefore, there is no difference between conclusive evidence and conclusive proof. Statutes may use the expression "conclusive proof" where the object is to make a fact non-justiciable. But the Legislature may use some other expression such as "conclusive evidence" for achieving the same result.¹⁰

Somawanti v. State of Punjab, (1963)
 S. G. R. 774; (1963)
 S. C. A. 548; (1963)
 S. C. J. 35; A.I.R.

¹⁹⁶³ S.C. 151; (1963) 2 Mad. L.J. (S.C.) 18: (1963) 2 Andh. W. R. (S.C.) 18

CHAPTER II

OF THE RELEVANCY OF FACTS

SYNOPSIS

1.	Logical relevancy and legal rele-		Agency.
	vancy.		Partnership.
	Relevancy and admissibility.		Companies.
3.	Meaning of relevancy.	9.	Conspiracy in Tort and Crime.
4.	Definition of relevancy,	10.	English and Indian law.
5.	Acts and representations of third	11.	Importance of provisions.
	p rsons when relevant		Scope of the Chapter

1. Logical relevancy and legal relevancy. As with many other questions connected with the Law of Evidence, the theory of relevancy has been the subject of varying opinions. Relevancy has been said by the framer of the act to mean the connection of events as cause and effect.12 But this theory, as was admitted afterwards, "was expressed too widely in certain parts, and not widely enough in others."12 For the former definition the following was substituted: "The word 'relevant' means that any two facts to which it is applied are so related to each other that, according to the common course of events, one, either taken by itself or in connection with other facts, proves or renders probable the past, present or future existence or non-existence of the other."13 "But this is 'relevancy' in a logical sense. Legal relevancy, which is essential to admissible evidence requires a higher standard of evidentiary force. It includes logical relevancy, and for reasons of particular convenience, demands a close connection between the fact to be proved and the fact offered to prove it. All evidence must be logically relevant—that is absolutely essential. The fact, however, that it is logically relevant does not ensure admissibility; it must also be legally relevant; a fact which 'in connection with other facts renders probable the existence of fact in issue,' may still be rejected, if in the opinion of the Judge and under the circumstances of the case it be considered essentially misleading or remote."14

^{11.} Steph, Introd., 68: see generally as to Relevancy, Introduction.

Steph. Dig., p. 152; see Whitley Stokes, 820, 851. Steph: Dig., Art. 1: "I have substi-tuted the present definition for it

not because I think it (the former definition) wrong, but because I think it gives rather the principle on which the rule depends than a convenient rule," ib. p. 158, 14. Best, Ew., p. 251.

- 2. Relevancy and admissibility. The tendency, however, of modern jurisprudence is to admit most evidence logically relevant. Logical relevancy may not thus be assumed to be the sole test of admissibility; relevancy and admissibility are not co-extensive and interchangeable terms. "Public policy, considerations of fairness, the particular necessity for reaching speedy decisions, these and similar reasons cause constantly the necessary rejection of much evidence entirely relevant. All admissible evidence is relevant; but all relevant evidence is not admissible."15 The question of relevancy strictly so called presents as a rule, little difficulty. Any educated person, whether lay or legal, can say whether a circumstance has probative force, which is the meaning of relevancy. This is an affair of logic and not of law. It is otherwise with the question of admissibility which must be determined according to rules of law. A fact may be relevant, but it may be excluded on grounds of policy as already noted. A communication to a legal adviser may be in the highest degree relevant, but other considerations exclude its reception as a privileged communication. Again, a fact may be relevant but the proof of it may be such as is not allowed as in the case of the "hearsay" rule.16
- 3. Meaning of relevancy. In this Chapter the word "relevancy" seems to mean the having of some probative force. In the title of this Part it appears to denote admissibility.17 However, the considerations mentioned go merely to the theory of relevancy and to the construction of. or definitions given in, the Act as based on that theory. For practical purposes one fact is relevant to another and admissible,18 "when the one is connected with the other in any of the ways referred to in the provisions of this Act relating to the relevancy of facts."19
- 4. Definition of relevancy. Relevancy in the sense in which it is used by the framer of the Act, is fully defined in Sections 6-11, both inclusive: "These sections enumerate specifically the different instances of the connection between cause and effect which occur most frequently in judicial proceedings. They are designedly worded very widely, and in such a way as to overlap each other. Thus, a motive for a fact in issue (Section 8) is part of its cause (Section 7); subsequent conduct influenced by it (Section 8) is part of its effect (Section 7). Facts relevant under Section 11 would, in most cases, be relevant under other sections."20

 As to the meaning of the expres-sion "hearsay is no evidence" see Steph. Dig., p. 180, Arts. 14 and 62 and notes to S. 60, post.

17. Whitley Stokes, 849.

18. Lala Lakshmi Chand v. Sayed

Haider Shah, (1899) 3 C. W. N. col. xviii ("Relevant" in this Act means admissible).

 S. 3, ante, v. Ss. 5-55, post.
 Steph. Introd., 72; see criticism of these sections in Whitley Stokes, p. 819; "two of these sections are so drawn (Ss. 7, 11) as to permit evidence of matter wholly irrelevant"; ib., and see notes to Sec. 11 post; but see also Steph. Introd. 160; and Best, Ev., 522. In the sections men-tioned in the text the subject of circumstantial evidence is distribut-ed into its elements. First Report of the Select Committee, 31st March

Best. Ev., 252: thus a communica-tion to a legal adviser, or a criminal confession improperly obtained may, undoubtedly, be relevant in a high degree, They are none the less inadmissible; ib. see also Taylor, Ev., ss. 293-316: Powell, Ev., 527, 528; Steph. Introd., Dig. Arts. 1 and 2 Appendix, note 1 . The Theory of Relevancy by G. C. Whiteworth, Bom. 1881.

5. Acts and representations of third persons when relevant. Not only may the acts and words of a party himself, if relevant, be given in evidence, but when the party is, by the substantive law, rendered liable, civilly or criminally, for the acts, contracts or representations of third persons, and such facts are material, they may generally be given in evidence for or against him, as if they were his own.

The particular relationship rendering such evidence receivable must be proved, prima facie at least, to the satisfaction of the court and cannot, except as against themselves, be established by the declarations of such third persons. The rule above stated, which is one rather of substantive law than of evidence, is based on the identity of interest between the parties.21 The following are the principal relationships of this kind.

6. Agency. In civil cases, the acts, contracts and representations of the agent bind the principal when they have been expressly or impliedly authorised, or subsequently ratified, by him.²² There is implied authority to conduct the principal's business in the usual way; what is necessary for that purpose being determined by the nature of the business and the practice of those engaged in such business.28 If the act be within the scope of the agent's authority it will bind the principal though done against his express instructions,24 or fraudulently and for the agent's sole benefit,25 or maliciously,1 or negligently.2

In criminal cases, a party is not in general criminally responsible for the acts and declarations of his agents and servants unless they have been expressly directed, or assented to, by him.3 In general, the principal will not be criminally liable, if the agent is not acting within the scope of his authority.4 But, there are certain well recognised exceptions to this rule, one of the exceptions is, that where a statute prohibits an act or enforces a duty in such words as to make the prohibition or the duty absolute, the master will be liable, if the act is, in fact, done by his servant. To ascertain, whether a particular statute has that effect or not, regard must be had to the object of the statute, the words used, the nature of the duty laid down, the person upon whom it is imposed, the person by whom it would in ordinary circumstances be performed, and the person upon whom the penalty is imposed.5

Phipson, Ev., 11th Ed., p. 106.
 Contract Act IX of 1872, Ss. 186—

 Penny v. Wimbledon Council, (1899) 2 K. B. 72.
 Coppen v. Moore, (1898) 2 Q. B. 306; R. v. I. C. R. Haulage, 1934 K. B. 551.

4. Barker v. Levinson, (1951) 1 K.B. 3-12; see also Ferguson v. Weaving, (1951) 1 K. B. 814; see Roscoe, Cr. Ev., 16th Ed. 1005, as to admissions by agents. See Ss. 17, 18, post.

sions by agents. See Ss. 17, 18, post.

Mausell Brothers v. L. & N. W.
Railway, (1917) 2 K. B. 836: 87 L.
J. K. B. 82: 118 L. T. 25; Allen
v. Whitehead (1930) 1 K. B. 211:
99 L. J. K. B. 146: 142 L. T.
141; Mahomed Bashir v. Emperor,
1946 Bom. 315: I. L. R. 1946 Bom.
173: 225 I. C. 430; Uttam Chand v.
Emperor, 1946 Lah. 54 (F.B.): I.
L. R. 1946 L. 284: 224 I. C. 199;
Harish Chandra Bagla v. Emperor,
1945 All. 90: I. L. R. 1945 All.
540: 219 I. C. 87: 46 Cr. L. J.
472. 472.

^{189, 196, 226.} 23. In re. Cunningham, (1887) 36 Ch.
Div. 532; Bank of Baroda v. Punjab National Bank, 1944 P. C. 58:
71 1 A. 124: 57 L. W. 571.
24. Wattcau v. Fenwick, (1893) 1 Q.

Lloyd v. Grace (1912) A. C. 716.
 See also Lylod's Bank v. Chartered Bank of India, (1929) 1 K. B. 40.
 Citizens Co. v. Brown, (1904) A.C.

- 7. Partnership. The liability of partners for the acts of their copartners is established on the ground of agency, each partner being the agent of the firm for the purposes of the business of the firm.⁶
- 8. Companies. A company is liable for the acts and representations of its directors, or other lawful agents, which are within the scope of their real or apparent authority, even though such acts may be fraudulent. A company is not liable for acts done ultra vires.
- 9. Conspiracy in Tort and Crime. See Section 10 post, and notes thereto.
- 10. English and Indian law. The principle of this Act differs from the English law in that it defines the evidence which may be given, so that, in order to produce any particular evidence, it must be shown to be admissible under some section of this Act; whereas the principle of the English law is to assume that everything is admissible subject to two main exceptions, namely,—
 - (a) that the best evidence that is available must be tendered and that best evidence only;
 - (b) that hearsay evidence is not admissible.

Working on these main principles, the law is chiefly concerned with exceptions to these general rules. The first of these English rules is nowhere expressly laid down in the Act, but it can be inferred by the exclusion of secondary evidence, by the exclusion of statement of persons not called as witnesses except in special cases, and by the presumption which is to be drawn from the absence of material witnesses or documents. The rule excluding hearsay evidence is dealt with in Sections 32 and 33.

11. Importance of provisions. The following sections have been considered by the author and others to be the most important, as all will admit: they are the most original part of the Act, as they affirm positively what facts may be proved, whereas the English law assumes this to be known and merely declares negatively that certain facts shall not be proved. In the opinion of many others, the English law proceeds upon sounder and more practical grounds. While importance is claimed for these sections in that they are said to make the whole body of law to which they belong easily intelligible, yet such importance cannot owing to the provisions of Sections 165 and 167, cause an undue weight to be attached to their strict applications, when a failure to so strictly apply them has not been the cause of an improper decision of the case. For, the improper admission or rejection of evidence in

^{6.} S. 18. Indian Partnership Act IX of 1932; as to the implied authority of a partner as the agent of the

firm, see ib., S. 19.

7. Pearson v. Dublin Corp., 1907 A.
C. 351; Refuge Co. v. Kattlewell
(1909) A. C. 243; see also Moore v.
Bresler, (1944) 2 All E. R. 515;

Smt. Premila Devi v. Peoples' Bank of Northern India Ltd., 1938 P. C. 284: 178 I. C. 659.

Russel, 12; Price on Ultra Vires; see also Anand Behari Lal v. Dinshaw & Co. (Bankers), Ltd., 1942 Oudh 417; 200 I. C. 485.

Indian Courts has no effect at all unless the Court thinks that the evidence improperly dealt with either turned, or ought to have turned, the scale. A Judge, moreover, if he doubts the relevancy of a fact suggested, can, if he thinks it will lead to anything relevant ask about it himself. 10

- 12. Scope of the Chapter. The rules in the following sections declare relevant-
 - (1) all facts in issue;
 - (2) all facts which are relevant to the issue (Section 5), which-
 - (a) form part of the same transaction (Section 6);
 - (b) are the immediate occasion, cause, or effect of tacts in issue (Section 7);
 - (c) show motive, preparation or conduct affected by a fact in issue (Section 8);
 - (d) are necessary to be known in order to introduce or explain relevant facts (Section 9);
 - (e) are done or said by a conspirator in furtherance of a common design (Section 10);
 - (f) are either inconsistent with any fact in issue; or inconsistent with it, except upon a supposition which should be proved by the other side; or render its existence or non-existence morally certain (Section 11);
 - (g) affect the amount of damages, in cases where damages are claimed (Section 12);
 - (h) show the origin or existence of a disputed right or custom (Section 13);
 - (i) show the existence of a relevant state of mind and body (Section 14);
 - (j) show the existence of a series of which a relevant fact forms a part (Section 15); or
 - (k) show (in certain cases) the existence of a given course of business (Section 16);
 - (3) admissions and confessions (Sections 17-31);

^{9.} Steph. Introd., 72, 73; aliter in Ev., 86; as to "indicative" evidence, England. ib., s. 93.

^{10.} ib., 72, 73, 162: s. 165, post, Best,

- (4) statements by persons who cannot be called as witnesses (Scctions 32, 33);
 - (5) statements made under special circumstances (Sections 34-39);
 - (6) judgments in other cases (Sections 40-44);
 - (7) opinion (Sections 45-51); and
 - (8) character (Sections 52-55).
- 5. Evidence may be given of facts in issue and relevant facts. Evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue and of such other facts as are hereinafter declared to be relevant, and of no others.

Explanation. This section shall not enable any person to give evidence of a fact which he is disentitled to prove by any provision of the law for the time being in force relating to Civil Procedure.11

Illustrations

(a) A is tried for the murder of B by beating him with a club with the intention of causing his death.

At A's trial the following facts are in issue:

A's beating B with the Club;

A's causing B's death by such beating;

A's intention to cause B's death.

- (b) A suitor does not bring with him, and have in readiness for production at the first hearing of the cause, a bond on which he relies. This section does not enable him to produce the bond or prove its contents at a subsequent stage of the proceedings, otherwise than in accordance with the conditions prescribed by the Code of Civil Procedure.
 - s. 3 ("Evidence").

- s. 3 ("Fact in issue").
 s. 3 ("Fact").
 s. 3 ("Relevant").
 ss. 5-55 ("Of the Relevancy of facts"). s. 60 (Oral Evidence must be direct).
- ss. 64, 165 Prov. 2 (Proof of docum nt by primary evidence).
- ss. 136, 162 (Judges to decide as to admissibility).
- ss. 145, 146, 153, 155, 158 (Relevancy of question to witness).
- s. 165 (Judge's power to put questions), s. 167 (Improper admission or rejection of evidence).

Civil Procedure Code, Order XIII, and Order XVIII; Steph. Introd., 12; Ch. II, III; Steph. Dig. Art. 2; Best, Ev., 251; Taylor, Ev., Section 316; Wigmo e, Ev., Sections 9-12.

^{11.} See now the Code of Civil Procedure, 1908 (Act V of 1908).

SYNOPSIS

Scope.
 Principle.
 "And of no others".

4. Relevancy not affected by the provisions of Cr. P. Code.

5. Explanation. Admissibility.

7. Object for which evidence is ten-dered and purposes for which it is admissible.

8. Evidence partly admissible and partly inadmissible.

9. Admissibility in civil and criminal

(a) General.

(b) Varying decisions as to admissibility.

10. Objections by parties.

11. Waiver: Onus.
12. Appeal, objection in.
13. Omission to object, effect of.
14. Evidence on commission.
15. Fresh objections.
16. Consent.

17. Waiver in criminal case.

18. Miscellaneous.

- (a) General.
- (b) Trap witness.
- 1. Scope. The section declares that in a suit or judicial proceeding evidence may be given of the existence or non-existence of (1) facts in issue and (2) of such other collateral facts as are declared to be relevant in the following sections. The expression "facts in issue" is defined in Section 3. The facts "declared to be relevant" are facts which, though they do not directly tend to prove or disprove a fact in issue, are so connected with facts in issue that they indirectly and presumptively tend to prove or disprove facts in issue.
- 2. Principle. The reception in evidence of facts, other than those mentioned in the section, tends to distract the attention of the tribunal and to waste its time. Frutra probatur quod probatum non relevant. This law of evidence is framed with a view to a trial at Nisi Prius and a proceeding at Nisi Prius ought to be restrained within practical limits.12
- 3. "And of no others". This section excludes everything which is not covered by the purview of other sections which follow in the statute.13 All evidence tendered must, therefore, be shown to be admissible under this or some one or other of the tollowing sections,14 or the provisions of some other statute, saved by Section 2 ante (repealed by the Repealing Act, 1938 (1 of

dhari, (1899) 12 A. 1 at p. 43; R. v. Panchu, 1920 Cal. 500: 47 C. 671; 58 I. C. 929. F.B.), per

probably it does. But the question again is, does the Act allow the evidence sought to be produced.

14. Lekraj v. Mehpal, 5, C. 744 (2.C.); 6 G. L. R. 593; 7 I. A. 63; Abinash /v. Paresh, (1904) 9 C. W. N. 402, 406; Dwijesh v. Naresh 1945 Cal. 492; 49 C. W. N. 791.

Mookerjee, J., "but the principle of exclusion should not be so applied as to exclude matter which may be

essential for the ascertainment of truth", R. v. Abdullah, (1885) 7 A. '385 (F.B.): and see observations

on the modern rule as to admissibility in Blake v. Albion Life Assurance, (1878) 4 C. P. D. 94. But the question in India is whether

the Act permits the particular evidence. If it is essential in any case

for the ascertainment of the truth

Best, Ev., 251; R. v. Parbhudas, (1874) 11 Bom. H. C. R. 90, 91: Taylor, Ev., s. 316; Managers, Asylum District v. Hill, 47 L. T. H. L. 29, 34. per Lord O'Hagan; see also judgment of Lord Watson as to the distinction between evidence having a direct relation to the principal question in dispute and evidence relating to collected. dence relating to collateral facts which will, if established, tend to clucidate that question; and ante. Introduction, "Facts" which are not themselves in issue, may affect probability of the existence of facts in issue, and these may be called collateral facts. First Report of the Select Committee, 31st March, 1871. 13. The Collector, Gorakhpur v. Palak-

1938), Section 2 and Sch.)' or enacted subsequent to this Act. Any fact, intended to be established, has to be, in accordance with the scheme of the Act, found to be relevant under a provision contained in the Act, before it can be allowed to be proved. Any argument based on possibility can have no effect. The court must, therefore, ignore any other consideration, and confine itself strictly to the provisions of the Act and come to a conclusion as to the relevancy of a fact on the interpretation of the relevant provisions of the Act, regardless of the fact whether the conclusion at which one ultimately arrives is in accordance with what is generally characterised to be a commonsense view of things, or not.15 It is not open to any Judge to exercise a dispensing power and admit evidence not admissible by the Statute because to him it appears that the irregular evidence would throw light upon the issue.16 Conversely he cannot, on the ground of public policy, exclude evidence legally admissible under this Act.17 Nor can he exclude such evidence on the ground that it is not admissible under English law.18 The words "and of no others" in the section, in conjunction with the language of other portions of the Act, further tend to show that the Court should, of itself and irrespective of the parties, take objection to evidence tendered before it which is not admissible under the provisions of this Act19 This section must be read as subject to the restriction of Part II as to proof, and Part III as to the production of evidence. Thus, the terms of a contract between the parties might be relevant, but oral evidence of it will be excluded, if those terms have been reduced to writing.20 Though a document may not be legal evidence of a fact within the provisions of this Act, it may yet be a document which the parties by the contract have made proof of that fact.21

- 4. Relevancy not affected by the provisions of Cr. P. Code. The Evidence Act is a special law dealing with the subject of evidence including the admissibility of evidence. Hence, no rule about the relevancy of evidence in the Act is affected by any provision of the Criminal Procedure Code.22
- 5. Explanation. For the provisions of the law relating to Civil Procedure Code referred to see Order VII, Rules 14 to 18, Order XIII, Rules 1 to 3 and 10, and Order XLI, Rule 27, Civil Procedure Code, Act V of 1908.

The credibility of a witness is not affected by the fact that he was not summoned but requested or asked to give evidence by the party which produced him. He cannot be regarded as untruthful for that reason.23

Whitley Stockes. 1945. See follow-

ing paragraphs. 20. S. 91, post; and cf. Ss. 92, 115-117, 121-127.

21. Oriental Assurance Company, Ltd.

v. Sarat, (1895) 20 B. 99 at 103. 22. Ram Naresh v. Emperor, 1989 All. 242; I. L. R. 1939 All. 377; 181 I. C. 646.

23. Asharfi Devi v. Tirlok Chand, A. I. R. 1965 Punj. 140; 66 P. L. R. 1130: Bibhuti v. Ramendra Narayan, 1947 P.C. 19: 73 I. A. 246: I. L. R. 1947 Cal. 85.

B. N. Kashyap v. Emperor, 1945
 Lah. 23: I. L. R. (1944) Lah. 408;
 217 I. C. 284; 46 Cr. L. J. 296 (F.B.).

^{16.} Sris Chandra Nandy v. khala Nanda, 1941 P. C. 16: 68 I. A. 34: I. L. R. (1941) 1 Car. 468; 193 I. C. 220: see also Chandu Lal v. Bibi Khatemonnessa, 1943 Cal. 76; I. L. R. (1942) 2 Cal. 299; 205 I. C. 344; 46 C. W. N.

^{17.} Katikineni V. G. Narsimha Rama Rao v. G. Venketaramayya, 1940 Mad. 768; I. L. R. 1940 Mad. 969: (1940) 2 M. L. J. 257 (F.B.).

King v. King, 1945 All. 190: I. L.
 R. 1945 All. 620: 1945 A. L. J. 162.

6. Admissibility. The question of admissibility of evidence is a question of law24 to be decided by the Judge.25 Where a Judge is in doubt as to the admissibility of a particular piece of evidence, he should declare in favour of admissibility rather than of non-admissibility.1 As a general rule evidence should never be shut out.2 "Under the Evidence Act admissibility is the rule, and exclusion the exception, and circumstances which under other system might operate to exclude are, under the Act, to be taken into consideration only in judging of the value to be allowed to evidence when admitted"& "The object of a trial in every case is to ascertain the truth in respect of the charge made. For this purpose, it is necessary that the Court should be in a position to estimate, at its true worth the evidence given by each witness, and nothing, that is calculated to assist it in doing so, ought to be excluded, unless, for reasons of public policy, the law expressly requires its exclusion."4 "The Judge's apprehension of possible danger in admitting certain evidence cannot create a rule for excluding it."5 No objection to admissibility of evidence could be entertained by the Supreme Court, when it had not been taken either before the arbitrator or before the High Court in an appeal against the award.6

If evidence is relevant, it is admissible and the court is not concerned with how the evidence was gathered.7 Where the fact in issue is whether the complainant filled the office of Food Inspector at the time of filing complaint, evidence of the Food Inspector that he filled that office would be a relevant fact for proving the fact in issue and he would be giving direct evidence of that fact. If the direct evidence is challenged, the order of appointment may be produced to prove the fact in issue.8 If a letter purports to have been written by S to R and R proves it to be in the handwriting of S, the letter would be relevant and admissible to the extent the contents of the letter have a bearing on the issues involved in the case.9

²⁴ Smt. Bibhabati Devi v. Ramendar, 277 I. C. 177; Dwijesh Chandra Roy v. Naresh Chandra, 1945 Cal, 492: 49 C. W. N. 791.

^{25.} S. 136, post.

^{25.} S. 136, post.

1. The Collector of Gorakhpur v. Palakdhari, (1889) 12 A. 1 at p. 26; Moriarty v. London C. & D. Ry. Co., (1870) L. R. 5 Q. B. 314, 323, But see also R. v. Parbhudas, 11 Bom. H. C. R. 90, 95 (1874); "the tendency to stray from the issues is so strong in this country, that any indulgence of it beyond the clear provisions of the law is certain to lead to future embarrassment," and in criminal proceedings, it has been observed, that the neit has been observed, that the necessity of confining the evidence to the issue is stronger if possible, than in civil cases, for when a pri-soner is charged with an offence it is of the utmost importance that the facts proved should be such as he can be expected to come prepared to answer, 3 Russ, Cr. 368, 5th Ed., cited in R. v. Parbhudas, (1874) 11 B. H. C. R. 90, 93; Roscoe Cr. Ev. 85 (12th Ed.) 78-

^{79. &}quot;It is of high importance that no security for truth, especially in criminal cases, should be weakened. On our rules of gvidence, said Lord Abinger, the paperty, the liberty and the lives of men depend," per Jardine, J. in R. v. Ram Chandra, 19 B. 749 at 759.

Rupendra Deb v. Ashrumati Debi, 1951 Cal. 286; 53 C. W. N. 770; 84 C. L. J. 313.

^{3.} R. v. Mona Puna, (1892) 16 B. 661, 668.

R. v. Uttam Chand, (1874) 11
 Bom. H.C.R. 120.
 Per Lord Denman in Wright v.

Beckett, 1 Moo. & R. 414.

Haji Mohammad v. State of West Bengal, A.I.R. 1959 S.C. 488: 1959 S.C.J. 443: 1959 S.C.A. 477.

Public Prosecutor v. Kalagana Kanaka Rao, (1969) 2 Andh. W.R. 449, 453.

^{8.} State of Kerala v. Enadeen,. 1971 Ker. L.J. 177: 1971 Ker. L.T. 177: A.I.R. 1971 Ker. 193 (F.B.). 9. Bishwanath Rai v. Sachhidanand

Singh, A.I.R. 1971 S.C. 1949, 1953.

In a case, appealable to a higher tribunal, the court ought not to reject evidence essential to the case of either party if it can possibly admit it,-at any rate where the court has doubt upon the matter (of admissibility) and its decision is open to appeal it is better to admit than to exclude document.10 Even if the Judge holds the evidence to be inadmissible, it is safest for him to contemplate its being regarded as admissible and express his view as to its weight.11

In criminal cases, the court should lean always in favour of the accused and exclude all evidence tendered by the prosecution which is of doubtful or remote relevance.12 To avoid prejudice to the accused, the court has a discretion to hear argument as to the admissibility of evidence in the absence of the jury.13 But, if the admissibility of the evidence depends upon facts, not affecting the merits, for which proof is needed, then such proof, e.g., as to a witness being able to understand the obligation of an oath, must be given in the presence of the jury.14 "Whether the court does or does not consider evidence, given on another occasion and between other parties appropriate and valuable for the decision of the case which is before it, is not of itself a reason for the admission or rejection of such evidence. The Court is bound to try the matter between the parties, who are before it, upon such evidence as those parties in their discretion produce for the purpose and at the time when the evidence is tendered to decide whether or not it is legally admissible."15 The value of evidence cannot affect its admissibility.16 Questions as to the admissibility of evidence should be decided, as they arise, and should not be reserved until judgment in the case is given.17 In a criminal case, the opening for the prosecution is not the stage where a doubtful question of admissibility should be either raised or decided.18 Where the question was as to the admissibility of certain documents, it was remarked:

"What, if all such documents are excluded, shall we have left but oral evidence? That this is not a desirable result probably no one will deny; and in all discussions on the law of evidence, it seems to me very desirable to consider how that result can be avoided."19

p. 203. Madhavrao v. Deonak, 21 Bom. 695,

Laijam Singh V. Emperor, 1925 All. 405: 86 I.C. 817.

13. R. v. Ball (1911) A.C. 47, 50; R. v. Thompson (1917) 2 K.B. 630 C.C.A., see also Alexander Perera v. King, 1937 P.C. 24: 166 I.C. 330: (1937) 1 M.L.J. 600.

14. R. v. Reynolds, (1950) 1 K. B.

15. Gorachand v. Ramnarain, (1868), 9 W.R. 587.

16. R. v. Roden (1874) 12 Cox 630.

Stores, 17. Ponnammal v. Modern 1950 Mad. 62: (1949) 2 M.L.J. 142; Parmanand v. Emperor, 1940 Nag. 340; I.L.R. 1941 Nag. 110; 190 I.C. 849; Bindeshwari Singh v. Ram Raj Singh, 1939 All. 61: 179 I.C. 974; 1939 A.L.J. 128; Jadu Rai v. Bhubotaran, 17 Cal. 173; Ramjibun v. Oghore Nath,

25 Cal. 401: 2 C.W.N. 188. 18. Padam Prasad v. Emperor, 1929 Cal. 617: 119 I.C. 139: 33 C.W.

N. 1121 (S.B.).

19. Gopeenath v. Ahundmoyee (1867)

8 W.R. p. 167 at 169; per Markby, J., for the procedure with regard to the admission of documentary evidence, see W.B. Manson v. Golam Kebria, (1871) 15 W.R. 190; Issur v. Russeek, (1868) 11 W.R. 576

Kali Kishore v. Bhusan Chunder,
 17 I.A. 159: 18 Cal. 201 (P.C.), judgment of High Court cited at

^{12.} Benoyendra Chandra Pandey v. Emperor, 1936 Cal. 78: I.L.R. 63 Cal. 929: 101 I.C. 74; see also Laijam Singh v. Emperor, 1925 All.

No argument in favour of the exclusion of evidence can be founded on the inability of Judicial Officers to perform the task of attributing to it its proper influence in the decision: to exclude evidence because, in some cases, Judges might found upon it a wrong conclusion would be utterly inconsistent with the assumption, on which all rules of law are founded, that the constituted tribunals are fairly competent to carry them out.²⁰ In the undernoted case it was said:

"To admit documents, not strictly evidence at all, to prop up oral evidence too weak to be relied upon, is not a course which their Lordships would be inclined to approve; and none of the chittahs which have been laid aside by the High Court is shown to have been admissible in evidence according to the law of evidence regulating the decisions of those Courts. It would expose purchasers to much danger if their possession could be disturbed by inferences from or statements in, documents not legally admissible in proof against them.²¹

Where a Judge is influenced in his estimate of parol testimony by the result of his consideration of documents which he ought not to have dealt with as evidence, there is no proper trial of the case.²²

7. Object for which evidence is tendered and purposes for which it is admissible. Where certain decisions of the Privy Council were referred to, in which it was said that with regard to the admissibility of evidence in the native courts in India no strict rule can be prescribed, it was remarked as follows:

"But these cases, it must be borne in mind, occurred many years ago, at the time when the practice in the mofuscil in this respect was very lax and before the Evidence Act was passed; and the observations of the Privy Council²³ were made, as I humbly conceive, not as approving of this laxity of practice, but rather as excusing it, upon the ground that the mofussil courts were not at the time so sufficiently acquainted with our English rules of evidence as to be able to observe them with anything like accuracy. I conceive that one great object of the Evidence Act was to prevent this laxity, and to introduce a more correct and uniform rule of practice than had previously prevailed."²⁴

In the under-noted case, Lord Tenterden, C. J., said:

"In deciding the question whether certain evidence be admissible or not, it is necessary to look at the object for which it is produced, and the point it is intended to establish; for it may be admissible for one purpose and not another." 25

20. Gopeenath v. Anundmoyee, 8 W.R. 167 and as to standard of value as applied to evidence it at p. 169.

22. Boidonath v. Russick, (1868) 9 W.

R. 274.

23. Unide v. Pemmasamy, (1856) 7

M.I.A. 128 at p. 137; s.c. 4 W.R.

(P.C.) 121; Naragunty v. Vengama, (1861) 9 M.I.A. 66 at p. 90; Ajodhya Pershad v. Omerao, (1870) 13 M.I.A. 519; 15 W.R.

(P.C.) 1.
24. Gujja v. Fatteh, (1880) 6 C. 171 at p. 193, per Garth, G.J. and as to the reception of loose evidence v. ib; Hureehur v. Churn, (1874) 22 W.R. 355, 356, 357.

25. Taylor v. Willans, (1830) 2 B. & Ad. 845, 855, per Lord Tenterden,

applied to evidence it at p. 169.

21. Eckowrie v. Heeralal, (1868) 11
W.R. (P.C.) 2: s.c. 12 Moo,
I.A. 136 ("Each relaxation is apt
to become a precedent for another."
ib, at p. 4): see notes to S. 36
post.

Evidence properly admitted may be treated as evidence for all purposes. Thus, the evidence of a witness given at the preliminary enquiry may, at the trial, be treated as evidence in the case for all purposes, subject to the provisions of this Act.1

- 8. Evidence partly admissible and partly inadmissible. If inadmissible evidence is so mixed up with admissible evidence as to make it impossible to separate one from the other, the whole of the evidence has to be rejected. But this result will not follow, if the admissible material is quite independent of the inadmissible material.2 Where a document consists of two separate parts, one of which is admissible and the other inadmissible, the document cannot be rejected as a whole.3 Though, no doubt, when portions of a statement are admitted, the person affected thereby may demand that the statement should be admitted and considered in its entirety, yet the principle that portions of a statement or confession may be admitted and others excluded is recognised in the Evidence Act itself, e.g., Section 27.4
- 9. Admissibility in civil and criminal cases. (a) General. "In civil and criminal cases there is no difference in the rules as to the admissibility of evidence, though there may be difference in their application; and it may be that a piece of evidence admissible in either class of cases may not be sufficient in a criminal case, that is, without further evidence." It is held duty of the Appellate Court to see that this judicial discretion is exercised in a proper manner.5-1 "The moment a witness commences giving evidence which is inadmissible, he should be stopped by the Court. It is not safe to rely on a subsequent exhortation to the jury to reject the hearsay evidence and to decide on the legal evidence alone."6 If the Courts themselves be passive in this respect, the utility of the Law of Evidence may be seriously impaired. Further,

(F.B.).

Fazal Din v. Karam Hussain, 1936
 Lah. 81, 83: 162 I. C. 404.
 Emperor v. Lalit Mohan Singh, 1921 Cal. 111, 112: 62 I.C. 578: 25 C.W.N. 788.

5. R. v. Mallory. (1884) 13 Q.B.D. 33: 15 Cox 458, 460, per Grove. J. v. ante. notes to S. 3. and cases there cited: and see also R. v. Francis, (1874) 12 Cox C.C. 612, 615, 616: Lord Melvillen's Trial. 29 How, St. Tr. 746, 764 (a fact must be established by the same, evidence whether it is to be followed by a criminal or civil consequence; but it is totally different question in the consi-

deration of criminal as distinguished from civil justice, the accused may be affected by the fact when so established), per Lord Erskine, L.G., Rest. Ev., s. 94. 5-1. R. v. Amrita, (1873) 10 B.H.C.R.

497.

6. R. v. Pitambar, (1867) 7 W.R. Cr. 25. Where hearsay is not admissible as evidence it should not be taken down; Pitamber Doss v. Ruttun, (1864) W.R. 213; and a prior consent to abide by the testimony of a certain witness cannot bind the consenting party to hearsay testimony, but only to such evidence as is legally admissible, Luskeemonee v. Shun-kuree, 2 W.R. 252; R. v. Alum Sheik, 5 W.R. Cr. 2; R. v. Ram-gopal. (1868) 10 W.R. Cr. 57; R. Kali Churn, 7 W.R. Cr. 2 (hearsay evidence prohibited); Re Kedarnath (1872) 18 W.R. Cr. 16; R. v. Chunder, (1875) 24 W.R. Cr. 77.

S. 288, Cr. P. Code: Fakira v. King-Emperor. 1937 P.C. 119: 64
 I.A. 148: 167 I.C. 790; Hanuman Prasad v. Crown. 1949 Nag. 254: I.L.R. 1949 Nag. 493: 1949 N.L. J. 456; Rang v. Emperor, 1944 Sind 178: I.L.R. 1944 Kar. 75.
 Gurmukh Singh v. Commr. of Income Tax, 1944 Lah, 353, 363 (F.B.)

having regard to the imperative language of 5th, 60th, 64th, 136th and 165th sections⁷ and of other portions of the Act, it would appear that it was the intention of the Legislature that a Court should, irrespective of objections made by parties, compel observance of the provisions of the law. If evidence is irrelevant and inadmissible, omission to take objection to its reception does not render it admissible.8 It is the duty of the Court to exclude all irrelevant evidence, even if no objection is taken to its admissibility by the parties.9 Procedure as to admission and rejection of documents is dealt with in the undermentioned Order of the Code.10 The Judge is to decide as to the admissibility of evidence, and may ask in what manner any evidence which is tendered is relevant. He is bound to try a collateral issue when the reception of evidence depends on a preliminary question of fact.11 The rules of evidence cannot be departed from, because there may be a strong moral conviction of guilt.12 The moral weight of evidence is not the test.13

- (b) Varying decisions as to admissibility. An interlocutory order by the Court holding that certain evidence is admissible can legally be varied by it, though in practice it is not often done.14 But a Judge who has refused to accept certain evidence in the first instance has no jurisdiction to take it again into consideration, unless some explanation or reason can be given for it.15
- 10. Objections by parties. An objection to the reception of secondary evidence is properly made in the Court of first instance. For, if it is made at the time when the evidence is tendered, it may be in the power of the party tendering the evidence to obviate the objection, if a valid one.16 It has been held that

7. v. S. 5 "... and of no others," S. 60, "oral evidence must be direct": S. 64. "Documents must be proved by primary evidence except etc."; S. 165, "nor shall he dispense with primary evidence, etc." S. 136, "shall admit evidence if relevant and not otherwise."

Narain Singh Development 8. Kamakshva Kamakshya Narain Singh v. Karandura Development Co. 1950 Pat. 134; I.L.R. 29 Pat. 19; Pandappa v. Shivalingappa, 1946 Bom. 193; 224 I.C. 169; 47 Bom. L. R. 962; Nanak Chand v. Shahbaz Khan, 1936 Lah. 114; Krishnaswami v. Ramchandra Ayyar, 1931 Mad. 601; 135 I.C. 572; 1931 M. W. N. 261; Jagdish Chandra De v. Harihar De 1924 Cal. 1042; 78 I.C. 219; 40 C.L.J. 39.

9. Dwijesh Chandra Roy v. Naresh Chandra Gupta, 1945 Cal. 492: 49 C. W. N. 791; Abdul Khalique v. Sushil Chandra, 39 C. W. N. 330. 10. Civ. Pr. Code, O. XVIII. 11. S. 136, post, and see S. 162 post; Cleave v. Jones, (1852) 7 Ex. 421; Phillips v. Cole, (1839) 10 A. & F. 106

E. 106.

Barindra v. R., (1909) 37 C. 467.
 R. v. Baijoo, (1876) 25 W.R. Cr. 43; R. v. Oddy (1851) 5 Cox C.C. 210, 213; "convictions must be

based on substantial and suffi-cient evidence not merely "moral convictions"; R. v. Sorab Roy, 5 W.R. Cr. 28 (1866) as to judicial disbelief see dictum in Re. Nobo-

disbelief see dictum in Re, Nobodoorga, (1880) 7 C.L.R. 387, 391.

14. Robert Cameron Chamarette v. Mrs. Phyllis E. Chamarette, 1937 Lah. 176; 17 I.C. 619.

15. Ram Keshan v. Ramsohag, 1939 Pat. 530; 182 I.C. 407.

16. Kissen v. Ram, (1869) 12 W.R. 13; Sheetul v. Junmejoy, 12 W. R. 244; Chooni v. Nilmadhub, 1925 Gal. 1034; 41 C.L.J. 374; 80 I.C. 874; Radha v. Kedar. (1924) 46 A. 815; 80 I. C. 874; 1924 All. 845; Bindeshwari Singh v. Ramraj Singh, 1939 All. 61; 179 I.C. 974; 1939 A.L.J. 128; Gopal Dass v. Sri Thakurji, 1943 P.C. 83; 207 I.G. 553; (1943) 2 M.L.J. Dass v. Sri Thakurji, 1943 P.C. 83: 207 I.G. 553: (1943) 2 M.L.J. 51; M.R. Seturatnam Ailyar v. Venkatachela Goundan, 1920 P. C. 67: 47 I. A. 76: 43 Mad. 567: 56 I.C. 117; Ghulam v. Kalimullah, 1928 Lah. 428: 109 I.C. 728: Ramanuj v. Dakshineswar, 1926 Cal. 752: 93 I.C. 101: 30 C.W.N. Cal. 752; 93 I.C. 101: 30 C.W.N. 259; Padam Prasad v. Emperor, 1929 Cal. 617: 119 I.C. 193: 33 C.W.N. 1121 (L.B.). Wigmore, Ev , s. 18:

where a valid objection is taken to the admissibility of evidence, it is discretionary with the Judge whether he will allow the objection to be withdrawn.¹⁷ Some latitude should be allowed to a member of the Bar, insisting in the conduct of his case upon his question being taken down, or his objection noted, where the court thinks the question inadmissible or the objection untenable.¹⁸ There ought to be a spirit of give-and-take between the Bench and the Bar in such matters, and every little persistence on the part of a pleader should not be turned into the occasion of a criminal trial unless the pleader's conduct is so clearly vexatious as to lead to the inference that his intention is to insult or to interrupt the Court.¹⁹

- 11. Waiver: Onus. An objection may be waived, but waiver cannot operate to confer on evidence the character of relevancy.20 If the objection is prima facie sustainable, then the opponent must show the Court that the evidence satisfies the law.21 If, however, the evidence appears to the Court to be prima facie admissible it is for the objector to make out the grounds of his objection. The objection should be specific. It should declare that the evidence violates a named principle or rule of evidence. The cardinal principle is that a general objection, if overruled, cannot avail. The only modification of this broad rule being that, if on the face of the evidence, in its relation to the rest of the case, there appears no purpose whatever for which it could have been admissible, then a general objection, though overruled, will be deemed to have been sufficient. The opposing counsel can make no reply to a general objection except to throw the whole responsibility upon the Judge at once, or else begin systematically and argue that under any possible objection the testimony should come in. Many trials under such a system would practically never end.22 The admissibility of documents can be challenged, though admitted without objection, when the question is not one of mode of proof but of the evidentiary value of their contents.23
 - 12. Appeal, objection in. When dealing in appeal with the admissibility of evidence admitted by the lower Court, a distinction has been drawn between the cases—
 - (a) in which evidence wholly irrelevant has been erroneously admitted by the Lower Court; and
 - (b) those cases in which a relevant fact has been erroneously allowed to be proved in a manner different from that which the law requires,²⁴ e.g., where secondary evidence of the contents of a document has been admitted without the absence of the original having been accounted for.²⁵

Barbat v. Allen, (1852) 7 Exch 609.

Barbat v. Allen, (1852) 7 Exch. 609.
 Per Cur. in In re Dattatraya, (1904) 6 Bom. L. R. 541.

v. post; Bommidala Poornaish v. Union of India, (1967) 2 Andh. L. T. 141: A. I. R. 1967 Andh. Pra. 338, 348 (document mere certificate or report of expert).

^{21.} See Wigmore, Ev., S. 18.
22. See Wigmore, Ev., s. 18 and see per Lord Brougham in Bain v.

Whitehaven, (1850) Ry. 3, H. L. C. 1, 16.

^{23.} Shashi v. Sarat, 1927 Cal. 327; 45 C. L. J. 537; 100 I. C. 713; 31 C. W. N. 310.

Ambar v. Lutfe. 45 C. 159; 21 C. W. N. 996; 41 I. C. 116; 25 C. L. J. 619; A. I. R. 1918 C. 971 and note to S. 167, post.
 As to parol evidence of written

contract admitted without objection, see Article in 14 Mad, L. J. 189,

In the first case, it is obvious that the decree can be supported upon relevant evidence only.1

A document can be objected to as irrelevant at any time; a document can be objected to as inadmissible, as opposed to irrelevant, at the first hearing only.2 As pointed out by the Judicial Committee in the case of Ram Kishen Das v. Madho Das3 and a number of other decisions, when a question is raised whether a document is admissible or not on the ground of want of registration or on the ground that the document is irrelevant, it can be raised at any stage of the case. It is such objections as can only be remedied if taken at the earliest stage, that are not allowed to be raised at a later stage, e.g., the question of the admissibility of a copy in the absence of the evidence that the original has been lost.4 Where the objection to be taken is not that the document is in itself inadmissible but that the mode of proof put forward is irregular or insufficient, it is essential that the objection should be taken at the trial before the document is marked as an exhibit and admitted to the record. A party cannot lie by until the case comes before a court of appeal and then complain for the first time of the mode of proof.5 The question of relevancy is a question of law, and can be raised at any stage. But the question of proof is a question of procedure and is capable of being waived.6 A party cannot be heard to object to the use of evidence to which the irregularity of his procedure gives relevance and to which he apparently took no exception when it was tendered at the trial, although such evidence would otherwise be

If no opportunity was given by an Industrial Tribunal to a Company to raise objection to certain documents being exhibited on the ground of want of proof or as to their admissibility in evidence, the objection can be raised in appeal.8 But where both parties adduced oral evidence in the trial court and no exception was taken then, an objection cannot be raised in second appeal.9

13. Omission to object, effect of. An erroneous omission to object to the admission of irrelevant testimony does not make it available as a ground of judgment.10 Nor can evidence be given which the law excludes as that a

1. Cf. S. 165, Prov. 2, post.

Pandappa v. Shivalingappa, 1946 Bom. 193: 224 I. C. 169: 47 Bom. L. R. 962.

Raghu Singh v. Burrakur Coal Co., Ltd., (1966-67) 30 F. J. R. 134; A. I. R. 1966 Cal. 504, 509.
 V. Sesha Reddi v. V. Tulasamma, A. I. R. 1969 Andh. Pra. 300, 302

(proceedings in court resulting in

^{2.} Ghulam Muhammad v. Kalimullah, 1928 Lah. 428: 109 I. C.

^{3. 23} I. A. 106; I. L. R. 19 All. 76

 ⁽P.C.).
 Sabdi Bepari v. Sh. Budhai, 1925
 Cal. 370: 82 I. C. 949.
 Gopal Das v. Shri Thakurji, 1943
 P. C. 83: 207 I. C. 553: (1943) 2
 M. L. J. 51.
 Bandappa v. Shivalingappa, 1946

Seturatnam Aiyar v. Venkatachela Goundan, 1920 P. C. 67: 47 I. A. 76: I. L. R. 43 Mad. 567: 56 I. C. 117; Atma Kuri Rajeshwar Rao v. Jogendra Patro, 34 Cut. L. T. 1131 at pp. 1135, 1136.

a compromise which

10. Ram Kishen Das v. Madho Das, (1896) 23 I. A. 106: 19 A. 76; Chooni v. Nilmadhab, 1925 Cal. 1034: 41 C. L. J. 374: 86 I. C. 734; Manmatha v. Probodh, (1925) 43 C. L. J. 274: 1926 S. 167 (3); Prakasa Rajaningaru v. Venkata. Prakasa Rajaningaru v. Venkata. (1915) 38 M. 160; A. I. R. 1915 M. 793 (2) and see Sreenath v. Goluck. (1871) 15 W. R. 348; Ayyavar Thevar v. Secretary of State, A. I. R. 1942 Mad. 528; 202 I. C. 274; (1942) 1 M. L. J. 485: 1942 M. W. N.

person who is liable on a note of hand signed it as surety only.11 Unless a party can be found to have been estopped from objecting to the admissibility of the evidence, it cannot be said that evidence not otherwise admissible, or which would have been liable to rejection if objection were taken to it, may be perfectly good evidence, if admitted by the consent of parties.12 Where a piece of evidence not proved in the proper manner has been admitted without objection, it is not open to the opposite party to challenge the admission at a later stage of the litigation. But, where evidence has been received without objection, in direct contravention of an imperative provision of the law, the principle on which unobjected evidence is admitted, be it acquiescence, evasion, or estoppel (none of which is available against a positive legislative enactment) does not apply.13 The Act (Section 165) also enacts that the judgment must be based upon facts duly proved, that is, proved in accordance with the provisions relating to proof contained in the Act. Where no proof has been offered, as where a document has been admitted in the lower Court without being proved, the Court of Appeal may reject the document notwithstanding want of objection by the other party.¹⁴ Where proof has been given of a document, but the proof is *prima facie* improper, an apparent exception exists in civil suits, based on principles akin to estoppel, as where no objection is taken to secondary evidence of documents being given.15 In this case, want of objection may mislead the party tendering the evidence and prevent him from producing primary evidence, or from showing that the secondary evidence offered is admissible.16 So, it has been held that if no objection is taken in the Court of first instance to the reception of a document in evidence (e.g., as being the copy of a copy) it is not within the province of the Appellate Court to raise or recognise it in appeal.17 Where, the Court of first instance

272: Ramaya v. Devappa, (1906) 30 B. 109. In Pudmavati v. Doolar, (1847) 4 M. I. A. 259 at pp. 285, 286, the Privy Council observed that the evidence "was, however received below and, therefore, we do not apprehended that we can treat it, as not being evidence in the cause." These observations appear, however, to nave referred to the weight and not to the admissibility of the evidence. See also Ningawa v. Bharmappa, (1897) 23 B. 63 at 69.

Harek v. Bishun, (1903) 8 C. W.

N. 101, 102.

 Ayyavar Thevar v. Secretary of State, A. I. R. 1942 Mad. 528: 202 I. C. 274.

13. Shib Chandra v. Gour, 1922 Cal. 160: 68 I. C. 86: 35 C. L. J. 473: 27 C. W. N. 134. See also Luchiram v. Radha, 1922 Cal. 267: (1922) 49 C. 93: 66 I. C. 15: 34

C. L. J. 107.

14. Kanto v. Jagat, (1895) 23 C. 335, 338: in this case the contention that a map was admissible in evidence was held to be open to the appellant on special appeal although he had not appealed against an order of remand made by the

lower Appellate Court rejecting the map as not being admissible: but see Girindra v. Rajendra, (1897) 1 C. W. N. 530.

15. See Robinson v. Davies, (1879) 5 Q. B. D. 26, where secondary evidence of the contents of written documents was received under a commission to take evidence abroad without objection.

16. Kissen v. Ram Chunder, (1869) 12

W. R. 13.

Chimnaji v. Dinkar, (1886) 11 B. 320. followed in Lakshman v. Amrit, (1900) 24 B. 591 in this case the copy from which the copy was taken had been filed in a suit between the predecessors in title of the parties; Akbar v. Bhyea, (1880) 6 G. 666 at pp. 669, 670; Kissen v. Ram Chunder, (1869) 12 W. R. 13, in which the case was remanded with liberty to supply the necessary proof; see Ningawa v. Bharmappa, (1897) 23 B. 63, 65; see notes to S. 165, post. No objection should be allowed to be taken in the Appellate Court as to the admissibility of a copy of a document which was admitted in evidence in the Court below without any objec-

admitted in evidence the deposition of certain witnesses in a previous litigation and no objection was taken, but in appeal it was objected that the witnesses who were alive ought to have been called and examined, and the Court excluded the evidence, it was held in second appeal that as, in consequence of the want of objection, the party tendering the evidence had cancelled his application to have his witnesses summoned, the lower Appellate Court ought either to have accepted the evidence, or if it required the party tendering the evidence to bring the witnesses before it for examination, it was bound to give him an opportunity of doing so, and that in no case was it justified in excluding the evidence altogether and deciding the case on the remaining evidence on the record. The appeal was remanded.18 But, the Appellate Court has a perfect right to attach such weight to the documents as it thinks proper, or to say whether they ought to be treated as evidence as against particular parties to the suit.19 Where a document is admitted without proof but without objection in the trial Court, no objection to its admissibility on the ground of want of formal proof can be taken in appeal.20 Where no objection is taken in the first Court to the admission in evidence of documents not inter partes, objection cannot be taken in second appeal that it has not been proved, that the conditions exist which make any particular section applicable.21 Where both sides adduced oral evidence regarding a certain compromise in the trial court and no objection was taken then, an objection cannot be raised in second appeal.22

In the undermentioned case,22 the Privy Council held that the examination of a material witness of the plaintiff in the absence of the defendant, his vakil having been removed and no other vakil then acting for him, was such an irregularity that, if objected to at the proper time, would have been fatal to the reception of such evidence; but that, no objection having been urged during the time or until an appeal was interposed, the objection came too late, and could not be sustained, as notwithstanding such irregularity, that fact did not taint the whole proceedings so as to prevent the plaintiff recovering upon the other evidence which was sufficient to establish his case.

14. Evidence on commission. Objections to the admissibility of documents attached to the return of a commission, if not previously made, cannot be taken at the hearing of the suit.24 If, when evidence is taken before Commissioners, a document is tendered and objected to on any ground, the opposite-party is not precluded from objecting to the document at the trial on any other ground.

tion: Kishore v. Rakhal, (1903) 31 C. 155; dissenting from Kameshwar v. Amanutulla. (1898) 26 G. 53; Shahzadi v. Secretary of State, (1907) 34 C. 1059 (P.C.); Thet v. Maung, 3 L. B. R. 493; Prakasarajaningaru v. Venkata, (1915) 38 M. 160;: A. I. R. 1915 M. 793 (2).

^{18.} Lakshman v. Amrit, (1900) 24 B.

^{19.} Akbar v. Bhyea, (1880) 6 C. 666 at pp. 669, 670.

Charitter v. Kailash, 4 Pat. L. W.
 213: 44 I. C. 422; A. I. R. 1918

Pat. 537: see Narhari v. Ambabai, 44 B. 199: 55 I. C. 316: A. I. R. 1920 B. 244.

^{21.} Reajaddi v. Ganga Charan, 53 I.C. 863: see Radha v. Kedar, 22 A. L. J. 761: (1924) 46 A. 815: 80 I. C. 874: A. I. R. 1924 A. 845.

22. V. Sesha Reddi v. V. Tulasamma, A. I. R. 1969 Andh. Pra. 300, 302.

^{23.} Bommarauze v. Rangasamy, (1855)

⁶ M. I. A. 232. 24. Struthers v. Wheeler, (1880) 6 C. L. R. 109.

- 15. Fresh objections. It is not necessary to state all the objections to the admissibility of a document when it is first tendered, but the party objecting is at liberty to take any fresh objection whenever the party producing the document tenders it in evidence.25
- 16. Consent. The Appellate Court has no jurisdiction to reject a copy of a document exhibited in the lower Court with the consent of both parties, at any rate without giving the parties an opportunity of producing the original.1 It is, however, correct that the parties cannot by consent admit irrelevant evidence as relevant.2
- 17. Waiver in criminal case. It has been held that the ground of waiver cannot be allowed to prevail in criminal case⁸ and that a prisoner on his trial can consent to nothing.4 As to objections to the reception of evidence by the Court itself, see the last but one paragraph; and as to the procedure when a question is objected to and allowed by the Court, see the Civil Procedure Code.5

A Court is bound to decide upon the evidence without reference to any previous arrangement between the parties as to the mode in which the evidence is to be dealt with.6 Upon the question of placing a favourable construction on doubtful evidence, so as to entitle the Court to treat it as substantive evidence in the case and not exclude it as inadmissible7 and as to the case where both parties have put in different portions of inadmissible proceedings and rested arguments thereon,8 see the cases noted below.

18. Miscellaneous. (a) General. Evidence illegally obtained is admissible. It has long been held, that the admissibility of evidence is not affected by the illegality of the means by which the evidence has been obtained, though a person taking recourse to illegality may be accountable under the law.9 If evidence is relevant, the court is not concerned by the method by

^{25.} Ralli v. Gau, (1883) 9 C. 939.

Ramalammal v. Athikari, 35 M. L. J. 11: 48 I. C. 615; 1919 M. 758

^{2.} Nathubhai v. Chhotubhai, A. I. R. 1962 Guj. 68.

R. v. Amrita, (1873) 10 B. H. C.
 R. 497, 498. On the question how far the rule of evidence may be relaxed by consent, Mr. Best re-marks: "In criminal cases, at least in treason and felony, it is the duty of the Judge to see that the accused is condemned according to law and the rules of evidence torming part of that law; no admissions

ing part of that law; no admissions from him or his counsel will be received", see also s. 58, post.

4. R. v. Bishonath, (1869) 12 W. R. Cr. 3; Attorney-General of New South Wales v. Bertrand, (1867) 36 L. J. P. C. 51; S. C. L. R. I. P. C. 520, 535; see also R. v. Navorji, (1872) 9 Bom. H. C. R. 358, 383; R. v. Bholanath, (1876) 2 C. 23; R. v. Allen, (1880) 6 C. 83; Hossein v. R., 6 C. 96, 99, as

to observation of Trevelyan, J., in Girish v. R., (1893) 20 C. 857: Best Ev., s. 97; as to admission of fact by legal practitioners, see Ss. 17, 18, 58, post.

Civ. Pr. Code, O. XVIII, R. 11.
 Cf. also Ss. 275 (3), 276 (3), 278 Cr.
 Pr. Code, 1973 (Act 2 of 1974).

^{6.} Gooroo v. Bykunto, (1856) 6 W. R. 82.

^{7.} Dwarka v. Sant, (1895) 18 A. 92. 8. Bir v. Bhansi, (1869) 3 B. L. K. A. C. 214, followed in Bindeshwari Pd. v. Lakpat Nath Singh, 8 I. C. 26. See also footnotes 14 and 15 above.

above.

9. Elias v. Passmore, (1934) 2 K. B. 164. (See Wigmore, s. 2183); R. M. Malkani v. State of Maharashtra, (1972) 2 S. C. W. R. 776: 1973 Cr. L. J. 228: 1973 Mah. L. J. 92: 1973 Cri. App. R. 31 (S.C.): 1973 M. P. L. J. 224: (1973) 1 S. C. C. 471: 1973 S. C. C. (Cri.) 399: (1973) 2 S. C. R. 417: 1974 Mad. L. W. (Cri) 121: A. I. R. 1973 S. C. 157.

which it was obtained, or with the question whether that method was tortious but excusable. There is no difference in principle for this purpose between a criminal case and a civil case. No doubt, in a criminal case, the judge always has the discretion to disallow the evidence, if the strict rules of the admissibility would operate unfairly against an accused, e.g., where a document is obtained from a defendant by a trick,10 the Court may rule it out. But, things seized under an illegal search warrant may, nevertheless, be used as evidence.11

Really the Act prohibits the employment of any kind of evidence not specifically authorised by it. Therefore, the principle of exclusion adopted by the Act should be applied so as to exclude matters not admissible by the Statute.12 In Sris Chandra v. Rakhalananda,18 Lord Atkin observed:

"What matters should be given in evidence as essential for the ascertainment of truth is the purpose of the law of evidence to define. Once a statute is passed which purports to contain the whole law, it is imperative. It is not open to any judge to exercise a dispensing power, and admit evidence not admissible by the statute, because to him it appears that the irregular evidence would throw light upon the issue. The rules of evidence, whether contained in a statute or not, are the result of long experience, choosing to confine evidence to particular form, and, therefore, eliminating others which it is conceivable might assist in arriving at truth. But that which has been eliminated has been considered to be of such doubtful value, as, on the whole, to be more likely to disguise truth than discover it. It is, therefore, discarded for all purposes and in all circumstances. To allow a judge to introduce it at his own discretion would be to destroy the whole object of the general

The Act prohibits the employment of any kind of evidence not specifically authorised by it. Therefore, there must be a specific provision in the Act before facts can be treated as relevant, and facts must also be proved as laid down in the Act. It is only those facts which are declared to be relevant and duly proved, which can be the basis of a judgment.14

Title deed cannot be held to be a forged document in the absence of any suggestion by the defendant to that effect, particularly when it is registered and there are entries in records of right in favour of plaintiff.15 Suggestions, if denied, cannot take the place of evidence.16

Kuruma v. Rex, (1955) 1 All E.

R. 236 (P.C.).

11. Mamsa v. Emperor, A. I. R. 1937
Rang. 206: 170 I. C. 870; Bonomali v. Emperor, A. I. R. 1940
Cal. 85; I. L. R. 1939-1 G. 210:
186 I. C. 471; Ramarao Ekoba v. R., I. L. R. 1951 Nag. 349; A. I. R. 1951 Nag. 237; State v. Raoji, A. I. R. 1956 Bom. 528; Lal Bahadur v. State, A. I. R. 1957 Assam 74; Sundar Singh v. State of U. P., A. I. R. 1956 S. C. 411: 1956 Gr. L. J. 801.

Khedia v. Turia, A. I. R. 1962
 Pat. 420: 1962 B. L. J. R. 323.
 L. R. 68 I. A. 34; A. I. R. 1941

P. C. 16.

Hasan Abdulla v. State of Gujarat, A. I. R. 1962 Guj. 214.
 Fattle v. Bashi Lal, 1973 M. P. L. J. 617: 1973 M. P. W. R. 605: A. I. R. 1974 M. P. 16 at 20, 21: 1973 Jab. L. J. 754.
 Sita Ram Pandey v. State of Bihar, 1076 Cr. J. J. 200 at 803; J. J. R.

¹⁹⁷⁶ Cr. L. J. 800 at 803; I. L. R. (1975) 54 Pat. 5.

- (b) Trap Witness. A trap witness is not an accomplice but a partisan witness. The law settled by a series of decisions of the Supreme Court is that as regards the evidence of a partisan witness, the conviction of an accused person can be solely based on that evidence if the court is satisfied that the evidence is reliable. But the court may in appropriate cases look for corroboration,17
- 6. Relevancy of facts forming part of same transaction. Facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction, are relevant, whether they occurred at the same time and place or at different times and places.

Illustrations

- (a) A is accused of the murder of B by beating him. Whatever was said or done by A or B or the bystanders at the beating, or so shortly before or after it as to form part of the transaction, is a relevant fact.
- (b) A is accused of waging war against the 18 [Government of India] by taking part in an armed insurrection in which property is destroyed, troops are attacked and gaols are broken open. The occurrence of these facts is relevant, as forming part of the general transactions, though A may not have been present at all of them.
- (c) A sues B for a libel contained in a letter forming part of a correspondence. Letters between the parties relating to the subject out of which the libel arose, and forming part of the correspondence in which it is contained, are relevant facts, though they do not contain the libel itself.
- (d) The question is, whether certain goods ordered from B were delivered to A. The goods were delivered to several intermediate persons successively. Each delivery is a relevant fact.
 - S. 3 ("Fact"). . S. 3 ("Fact in issue").

S. 3 ("Relevancy").

R. 1968 Guj. 88; See also Ganpat Singh v. State, I. L. R. (1966) 16 Raj. 436: 1966 Raj. L. W. 163: 1967 Cr. L. J. 121: A. I. R. 1967 Raj. 10. The decision to the contrary in Gavadesh Khandeparkar v. State, 1968 Cr. L. J. 925; A. I. R. 1968 Goa 63, 64 (Bhanuprasad's case, supra: was not before the court and must be deemed to be overruled). The observations to the overruled). The observations to the contrary in E. G. Barsay v. State of Bombay, A. I. R. 1961 S. C. 1762, which was bound by the decision in Basaran Singh's case, Supra, must be confined, to the facts of that case (Bhanu Prasad v. State of Gujarat, supra).

18. Subs. by the A. O. 1950 for "Queen",

^{17.} Bhanuprasad v. State of Gujarat. 1968 S. C. D. 1026: 9 Guj. L. R. 853: 1968 Cr. L. J. 1505: A. I. R. 1968 S. C. 1323, 1327; The State of Bihar v. Basaran Singh, 1959 S. C. R. 195: 1958 S. C. J. 856: 1958 A. L. J. 608: 1958 A. W. R. (H.C.) 609: (1958) 2 Andh. W. R. (S.C.) 136: 1958 B. L. J. R. 618: (1958) 2 M. L. J. (S.C.) 136: 1958 M. L. J. (Cri.) 641: 1958 Cr. L. J. 976: A. I. R. 1958 S. C. 500 (a decision of a Bench of five Judges) overruling the decision in Rao Shiw Bahadur Singh v. State of Vindhya Pradesh, 1954 S. C. R. 1098: A. I. R. 1954 S. C. R. 1098: A. I. R. 1954 S. C. 322; Manka Hari v. State of Gujarat, I. L. R. 1967 Guj. 457: 8 Guj. L. R. 588: 1968 Cr. L. J. 746: A. I.

Steph. Dig. Art. 3; Roscoe, Cr. Ev., 86, 13th Ed., 78; Steph. Introd., Ch. III; Phipson, Ev., 11th Ed. 70; Norton. Ev. 111; Cunningham, Ev., 87; Whitley Stokes, 854; Taylor Ev., Sections 320, 326, 328; Wharton, Ev., Section 258; Thayer's Cases on Evidence, 629; Rice on Evidence, 369-392.

SYNOPSIS

- 1. Principle,
- 2. Scope.
- 3. Res gestae.
 - (a) History of doctrine.
 - (b) Conflicting views in England and America.
 - (c) Phrase criticised.
 - (d) Its place in the law of Evidence.
 - (e) Cases in which the term has been improperly applied.
 - (f) Res gestae proper.
 - (g) Declarations: Conditions of admissibility.

- (h) Documentary declarations.
- 4. Facts forming part of the same transaction.
- 5. Constituents of res gestae.
- Test of admissibility.
- 7. Conditions for admissibility.
- 8. Statement of ravished woman.
- 9. First Information Report.
- 10. Illustrations.
 - (a) Illustration (a) Bystanders.
 - (b) Illustration (b).
 - (c) Illustration (c). (d) Illustration (d).
- 1. Principle. The rule is derived from the obvious consideration that no disputed event or transaction ever occurs isolated from all other events or transactions. It must, however, be detached from such other events or transactions.¹⁹ If facts form part of the transaction which is the subject of enquiry, manifestly evidence of them ought not to be excluded.²⁰ Moreover such facts, forming part of the res gestae, in most cases could not be excluded without rendering the evidence unintelligible21 for every part of a transaction is connected with every other part as cause or effect. The point for decision will always be whether they do form part, or are too remote to be considered really part of the transaction before the Court.22
- 2. Scope. This section enacts the law which is usually laid down in England in these terms, namely, that acts, declarations and incidents which constitute or accompany and explain the fact or transaction in issue, are admissible for or against either party as forming parts of the res gestae.22 It renders relevant facts which form part of the same transaction as the fact in issue. Even hearsay statements are admissible under this section, if they form part of the transaction and not merely uttered in the course of the transaction.24 This section permits proof of collateral statements or subsidiary ones which are so connected with the facts in issue as to form part of a single or the same transaction.25 They are admissible, though hearsay, because, in such cases, it is the act that creates the hearsay, not the hearsay the act Wigmore says:

"The theory of the Hearsay rule is that, when a human utterance is offered as evidence of the truth of the fact asserted in it, the credit of the assertion becomes the basis of our inference, and therefore the assertion

Phipson Ev., 11th Ed., p. 71.
 See Norton, Ev., 101.
 Roscoe, Cr. Ev., 13th Ed., 78.

Norton, Ev., 101. In Fazaruddin v. R., 90 I. C. 453; 1926 Cal. 105; 42 C. L. J. 111, it was held that the fact was not part of the same transaction.

^{23.} Jalpa Prasad v. Emperor, 50 I. C. 487; 17 A. L. J. 760; Phipson, Ev. 11th Ed., p. 71.
24. Hadu v. State, 1951 Orissa 53; I. L. R. (1950) Cut. 509.
25. Chhotka v. State, A. I. R. 1958 Cal, 482; 1958 Cr. L. J. 1170.

can be received only when made upon the stand, subject to the test of cross-examination. If, therefore, an extra-judicial utterance is offered, not as an assertion to evidence the matter asserted, but without reference to the truth of the matter asserted, the Hearsay rule does not apply. The utterance is then merely not obnoxious to that rule. It may or may not be received, according as it has any relevancy in the case; but if it is not received, this is in no way due to the Hearsay rule."1

There is no distinction with regard to the admissibility of the declarations between civil and criminal proceedings. In both they may be used for or against a party2 whether he be called as a witness or not,3 or even though he would be incompetent, if so called.4

Where the accused inflicts injuries on the person of the deceased resulting in fracture of his ribs, and the deceased when questioned, soon after, states that it was the accused, who inflicted the injuries, the statement is admissible under this section, as it was made by the deceased very shortly after he sustained the injuries.5 So where a deed of adoption forms part of the transaction of adoption and a statement was made by the deceased adoptive mother about relationship by adoption, the statement is relevant under this section.6 But evidence pure hearsay does not become admissible under this section. Thus, where the accused is charged under Section 294, Penal Code, for using obscene words towards a school girl and teasing her on road, and the prosecution relies on the sole testimony of a witness who had reached the spot after the incident and was told about the words used by the girl, the evidence being pure hearsay is inadmissible.7 However, evidence as to other offences is relevant and admissible if there is a nexus between the offence charged with the other offence, or the two acts form part of the same transaction, so as to fall within this section.8 In the abovenoted case, the accused was charged under Section 302, Penal Code, with murder. In the morning of the day of the incident, a threat was alleged to have been given by the accused that he would finish off the deceased and also finish himself off. The defence of the accused was one of alibi. His case was that he sustained serious injuries on that day as a result of an attack on him by another named person and that the injuries sustained by him were not self-inflicted. It was held, that the evidence as to the manner in which according to the prosecution, the injuries came to be sustained by the accused, was so closely connected with the offence charged against him as to form part of the evidence upon which the offence charged was sought to be proved, the Sessions Judge could refer to that evidence to the jury on the ground that it was a part of the same transaction.

A fact besides being relevant under this section, by virtue merely of its being so connected with a fact in issue as to form part of the same transaction,

Wigmore, s. 176, 3rd Ed.
 Fellowes v. Williamson, 1829 Moo. Fellowes V. Williamson, 1829 Mod.
 Mal. 303; Milne v. Lelsler, (1862)
 H. & N. 786; R. v. Hunt, B. (1820) Ald. 566.
 Dysart Peerage case (1861) 6 App.

Cas. 516.

^{4.} Bateman v. Bailey, (1794) 5 T. R.. 512: Aylesford Peerage case, 11 App. Cas 1; Phipson, Ev., 11th Ed., p. 84. 5. Krishna Ram v. The State, A. I.

R. 1964 Assam 53: (1964) 1 Cr. L.

Punjabrao v. Sheshrao, I. L. R. 1960 B. 847; A. I. R. 1962 B. 175: 63 Bom. L. R. 726.
 Kashmira Singh v. State, A. I. R. 1962 B. 175: 63 Bom. L. R. 726.

¹⁹⁶⁵ J. & K. 37. 8. Wasu Pillai v. State, I. L. R. 1961 B. 183: A. I. R. 1961 B. 114: 62. Bom. L. R. 857.

may also be relevant on the grounds mentioned in one or other of the succeeding sections. So, where several offences are connected together and form part of one entire transaction, then the one is evidence to show the character of the other.9 Statements relevant under this section may also be used to impeach the credit of a witness under Section 155, or to corroborate his testimony under Section 157,10 or as evidence of intention.11 The section shows only one of the ways in which a fact can be relevant, and it cannot be said that because a fact or statement is not relevant under this section, it is not relevant at all. A statement may not be relevant under this section, but may yet be admissible, e.g., under Section 32,12 or Section 157.13

The section requires that the statement sought to be admitted must have been made contemporaneously with the act or immediately after it and not at such an interval of time as to allow of fabrication or to reduce the statement to a mere narrative of past events.14

- 3. Res gestae. Few phrases in the law of evidence are more persistent than the Latin phrase res gestae. The earlier term was res gesta. Its original meaning seems to have been quite untechnical importing 'a fact', 'a transaction', 'an event'. The plural sometimes indicated not so much the plural - of the English equivalent facts, transactions, as the details or particulars of which a single fact or transaction might be composed.15
 - (a) History of doctrine. The use of the plural form, first met with in the present relation in Aveson v. Kinnaird,16 led to confusion and gave rise to at least four conflicting conceptions, e.g., - (i) one which applies the term res gestae to the main fact in relation to its constituent details, (ii) one which applies it to the details of such fact merely, (iii) one which applies it to the "surrounding circumstances" of same central fact, called in contradistinction, the "principal fact" and (iv) one which applies it to the total whole composed of both "principal fact" and "surrounding circumstances." Not infrequently, indeed two or more of these meanings are confounded in the same definition.17 That is how an ambiguous phrase is apparent from the numerous attempts to define it, a few of which are given below as they are given in Chamberlayne's Trial Evidence.18

The circumstances surrounding the principal fact. 10 Statements accompanying the act are to be proved, which explain it and are reasonably necessary to its proper understanding.²⁰ Words, and declarations accompanying an

^{9.} R. v. Ellis, 6 B. and C. 45, cited

in R. v. Parbhudass, (1874) 11 B. H. C. R. 90, 94; S. 14. Nga San Pu. v. Emperor, 19 Cr. L.J. 155: 43 I.C. 443: A.I.R. 1918 L.B. 81.

^{11.} Muthu Krishna v. Ramchandra, 47 I.C. 611: 37 M.L.J. 489: A.I.R. 1919 M. 659 (statement by testator).

^{12.} Ram Bharose v. Rameswar Prasad Singh 1938 Oudh 26: I.L.R. 13 Luck. 697: 171 I.C. 481: 1937 O. W.N. 1058.

^{13.} Kameshwar Prasad Singh v. Rex 1951 A.L.J. 149

Chhotka v. State, 1958 Cr. L.J. 1170; A.I.R. 1958 Cal. 482, 487; Pratap Singh v. State of M. P., 1970 Jab. L. J. 797. Thayer's Cases on Evidence, 629;

Thaver's same in XV American Law Review,

^{16.} (1805) 6 East. 188.

Phipson on Ev., 11th Ed., 70.

^{18. 2}nd Ed., p. 752.

19. Greenleaf, Ev., 15th Ed., s. 108.

20. Stephen's Dig. Ev., Art. s. 108, (Am. Ed.) Stephen had little or no use for the phrase however, preferring the word "transaction."

act, the nature, object, motives of which are the subject of inquiry,21 declarations which are part of same fact itself are admissible.22

A more comprehensive definition is that of the Earl of Halsbury: "Facts which form part of the res gestae, and are consequently provable as fact relevant to the issue, include acts, declarations and incidents which themselves constitute, or accompany and explain the facts or transaction in issue."28

All definitions insist that the res gestae shall be so connected with the main fact in issue as to form one transaction and that, in comptemplation of law, they are a part of the act itself, and the test of admissibility is that "the declaration and the act must make up one transaction."24

(b) Conflicting views in England and America. In England, the phrase has been given a restricted meaning, to the effect that facts which constitute the res gestae must be such as are so connected with the main transaction or fact under investigation as to constitute a part of it; and it has been declared that the expression "so connected with the transaction" indicates that the words must accompany the act in such a way as to be identical with it.25 The American view goes much farther and covers all relevant facts necessary to the specific proof of the principal fact.1

The English view is succinctly summed up in Dr. Kenny's Outlines of Criminal Law, 17th Edition, page 463 (Section 570) as follows:

"It is unfortunate that owing to the lack of a clear formulation of the nature of hearsay, and of the principles which govern its exclusion, there has arisen a confusion of that topic with what is fundamentally a different one, namely, the law relating to that which has for a long time been called res gestae, two Latin words which are mostly used without any attempt to explain precisely what their meaning is. The Latin words may be translated simply as the 'the events which happened', and for legal purposes they are a term of art restricted to events which happened in the affair which is now being considered by the Court. It is obvious that, in and during the continuance of any factual situation which has been selected for the consideration of a Court of law in a trial (i.e., a fact 'in issue'), there are an infinite number of other events or facts which existed, contemporaneously with this alleged fact in issue which has to be proved. Only a few of these will be found to help to establish the existence or nonexistence of the fact in issue, and the rules as to relevance adequately restrict the admissible evidence to these few. Res gestae therefore comprises all relevant facts or events which are either in issue, or which though not themselves in issue yet accompany some fact which is in issue so as to constitute circumstantial evidence which goes to explain or establish that fact."

^{21.} Phillips, Ev., 10th Ed., s. 152.
22. Thayer's Prelim. Tr. Ev., p. 531.
23. Halsbury's Laws of England, Vol.

^{13, 522 (1934).} 24. Chamberlayne: Trial Evidence, 2nd

Ed., s. 804, p. 753, 25. Chamberlayne: Tr. Ev., 2nd Ed., s. 808, p. 755; Citing Rex v. Bed-ingfield, (1879) 14 Cox, 341,

^{1.} Ibid.

From this point of view, the question of admissibility is really quite a simple one, namely, whether the evidence offered is circumstantial or direct, Lord Normand, in Taper v. R,2 enunciated this principle when he said (omitting the words which make the passage indecisive) at page 587:

"Words sought to be proved should be an item or part of real evidence and not merely a reported statement."

It may be well at this point to warn that if spoken words are themselves a fact in issue, then they are admissible whatever their character; for example, in an action for slander, a witness can, of course, narrate the defamatory words which he heard the defendant utter even though they be a statement at third hand. For, in such cases as these, the question for decision is, "What did that man say?" As stated above, res gestae comprise every sort of relevant evidence or fact associated with the fact in issue; unhappily, both in the books and in the judgments the expression "res gestae" is seldom used except when there is a dispute as to the admissibility of the evidence purporting to state the words spoken by some other person than the present witness; then because of the failure to grasp clearly what are the basic principles of exclusion or admission, there has been engendered an erroneous proposition to the effect that if the words are part of the res gestae, they are admissible and therefore are an exception to the rule against hearsay; from what has been stated above it will be seen that such a proposition contains a double non sequitur.

The American view is set out in the following passage from Underhill's Criminal Evidence, Fifth Edition, Volume I, page 664 and following (Section 266):

"Res gestae is from the Latin meaning 'things done', and includes the circumstances, facts and declarations incidental to the main fact or transaction, necessary to illustrate its character, and also includes acts, words and declarations which are so closely connected therewith as to constitute a part of the transaction. The expression, 'res gestae' as applied to a crime, means the complete criminal transaction from its beginning or starting point in the act of the accused until the end is reached. What in any case constitutes the res gestae of a crime depends wholly on the character of the crime and the circumstances of the case,

"The rule of res gestae, under which it is said that all facts which are a part of the res gestae are admissible, is a rule determining the relevancy and not the character or probative force of the evidence. If the court determines that the fact offered is a part of the res gestae, it will be accepted, because as it is said, that fact is then relevant. Relevancy is always a judicial question to be determined according to the issue which is to be tried. Taking the main facts which are embraced in the commission of any crime and which are essential to be proved, it will be found, in most instances, that they are connected with others which are not essential to be proved, but which tend more or less to prove those facts which are to be proved. Every occurrence which is the result of human agency is more

^{2. (1952)} A.C. 480: (1952) 2 All E. R. 447.

or less implicated and involved with other occurrences. One event is the cause or the result of another, or two or more events or incidents may be collaterally connected or related. Circumstances constituting a criminal transaction which is being investigated by the jury, and which are so interwoven with other circumstances and with the principal facts which are at issue that they cannot be very well separated from the principal facts without depriving the jury of proof which is necessary for it to have in order to reach a direct conclusion on the evidence, may be regarded as res gestae.

"These facts include declarations which grow out of the main fact, shed light upon it, and which are unpremeditated, spontaneous, and made at a time so near, either prior or subsequent to the main act, as to exclude the idea of deliberation or fabrication. A statement made as part of res gestate does not narrate a past event, but it is the event speaking through the person and therefore is not excluded as hearsay, and precludes the idea of design. This rule is applicable to all facts which are relevant, explanatory, or illustrative of, or which characterize the act. Whether utterances may be admissible as res gestae, though separated by time or distance from the principal transaction, depends on the circumstances of the particular case. Whether evidence is admissible as a part of the res gestae rests largely in judicial discretion."

Wharton's Criminal Evidence, 12th Edition, page 624 and following (Section 279):

"When strictly defined, res gestae refers to those exclamations and statements made by either the participants, victims, or spectators to a crime immediately before, during, or immediately after the commission of the crime, when the circumstances are such that the statements were made as a spontaneous reaction or utterance inspired by the excitement of the occasion and there was no opportunity for the declarant to deliberate and to fabricate a false statement. Such res gestae statements may be testified to in court by the declarant or by persons who heard them. This is allowed as an exception to the hearsay evidence rule, on the theory that the circumstances under which the utterances were made stand as a guaranty of their truthfulness.

"Many courts give res gestae a broader scope than above defined and allow the introduction in evidence of statements made under circumstances where no shock or excitement element was present. Under this view, declarations of intention made prior to the occurrence of an event or the commission of a crime have been held admissible as res gestae. Similarly, fears expressed by the victim prior to the commencement of the fatal encounter, and statements made by the defendant upon being arrested, have been admitted as res gestae, although the danger of self-serving declarations in such cases is obvious unless the questioning or the arrest follows the commission of the crime so quickly that there is no time for reflection or fabrication. Explanations made by the parties after the occurrence, as the explanation of a robbery, have also been held admissible

"In some States, res gestae is given an even broader definition to include not only spontaneous utterances, and declarations made before and after the commission of the crime, but also to include real or demonstrative evidence relevant to the crime, and to include testmony, offered at the trial, of witnesses and police officers as to what they heard or observed before, during, or after the commission of the crime; all that occurred at the time and place of the crime, or immediately before or after the crime, if casually related thereto; confessions and admissions of the defendant; and declarations and conduct of co-conspirators and accomplices. In these jurisdictions, it would seem that res gestae has become a term which means little more than a logical relevancy or relationship of the evidence to the crime.

"It view of these three concepts of the res gestae rule, namely (1) the spontaneous concept, (2) the relevant statement concept, and (3) the relevant evidence concept, it is difficult to define the exact scope of the res gestae rule."

(c) Phrase criticised. According to Prof. Wigmore, "The phrase 'res gestae' has long been not only entirely useless, but even positively harmful. It is useless because every rule of Evidence to which it has ever been applied exists as a part of some other well-established principle and can be explained in the terms of that principle. It is harmful, because, by its ambiguity, it invites the confusion of one rule with another and thus creates uncertainty as to the limitations of both. It ought, therefore, wholly to be repudiated, as a vicious element in our legal phraseology. No rule of Evidence can be created or applied by the mere muttering of a shibboleth."3 In Phillip's Treatise on Evidence, which was published in 1814, it was said:

"Hearsay is often admitted in evidence as part of the 'res gestae'.4 But in the 4th Ed., (1819) he struck out the phrase and substituted for it the English word 'transaction.' The framers of the Indian Evidence Act have also scrupulously avoided the use of the phrase in this Act."

- (d) Its place in the law of Evidence. In dealing with such a vague and uncertain concept the first problem to be tackled is to discover what exactly is meant by res gestae and what is its place in the law of evidence. Some judges have used the phrase as a convenient ground for the admission of evidence for which they could find no other basis of its admissibility. So recklessly has the phrase been used by the advocate in adversity that Lord Blackburn once sarcastically remarked: "If you wish to tender inadmissible evidence, say it is part of the 'res gestae'. But, it is submitted, that if all the cases in which the term is improperly applied are marked off and res gestae is confined to its proper sphere, then a formula of greater or less precision will be found to exist."
- (e) Cases in which the term has been improperly applied. (1) The phrase has been frequently referred to as the basis for the admission of 'declarations as to physical and mental feelings.5 Greenleafe and Taylor,7 are of opinion that such declarations are original evidence and have no connection either

Wigmore, Ev., 3rd Ed., s. 1767.
 Ev., Vol. 1, p. 202.
 See s. 24, post.

^{6.} Ev., Vol. I, p. 137.

^{7.} Ev., 10th Ed., para. 580 at p. 409.

with the hearsay rule or the res gestae doctrine. Thayer8 and Phipson9 take the view that they are admissible as part of the res gestae. But, as pointed out by Wigmore, 10 Morgan, 11 Wills 12 and Powell, 18 these statements are offered to prove the truth of the matters contained in them and are, therefore, admitted only by virtue of a special exception to the hearsay rule.

- (2) Complaints in case of rape are sometimes regarded as being an applicat on of the res gestae doctrine and are dealt with under that head,14 but the rule as to admissibility of these complaints is an exceptional rule outside both the res gestae doctrine and the rule against hearsay. 15
- (3) In agency cases, the doctrine of res gestae is sometimes invoked for the admissibility of agents' declarations against the principal. Wills,16 for example, adopts this treatment. But when the substantive law of agency makes one person responsible for the declarations of the latter, they are admissible against the former only where his own declarations would be admissible against him.17 The res gestae doctrine is not in point.
- (4) Declarations of co-conspirators. 18 By a rule of substantive law, the acts of all the conspirators, in furtherance of their common purposes, are regarded as parts of the facts in issue against each conspirator; in the same way, and subject to the same limit, their declarations are admissible against each other to the extent they would be admissible against the actual declarant.¹⁹ In such a case, the use of the phrase res gestae is unnecessary and confusing.
- (5) Completeness: Similar facts.²⁰ Professor Stone²¹ claims that the term is unobjectionable and eminently suitable when correlated with the principle of completeness.22 But the principle of completeness—the necessity of having a complete picture-may be an explanation of why res gestae declarations are received, but we are still left in the position of, 'having to define the limits of "the picture".' Most of cases cited by Professor Stone23 are decisions on the admissibility of similar facts, a head of evidence, which though illustrative of the general principle of completeness in no way depends upon the res gestae doctrine for its reception.24
- (6) Facts in issue.25 In this chapter on res gestae, Phipson declares1 that fact; admissible under that doctrine fall into two classes: (1) constituent facts and (2) accompanying facts. An examination of the former, reveals that what the learned author includes under constituent facts are simply facts in issue and facts relevant to them. There is obviously not only no necessity for using a shadowy phrase I'ke res gestae to cover the admission of this kind of evidence

^{8.} Legal Essays, p. 292.

^{9. 11}th Ed., 96.

^{10.} ss. 1714-1715. 11. 31 Yale, Law Journal, 229, 233.

^{12.} at p. 210.

¹⁰th Ed., p. 68. Best on Ev., 9th Ed., p. 411; see also Phipson, 11th Ed., 84 (reference to the res gestae principle erroreous); Taylor, p. 369.

R. v. Osborne, (1905) 1 K. B. 551, 560; Thayer, Legal Essays, p. 223.

^{16.} at p. 94. Wigmore, s. 1769; Phipson, 11th Ed., 87.

^{18.} See s. 10, post.

See Stond, 55 L.Q.R., p. 79; Thayer, Legal Essays, pp. 268-9; Wigmore, s. 1769.

^{20.} Sec s. 7. post.

See Stone, 55 L.Q.R., p. 80. See also Wigmore, s. 2114. 21. 22.

e.g., R. v. Salisbury, (1831) 5. C. & P. 155: R. v. Rearden, (1864) 4 F. & F. 76; R. v. Ellis, (1826) 6 B. & C. 145; R. v. Cobler, (1862) 3 F. & F. 833.

^{24.} Phipson on Evidence, 11th Ed., pp. 71, 74 and 75 includes similar facts cases under res gestae.

^{25.} See S. 5, ante. 1. See pp. 50 and 65 of 9th Ed.

but also every reason for not doing so2 for example in an action for breach of contract, the testimony of a witness as to statements he had heard which constituted the offer or acceptance or revocation is admissible under the issue. Similarly, with the words of an alleged slander or in an action for defamation. Therefore, it only makes for uncertainty to talk about res gestae in such cases.

- (7) Statements relevant to issue. Lastly, the res gestae phrase is occasionally used in connection with cases in which the statements are really admitted as being relevant to the existence or non-existence of a material fact. For example, if, in a case of a disputed will, the issue is as to the testator's competency and a witness testifies that he had heard the testator say he was Napoleon. That statement is admissible to prove the testator's mental condition and the res gestae doctrine is quite inapplicable.
- (f) Res gestae proper. The fields of evidence in which res gestae has no place having been thus marked off, there remains only one set of circumstances in which the phrase is commonly used to justify admission of evidence, and that is in connection with what Phipson calls "accompanying facts." They are "utterances constituting a verbal part of an act" (or shortly, the verbal act doctrine) and which may be simply called declarations accompanying acts.4 It is with respect to these declarations that the term res gestae has its proper and the only application. Here too it must be noted that it is not all declarations which accompany particular kinds of acts that are admissible. The act which the statement accompanies must be either a fact in issue or a fact relevant to a fact in issue,5 Coltman, I., in Wright v. Tatham put the matter concisely in these words: "I am not aware of any case where the act done is, in its own nature, irrelevant to the issue, and where the declaration per se is inadmissible, in which it has been held that a union of the two has rendered them admissible,"6
- (g) Declarations: Conditions of admissibility. As to the declarations. they must conform to the following conditions:
- (1) The words must explain "or qualify"; for example, the act of handing over or receiving money can be construed either as a loan, a gift or a repayment. The words which accompany the act will be admissible under the res gestae doctrine, if they tend to show which it was.7
- (2) The statement must have been made contemporaneously with the acts, i.e., made either during, or immediately before or after, its occurrence, but not at such an interval from it as to allow of fabrication, or to reduce them to mere narrative of a past event.8

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See Wigmore, s. 1770; Wills, p. 94. 8th Ed

^{3.} p. 65, 9th Ed.

Wigmore, s. 1772.
 R. v. Bliss. (1837) 7 A. & E. 550;
 Pritam Singh v. State, 1972 All W. R. (H.C.) 521: 1972 All. Cri. R.

^{332: 1972} All: L. J. 744. Wright v. Tatham. (1838) 7 A. &

E. 304, 361. See also Hyde v. Palmer. (1863) 32 L. J. Q. B. 126. See Hayslep v. Gymer. (1834) 1 A. & E. 162: Chhotka v. State. A.I.R. 1958 Cal. 482. Phipson Ev., 11th Ed., 82; Thom-

pson v. Trevanion, (1693) Skin 402; R. v. Christie. (1914) A.C. 545, 556, 566, See C.N. Peters v. State. A.I.R. 1959 All. 483; 1959 Cr. L. J. 924—When the accused gives a spontaneous explanation right at the moment the crime is committed, the explanation becomes res gestae: Chhotka v. State, 1958 Cr. I. J. 1170: A.I.R. 1958 Cal. 482, 487: Pratap Singh v. State of M.P., 1970 M.P.I. J. 978, 981: 1970 Jab. I. J. 797 (statement not contemporaneous, and belated).

- (3) It is sometimes said that the statements must have been made by the person who did the act which the statements accompany.9 But this limitation cannot be taken as invariable, for the exclamations of mere bystanders may sometimes be both relevant and admissible.10 In Stephen's Digest, Art. 9, it is said that statements accompanying an act are limited to those made "by or to the party doing the act," but this article should probably be read with Art. 3, in which R. v. Fowkes11 is cited in illustration. In cases of conspiracy, riot and the like the declarations of all concerned in the common object, although not defendants, are admissible. 12 But, it has already been seen that in such cases, the use of the phrase res gestae is unnecessary and confusing.
- (h) Documentary declarations. It is immmaterial whether declarations accompanying and explaining an act are oral or written,18
- 4. Facts forming part of the same transaction. A "transaction" as the derivation denotes, is something which has been concluded between persons by a cross or reciprocal action as it were. The word "transaction" in its largest sense means "that which is done."14 For the purpose of this section, it must be said that a transaction is group of facts so connected together as to be referred to by a single legal name, e.g., a contract, tort or crime. Whether any particular fact is, or is not, part of the same transaction as the fact in issue is a question of law upon which no principle has been stated by authority and on which single Judges have given different decisions.15 There are many incidents, which though not strictly constituting a fact in issue, may yet be regarded as forming a part of it, in the sense that they closely accompany and explain that fact. These constituents or accompanying incidents are in law said to be admissible as forming part of the res gestae or main fact.16

The phrase 'same transaction' occurs also in Sections 235 and 239 of the Criminal Procedure Code, and it has been held in numerous cases that whether a series of acts are so connected together as to form the same transaction is purely a question of fact depending on proximity of time and place, continuity of action and unity of purpose and design.17

The area of events covered by the term res gestae depends upon the circumstances of each particular case. There is obvious scope for considerable

 Howe v. Malkin, (1878) 40 L.T. 196: 27 W.R. 340.
 R. v. Fowkes. (1856), Times, March 8th. (1856) cited in Stephen, Dig. Ev. Art. 3n; Milne v. Liesler, (1862) 7 H. & N: 786. See also Bennison v. Cartwright, (1864) 5B. & S. 1: Stanley v. White, (1811) 14 East 332. The Schwalbe Swab 52, 1860 Moore P.C. 241, Wharton Ev., рата 260.

The Times March 8. (1856)

11. The Times March 8. (1850)

12. R. v. Gordon, (1781) 21 How. St. Tr. 535: R. v. Hunt Schwalbe, (1820) 3 B. & Ald. 566, 574-6; R. v. O. Connell, (1844) 1 Cox 403.

13. Home v. Newman, (1931) 2 Ch. 112; Young v. Schuler, (1883) 11 Q.B.D. 651 (C.A.): Parrott v. Perrott, 14 Fast 423; Parrott v.

Watts, 37 L.T. 577; R. v. Podmore,

22 Cr. App. R. 36.
14. Gujja Lal v. Fattch Lal, 6 Cal.
171, 185 (F.B.), per Jackson, J.
15. Steph. Dig. Art. 3; R. v. Vyapoory, (1881) 6 C. 655, 662.

poory, (1881) 6 C. 655, 662.
Halsbury's Laws of England, 3rd.
Ed., Vol. 15, para, 509, B. Choukhani v. Western India Theatres,
Ltd., A. I. R. 1957 Cal. 709;
Pritam Singh v. State, 1972 All W.
R. (H.C.) 521: 1972 All Cri. R.
332: 1972 All L. J. 744.
Backbaran v. Emperor. 1944 Cal.

17. Becharam v. Emperor, 1944 Cal. 224; I.L.R. (1944) 1 Cal. 398; 213 I.C. 401; Hirday Singh v. Emperor, 1946 Pat. 40; I.L.R. 24 Pat. 501; 227 I.C. 404; I.L.R. (1973)

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RELEVANCY OF FACTS FORMING PART OF SAME TRANSACTION

difference of opinion as to what facts together constitute the event or transaction in dispute and also as to what facts accompanying it are necessary to be proved in order that it should be brought before the Court in its true light. If the evidential fact in question is, in the particular circumstances, either an integral part of the event or transaction itself, or so connected with it as to be of real value in determining its existence or its true nature, then such fact is admissible as part of the res gestae, otherwise not.18

The contemporaneous dialogue or conversation between the complainant and the accused forms part of the res gestae.19

- 5. Constituents of res gestae. The res gestae may be defined as those circumstances which are the automatic and undesigned incidents of a particular litigated act and which are admissible when illustrative of such act. These incidents may be separated from the act by a lapse of time more or less appreciable. A transaction may last for weeks. The incidents may consist of sayings and doings of any one absorbed in the event whether participant or bystander; they may comprise things left undone as well as things done. They must be necessary incidents of the litigated act in the sense that they are part of the immediate preparation for or emanations of such act and are not produced by the calculated policy of the actors. They are the act talking for itself, not what people say when talking about the act. In other words, they must stand on an immediate casual relation to the act-a relation not broken by the interposition of voluntary individual wariness, seeking to manufacture evidence for itself.
- 6. Test of admissibility. The test of the admissibility of evidence as part of the res gestae is-
 - (a) whether the act, declaration, or exclamation, is so intimately interwoven or connected with the principal fact or event, which it characterises, as to be regarded as a part of the transaction itself, and
 - (b) also whether it clearly negatives any premeditation or purpose to manufacture testimony.20

Incidents that are thus immediately and unconsciously associated with an act, whether such incidents are doings or declarations, become in this way evidence of the character of the act.

- 7. Conditions for admissibility. Where the transaction consists of different acts, in order that the chain of such acts may constitute same transaction, they must be connected together by-
 - (a) proximity of time,
 - (b) proximity or unity of place,

Phipson, 11th Ed., 71.
 Yusu(alli Esmail v. State of Maharashtra, (1967) 3 S.C.R. 720: 1968 S.C.D. 347: (1968) 1 S.C.J. 511: (1967) 2 S.C.W.R. 934: 1968 A.W.R. (H.C.) 268: 70 Bom.

L.R. 76: 1968 M.L.J. (Cr.) 247: 1968 Mah. L.J. 179: 1968 Cr. L. J. 103: A.I.R. 1968 S.C. 147, at pp. 148, 149.

^{20.} Corps Juris Secundum, Vol. XXXII, s. 403, p. 21.

- (c) continuity of action, and
- (d) community purpose or design,21

Where the incidents consist of declarations accompanying an act they are subject to three important qualifications:

- (1) They must not be made at such an interval as to allow of fabrication or to reduce them to the mere narrative of a past event;
- (2) They must relate to, and can only be used to explain, the act they accompany and not independent facts prior or subsequent thereto; evidence as to other offences would be relevant and admissible, if there is a nexus between the offence charged with the other offences of the two acts forming part of the same transaction, so as to fall within this section.22
- (3) Though admissible to explain, they are not always taken as proof of the truth of the matter stated, that is, as hearsay.23

Hearsay statements to be admissible as substantive evidence of the truth of the facts stated therein must themselves be "part of the transaction" and not merely uttered in the course of the transaction. Where the transaction is a single incident, a statement by a person who was perceiving the incident, made simultaneously with the occurrence of the incident, may, with justification, be said to be part of the transaction inasmuch as it is the result of a spontaneous psychological reaction through perception. While no doubt the spontaneity of the statement is a guarantee of its truth, the reason for its admissibility under this section is that it is part of the transaction and not merely because it is spontaneous,24

Declarations to be admissible as res gestae should be contemporaneous with the transactions in issue, that is, the interval should not be such as to give time or opportunity for fabrication, and they should not amount to a mere narrative of a past occurrence. They are admitted when they appear to have been made under the influence of some principal transaction relevant to the issue and are so connected with it as to characterize or explain it. A bare statement of the complainant made to a third person after the complaint to the police has been made is not admissible.25 It is the power of perception, unmodified by recollection, that is appealed to; not of recollection modifying perception. Whenever recollection comes in, whenever there is opportunity for reflection and explanations, then statements cease to be part of the res gestue. Unsworn declarations which are received as part of the res gestae do not depend for their effect on the credit or credibility of the declarant, but

^{21.} Amrita Lal v. Emperor, 29 I. C. Amrita Lai v. Emperor, 29 1. C. 513; 21 C. L. J. 331; 19 C. W. N. 676; 42 C. 957; 16 Cr. L. J. 497; Ata Muhammed Khan v. The Crown, 1950 Lah, 199 (F.B.); Hadu v. The State, 1951 Orissa 53; I. L. R. (1950) Cut. 509.

Wasu Pillai v. State, A. I. R. 1961

Bons, 114: 1961 Cr. L. J. 466. 23. Halsbury's Laws of England, 3rd Ed., Vol. 15, para. 509; see also

Phipson, Ev., 11th Ed., 81; Llyod v. Powell etc. Co., (1914) A. C. 733; R. v. Christie, 1914 A. C.

<sup>545, 553.

24.</sup> Hadu v. The State, 1951 Orissa 53:
I. L. R. (1950) Cut. 509.

25. Noor Mohanmad v. Imtiaz Ahmad, 1942 Oudh 130; 197 I. C. 839: 43
Cr. L. J. 280: 1941 O. W. N. 1290.

derive their probative force from their close connection with the occurrence which they accompany and tend to explain, and are admissible as original evidence, although it is frequently stated that they are received under an exception to the hearsay rule.1 Declaration to be admissible must be made during the transaction. If made after its completion, they are too late,2 but it is no objection that they are self-serving.2 The minor married girl, who was abducted by the accused, after her recovery stated to her uncle that the accused had run away with her ornaments. This statement of the girl immediately after the occurrence was admissible as res gestae under Section 6 of the Evidence Act and provided the necessary corroboration so as to lend assurance about the trustworthiness of the witness's testimony on the question of exercise of dishonest inducement by the accused.4

The circumstances, facts and declarations, which grew out of the main fact, are contemporaneous with and serve to illustrate its character, as part of the res gestae. Thus, the contemporaneous dialogue between the complainant and the accused in the case of an offence under Section 165-A, I. P. C., forms part of the res gestae.5 Whenever a fact is a link in a chain of facts necessary to establish another fact, it is, of course, admissible. In some cases, an offence consists of a series of transactions; in such cases, evidence is admissible of any act which goes to make up the offence.6

Where the only evidence against a prisoner charged with having voluntarily caused grievous hurt was a statement made in the presence of the prisoner by the person injured to a third person immediately after the commission of the offence and the prisoner did not, when the statement was made, deny that she had done the act complained of, it was held that the evidence was admissible under this section and Section 8, illustration (g) of this Act.7 But where it did not appear how long an interval had elapsed between a murder and the statement of an alleged bystander, whose condition of mind did not seem to have been such as to exclude the supposition that this evidence was fabricated, it was held that his statement was inadmissible under this section.8 The doctrine of election (in Criminal trials) is closely connected with that about the admissibility of collateral facts which, though not in issue, may be relevant under this section, if they form part of the same transaction.9 The cases cited below may be further consulted in connection with this section.10 Certain per-

Corpus Juris Secundum, Vol. YXXII, s. 403, p. 21.
 Chain Mahto v. R., (1907) 11 C. W. N. 266.

^{3.} Wharton, Ev., ss. 258-262, See definitions of Supreme Court of Georgia cited in Rice, Ev., 375.

^{4.} Ram Das v. State, 1972 Cr. L. J.

Ram Das v. State, 1972 Cr. L. J. 57 at 58 (All.).
 Yusufalli Ismail Nagree v. State of Maharashtra, (1967) 3 S. C. R. 720; 1968 S. C. D. 347; (1968) 1 S. C. J. 511; (1967) 2 S. C. W. R. 934; 1968 A. W. R. (H.C.) 268; 70 Bom. L. R. 76; 1968 Cr. L. J. 103; 1968 M. P. L. J. 114; 1968 M. L. J. (Cr.) 247; 1968 M. L. W. (Cr.) 12; 1968 Mah. L. J. 179; A. J. R. 1968 S. C. 147, 148.
 Roscoe Cr. Ev. 13th Fd., 77, 78; Norton; Ev., 102.

Norton; Ev., 102.

^{7.} In re. Surat Dhobni, (1884) 10 C.

^{8.} Chain Mahto v. R., (1907) 11 C. W. N. 266.

R. v. Fakirapa, 15 B. 491, 496,
 502; see also Ss. 220, 223 Cr. Pr.

Code, 1973; Taylor, Ev., s. 329. 10. R. v. Birdseye, (1830) 4 C. & P. 386; R. v. Rearden, (1864) 4 Fost. & Fin. 76; R. v. Ellis, (1826) 6 B. & C. 145; R. v. Cobden, (1862) 3 Fost. & Fin. 833; R. v. Young, R. & R., C. C. R. 280, note; R. v. Westwood, 2 Dowl N. S. 361; R. v. Cobden, 4 C. & P. 547; R. Cobden, 4 C. & P. 547; R. v. Willis, (1845) 1 Den G. C. 80; R. v. Rooney, (1836) 7 C. & P. 517; R. v. Whiley, (1804) 2 Lea. 983; R. v. Long, (1833) 6 C. & P. 179; R. v. Firth, 1869 L. R. 1 C. C. R. 172; R. v. Salisbury, (1833) 5 C. & P. 155, 157; see cases cited in Steph. Dig. Art, 3: 2' East P. C. 934.

sons were convicted of robbery and murder, and on its appearing that the two offences constituted part of the same transaction, it was held that recent and unexplained possession of the stolen property, which would be presumptive evidence against the prisoners on the charge of robbery was similarly evidence against them on the charge of murder.11

- 8. Statement of ravished woman. In certain cases, e.g., in cases of sexual offences against woman, statements made to third parties are in certain circumstances admissible. But the careful limits placed upon the admissibility of such statements is evidence of the jealousy with which their admission is regarded. They must be complaints, made voluntarily and at the earliest convenient moment, and even then they are received not as evidence or corroboration of the facts complained of, but as evidence of the credibility of the complainant's testimony to the facts alleged, and where consent is a defence, to negative consent. They are inadmissible in any other class of cases. 12 The particulars of the complaint made by the ravished woman may, so far as they relate to the charge against the accused, be given in evidence, not as being evidence of the facts complained of but as evidence of consistency of the conduct of the prosecutrix with the story told by her in the witness-box and as negativing consent on her part.13 They are admissible as evidence of conduct under Section 8,14 but the complaint made by the woman does not form part of the res gestae and is not admissible under this section.15
- 9. First Information Report. The first information report of a crime is not a substantive piece of evidence, but can be used only for corroborative purposes.16 Ordinarily, it is proved by the prosecution for the purpose of corroborating the first informant and cannot be treated as substantive evidence. It may be used by the defence under Section 145, post. It may, however, be admissible as substantive evidence under Section 32, post, if the informant had died as a result of an attack on him.17
- 10. Illustrations. (a) Illustration (a). Bystanders. The word "bystanders" in illustration (a) means the persons who are present at the time of occurrence and not the persons who gather on the spot after it. The remarks made by persons other than the eye-witnesses could only be hearsay, because they must have picked up the news from others.18 Hearsay evidence of statement of a bystander as to an occurrence would be admissible in evi-

^{11.} R. v. Sami, (1890) 13 M. 426.

^{12.} Richard Gillie v. Posho, Ltd., 1939 P. C. 146: 182 I. C. 27: 50 L. W. 81.

^{13.} R. v. Lillyman, (1896) 2 Q. B. 167: 18 Cox C. C. 346: 65 L. J. M. C. 195; 74 L. T. 730; 44 W. R. 634.

^{14.} See Illustration (j) to that section.
15. Kappinaiah v, Emperor, A. I. R.
1931 Mad. 233 (2): 131 I. C. 456:
1930 M. W. N. 702, See also Sree
Hari Swarnakar v. Emperor, A. I.
R. 1930 Cal. 132: 124 I. C. 175;
Nga San Pu v. Emperor, 19 Cr.
L. J. 155: 43 I. C. 443: A. I. R.
1918 L. B. 81; Ghulam Hussain v.
Emperor, 1930 Lan. 337: 127 I. C. Emperor, 1930 Lan. 337: 127 I. C. 862; Raman v. Emperor, 1921 Lah. 258, Emperor v. Phagunia, 1926

l'at. 58; 26 Cr. L. J. 1475; 89 I. C. 1043; In re Surat Dhobni, (1884) 10 Cal. 302.

^{16.} Waris Khan v. Emperor, 1940 Oudh 209: I, L. R. 15 Luck. 429; Mahadeo v. Ram Kuber, 1943 Oudh 451; 209 I. C. 114. 17. Inchan v. Emperor, 1943 Cal. 647; 210 I. C. 322; 45 Cr. L. J. 210. 18. Nasir Din v. Emperor, 1945 Lah.

^{16:} I. L. R. (1944) Lah. 461: 218 I. C. 242: See also Pakhar Singh v. Emperor, 1925 Lah. 578: 91 I. C. 812: 27 Gr. L. J. 140; Hadu v. The State, 1951 Orissa 53: I. L. R. (1950) Cut. 509; Mahendra v. State of M. P., 1975 Cr. L. J. 110: 1974 M. P. L. J. 357: 1974 Jab. L. J.

dence as a part of the res gestae only, if it was made at the time the transaction was taking place, or so shortly before or after it as to form part of the transaction. If the transaction has terminated when the statement was made it would be irrelevant.¹⁹

In the undernoted case, the place where a murder was committed was occupied by a number of persons besides the deceased and the eye-witnesses. The evidence showed that these persons came up immediately after the murder and it was alleged that they were informed by the eye-witnesses as to who the culprits were. It was held, that though those persons did not actually see the culprits, their evidence was material, not with a view to prove the actual fact of murder, which was in 'issue', but to prove the 'relevant fact' that, just after the event, the eye-witnesses disclosed the names of the culprits to those who came there-this relevant fact being so connected with the fact in issue as to have necessitated the giving of evidence on that relevant fact itself.20 Where the cries of the child of a murdered woman attracted the passers-by, it was held that witnesses could speak not only of the child's cries but even as to what the child said, so far as it explained their conduct.21 There was admissible and credible evidence of five witnesses, who heard or watched from outside, from varying distances, of what was going on in the Verandah. but no eye-witness was produced who could prove what actually took place inside the room where the murder was committed. The only evidence given of what could have taken place inside the room was the cry of "Bacaho" "Bachao" although there was some understandable variation between accounts of witnesses as to whether the murdered woman also uttered some more words showing that she was being actually killed. The evidence of witnesses about what the children said or did at the time of murder of their mother is admissible under Section 6 of the Evidence Act. Where the children had refrained from revealing any facts against their father, when they were questioned by relations or by the Police it could be said that there was no point in producing the children. The Court could also have rightly decided, in such circumstances, not to examine the children under Section 311, Criminal Procedure Code, 1973. But omission to produce the maid-servant who was also in the Verandah at the time of the murder although her statement was recorded under Section 164, Criminal Procedure Code and was brought on the record. The statement could only be used as evidence to corroborate or contradict testimony of the maid-servant if she had appeared as a witness at the trial. The accused could, therefore, quite reasonably ask the Court to give him the benefit of the optional presumption under Section 114, Illustration (g) of the Evidence Act and to infer that, if she had been produced, it would have damaged the prosecution case against the appellant,22

The word 'transaction' is used in this illustration in the limited sense of the particular incident, though it is used in a more general sense in the remaining illustrations.²³

Chain Mahto v. Emperor, 11 C. W. N. 266.

^{20.} Malendra Pal v. State, 1955 All.

Raban Lalu v. Emperor, 1938 Sind 97; 175 I. C. 324; 39 Cr. L. J. 618

Sawal Das v. State of Bihar, 1974
 Cr. L. J. 664 at 668; 1974

Cri. App. R. 71: 1974 S. C. D. 220: 1974 Chand L. R. (Cri.) 391: (1974) 3 S. C. R. 74: 1974 Cri. L. J. 664: 1974 S. C. C. (Cri.) 362: 1974 Cri. L. R. (S.C.) 186: (1974) 4 S. C. G. 193: A. I. R. 1974 S. C. 778.

^{23.} Queen-Empress v, Fakirappa, 15 B.

- (b) Illustration (b). Section 10 post. That war was waged is one of the facts in issue. The occurrences are part of that fact.
- (c) Illustration (c). Compare R. v. Pearce,24 and R. v. Barnard.25 Even other letters written by B to third persons are admissible as proof of handwriting and thus of authorship.1
- (d) Illustration (d). The deliveries are relevant as being part of the fact in issue, did the goods pass to A?
- 7. Facts which are the occasion, cause or effect of facts in issue. Facts which are the occasion, cause, or effect, immediate or otherwise, of relevant facts, or facts, in issue, or which constitute the state of things under which they happened, or which afforded an opportunity for their occurrence or transaction, are relevant.

Illustrations

(a) The question is, whether A robbed B.

The facts that, shortly before the robbery, B went to a fair with money in his possession, and that he showed it, or mentioned the fact that he had it, to third persons, are relevant.

(b) The question is, whether A murdered B.

Marks on the ground, produced by a struggle at or near the place where the murder was committed, are relevant facts.

(c) The question is, whether A poisoned B.

The state of B's health before the symptoms ascribed to poison, and habits of B, known to A, which afforded an opportunity for the administration of poison, are relevant facts.

s. 3 ('Tact"). s. 3 ("Relevant"). s. 3 ("Facts in issue").

Steph. Dig.-Art. 9, and note; Steph. Introd., Ch. III; Phipson Ev., 11th Ed., 169, 170, 217; Norton Ev., 103; Cunningham, Ev., 90; Wigmore, Ev., Sections 131-134, Best Ev., Section 453. Will's Circ. Ev. passim.

SYNOPSIS

- Principle.

Causation.
 Opportunity.

- Report of Court of Enquiry under section 7 of the Aircraft Act, 1934, read with Rule 75 of Aircraft Rules.
- 5. Similar unconnected facts: (a) Principle of exclusion.

(b) Exceptions to the rule.(c) Halsbury on similar facts.

Dissimilar facts.

- 7. Proof of similar acts (criminal and civil).
- 8. Contemporaneous record of conver-

1. Principle. The reason for the admission of facts of this nature is that, it is desired to decide whether a fact occurred or not, almost the first natural step, is to ascertain whether there were facts at hand calculated to produce or afford opportunity for its occurrence, or facts which its occurrence

Pea R. 75, per Lord Kenyon,
 19 How St. Tr. at 825-826.

Jones v. Richard. (1885) 15 Q. B. D. 439; 1 T. L. R. 660, D. C.

was calculated to produce. Further, in order to the proper appreciation of a fact, it is necessary to know the state of things under which it occurred.2

2. Causation. Leaving the transaction itself, the present section embraces a larger area and provides for the admission of several classes of facts, which, though not possibly forming part of the transaction, are yet connected with it in particular modes (viz., as occasion, cause; as giving opportunity for its occurrence or as constituting the state of things under which it happened), and so are relevant when the transaction itself is under enquiry. These modesoccasion, cause, effect, opportunity-are really different aspects of causation. When an act is done and a particular person is alleged to have done it (not through an agent but personally), it is obvious that his physical presence, within a proper range of time and place, forms one step on the way to the belief that he did it. If it be asked, whether the mere possibility involved in opportunity is not too slender and whether something more than mere opportunity, for example, exclusive opportunity, should not first be shown, the answer is, that, by the very showing of an opportunity, countless hypotheses are negatived; and the person charged, who might otherwise have been one of innumerable other persons at the time, is shown to have been one of the limited number, who were in a position to do this particular act. In short, opportunity alone and not exclusive opportunity, is a sufficient showing for admissibility.8 On the other hand, no circumstance can be more informative of a charge than that the accused had no opportunity of committing the crime. On the strength of this rests the force of a defence founded on an alibi.4 But care must be taken against a hasty inference from opportunity for, to commission of, a crime. There can be no crime without the opportunity; but there is a wide gulf to be bridged over by evidence between opportunity and commission."

Where the fact in issue is, whether the accused had committed the murder of the deceased, the facts that the accused had taken money and ornaments from the deceased and that the deceased had, on the day of murder, gone to the accused to demand the money and ornaments, are relevant facts showing occasion, cause or effect of the fact in issue.6

Evidence, that there were footprints at or near the scene of the offence under enquiry or that these footprints came from a particular place or led to a particular place, is relevant evidence under this section.7

3. Opportunity. Facts which afford an opportunity for the occurrence of a transaction are relevant. Illustration (c) refers to circumstances affording an opportunity for the commission of a crime of administering poison. No offence can be committed without a proper opportunity for the accused to commit it. Physical presence of the time and place in issue or opportunity is a part probandum. The inference is not, ordinarily, a strong one; its chief value is that it prevents the accused from denying his presence. But the frequent difficulty here is that the evidentiary fact is not that the accused was

Cunningham, Ev., 90, 91. Introd., Ch. III: knowledge of circumstances enabling a person to do also relevant, the act is thus illust. (c). Wigmore. Ev., s. 131.

^{4.} See S. 11. post. 5. Norton, Ev., 104: Best Ev., s. 453;

see cases cited in Starkie, Ev., Ed., 864, note: Wills' Circ. Ev.,

⁶th Ed., 82, 356.

Dr. Jainand v. Rex. 1949 All. 291:
50 Cr. L. J. 498; 1949 A. L. J. 60.
Sidik Sumar v. Emperor. 1942 Sind
11: J. L. R. 1941 Kar. 525; 198
J. C. 110: 43 Cr. J. 7 309 I. C. 110: 43 Cr. L. J. 308.

present at the exact time and place of the act but that he was near enough to be able to be there at the exact time and place. Therefore, it should be the endeavour of prosecution, not only to prove opportunity but exclusive opportunity, thereby forging an important link in the chain of evidence against the accused. The only important aspect of opportunity of evidence is that, in murder cases, the circumstance that the deceased was last seen alive with the prisoner is often relied upon to show that he had opportunity to commit the offence. Once the prosecution establishes that the deceased was last seen alive with the prisoner, it becomes incumbent on the accused to explain that fact either by showing that his being seen together with the deceased had an innocent explanation, or by establishing additional facts to show that just before the murder could have taken place he had left the company of the deceased and was elsewhere than at the scene of crime, or that he was not the person at all seen with the deceased and had been mistakenly identified.8

- 4. Report of Court of Enquiry under Section 7 of the Aircraft Act, 1934, read with Rule 75 of Aircraft Rules. The enquiry under Section 7 of the Aircraft Act, 1934, read with Rule 75 of the Aircraft Rules is a formal and statutory enquiry. It is not a private enquiry. The report of the Court of Enquiry is a relevant fact under Section 5 of this Act, because it bears on the question of the existence or non-existence of a fact in issue and of such other facts which are regarded as relevant under this Act. This report is also a fact which speaks of the occasion, cause or effect of facts in issue under this section. The report is also admissible as a fact under Section 9 of this Act, because it is a fact necessary to explain or introduce a fact in issue or relevant fact, or which supports or rebuts an inference suggested by a fact in issue or relevant fact, or fix the time and place at which any fact in issue or relevant fact happened.9
- 5. Similar unconnected facts. Generally speaking, it is not admissible to prove the fact in issue by showing that facts similar to it, but not part of the same transaction, have occurred on other occasions. Facts which are sought to be made relevant merely from their general similarity to the main fact or transaction, and not from some specific connection therewith, are not admissible to show its existence.10
- (a) Principle of exclusion. Such facts, though often of moral weight i.e., logically relevant, are rejected as legal evidence on the grounds of policy and fairness, since they tend to waste time, embarrass the enquiry with collateral issues, prejudice the parties with the jury and encourage attacks without notice.11 In Makin v. Attorney Genera' for New South Wales,12 Lord Herschell, then Lord Chancellor, laid down two principles which must be observed in a case of this character. Of these, the first was that:

9. Indian Airlines Corporation v. Ma-

Attorney-General, N. S. W. 1894 A. C. 57 at p. 65, per Lord Hers-

11. Phipson, Ev., 11th Ed., 161 citing R. v. Oddy, (1851) 2. Den. C. C. 264; Att. Gen. v. Nottingham Corporation, (1964) 1 Ch. 673; R. v. Bond, (1906) 2 K. B. 389, 397-

(1894) A. C. 57 at p. 65; 63 L. J. P. C. 41.

^{8.} Hadu v. The State, A. I. R. 1951 Orissa 53; Mohd. Sabir v. Rex, A. I. R. 1952 All. 796; 1952 Cr. L. J. 1277.

dhuri, A. I. R. 1965 C. 252. Steph. Dig., Art. 10; Phipson, Ev., 11th Ed., 169; Best Ev., ss. 506— 510; Taylor, Ev., ss. 317—326; Broom's Legal Maxims, 908; Ros-510; Taylor, Ev., ss. 317-326; Broom's Legal Maxims, 908; Roscoe, N. P. Ev., 84-86; Powell, Ev., 9th Ed., 60-64 and v. post; Makin

"It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person, likely from his criminal conduct or character to have committed the offence for which he is being

In 1934, this principle was said by Lord Sankey, then Lord Chancellor, with the concurrence of all the noble and learned Lords who sat with him, to be "one of the most deeply rooted that jealously guarded principles of our criminal law and to be fundamental in the law of evidence as conceived in this country."13

The meaning of the rule, excluding transactions similar to, but unconnected with, the facts in issue, is, that inferences are not to be drawn from one transaction to another which is not specifically connected with it, merely because the two resemble one another. They must be linked together by the chain of cause and effect in some assignable way before an inference may be drawn.14 They are not facts in issue and are, therefore, excluded by the fifth section. They are not parts of the same transaction so as to be admissible under the sixth section, and there is no principle of causation which would render them relevant under this section. The maxim res inter alios acta is frequently supposed to express the principle of exclusion in such cases; but, this is incorrect, for similar transactions inter partes would be equally inadmissible in this relation. The maxim has its principal utility in the domain of substantive law.15 And so when, as in a well-known case, the question was whether A, brewer, sold good beer to B, publican, the fact that A sold good beer to C, D and E, other publicans, was held to be irrelevant. 16 Nor, when an act has been proved to show that a given party did the act, evidence may be tendered of similar acts done either by himself, with the object of showing a disposition, habit or propensity to commit, and a consequent probability of his having committed, the act in question, or by others, though similarly circumstanced to himself, to show that he would be likely to act as they.17 And so, when the question is, whether A committed a crime, the fact that he formerly committed another crime of the same sort, and has tendency to commit such crimes is irrelevant.18

^{13.} Maxwell v. The Director of Public

Prosecutions, (1934) A. C. 309 at pp. 317, 320: 106 L. J. K. B. 501.

14. Steph. Dig., p. 163.

15. Phipson, Ev., 11th Ed., 215; Steph. Dig., Art. 10, and n. vi, p. 162: Best, Ev., ss. 112, 506-510; Taylor, Ev., 317, 326; Brown's Legal Maxims, 954-968 954-968.

^{16.} Holcumbe v. Hewson, 2 Camp. 391; if it had been shown that the beer sold to all was of the same brewing, Steph. Dig Art. 10 illust, (b); so (unless a general custom be proved) the terms on which A let land to B are no evidence of the terms on which A let lands to other tenants. Carter v. (1791) Peake, 130; see Hollingham v.

Head, (1858) 4 C. B. (N. S.) 388; Spencely v. DeWillott, (1806) 7 East. 108; Smith v. Wilkins, (1833) 6 C. & P. 180; Taylor. Ev., ss. 317-326.

^{17.} Phipson, Ev., 11th Ed. 213; and text-books cited ante, and notes to S. 14, post; as to the converse cases of character and course of business v. post, Ss. 52-55, 16.

v. post, Ss. 52-55, 16.

18. Steph. Dig. Art. 10, illust. (a): R. v. Cole, (1810) cited 1 Phill. & Aron. Ev., 10th Ed., 508 the Judge's note is now printed in L. R. 1946, 7 L. B. at p. 544; Steph. Dig. pp. 162-164; see S. 14, post illust. (n) and (p); Makin v. Attorney-General, N. S. W. (1894) A. C. 57, 65.

(b) Exceptions to the rule. If, however, the similar acts are so related to the main act as to show the party's identity, irrespective of any general propensity, they will be admissible, notwithstanding that they may also tend to show such propensity.19 So, to show that A was a writer of a libellous letter other letters written by A to third persons are admissible as proof handwriting and thus of authorship,20 and it would be immaterial for this purpose whether the other letters were libellous or not.21 Similar facts are also admissible to corroborate testimony as to identity, though they might not be receivable as substantive evidence thereof.22

Similar facts under the present rule are inadmissible whether proved by the direct admissions of the party himself, or by independent witnesses.

The second principle stated in Makin's case23 was that .

"...the mere fact that the evidence adduced tends to show the comission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental or to rebut a defence which would otherwise be open to the accused."

This statement of principle has given rise to some discussion. A plea of not guilty puts everything in issue which is a necessary ingredient of the offence charged, and if the prosecution were permitted, ostensibly in order to strengthen the evidence of a fact which was not denied and perhaps could not be the subject of a rational dispute, to adduce evidence of a previous crime, it is manifest that the protection offered by the "jealously guarded" principle enunciated above would be gravely impaired. This aspect of the matter was considered by the House of Lords in Thompson v. R.24 in which Lord Sumner dealt particularly with the difficulty referred to and stated his conclusion as follows:

"Before an issue can be said to be raised, which would permit the introduction of such evidence so obviously prejudicial to the accused, it must have been raised in substance if not in so many words, and the issue so raised must be one to which the prejudicial evidence is relevant. The mere theory that a plea of non-guilty puts everything material in issue is not enough for this purpose. The prosecution cannot credit the accused with fancy defences in order to rebut them at the outset with same damning piece of prejudice."

Referring to this, and agreeing with the spirit and intention of Lord Sumner's words their Lordships of the Privy Council in Noor Mohamed v. The King25 observed as follows:

^{19.} Phipson, Ev., 11th Ed. pp. 169-170. See also R. v. Hall, (1952) 1 K. B. 302; 35 Cr. App. R. 167; R. v. Straffen, (1952) 2 All E. R. 657; R. v. Robinson, 1953 Q. B. D. 911: 36 Cr. App. R. 132; (1953) 37 Cr. App. R. 95: (1953) 2 All E. R. 334.

^{20.} Jones v. Richards, (1885) 15 Q. B. D. 439; see illust. (c) to S. 6 ante.
21. R. v. Pearce, (1791), Peak 106, per Lord Kenyon; see also R. v. Barnard, 19 How, St. Tr. 825-6

threatening letter.

ib., R. v. Burlison, (1914) 11 Cr. App. R. 39; R. v. Chitson, (1909) 2 K. B. 945; Perkins v. Jefferey, (1915) 2 K. B. 702.

Makin v. Attorney-General, N. I. W. (1894) A. C. 57: 63 L. J. P.

⁽¹⁹¹⁸⁾ A. C. 221: 87 L. J. K. B.

¹⁹⁴⁹ P. C. 161: 53 C. W. N. 736: 1949 M. W. N. 437: 62 L. W. 530.

"On principle, however, and with due regard to subsequent authority,1 their Lordships think that one qualification of the rule laid down by Lord Summer must be admitted. An accused person need set up no defence other than a general denial of the crime alleged. The plea of not guilty may be equivalent to saying 'let the prosecution prove its case, if it can,' and having said so much, the accused may take refuge in silence. In such a case, it may appear, for instance, that the facts and circumstances of the particular offence charged are consistent with innocent intention, whereas further evidence which incidentally shows that the accused has committed one or more other offences, may tend to prove that they are consistent only with a guilty intent. The prosecution could not be said to be 'crediting the accused with a fancy defence' if they sought to adduce such evidence. In all such cases the Judge ought to consider whether the evidence which it is proposed to adduce is sufficiently substantial, having regard to the purpose to which it is professedly directed, to make it desirable in the interest of justice that it should be admitted. If, so far as that purpose is concerned, it can in the circumstances of the case have only trifling weight, the Judge will be right to exclude it. To say this is not to confuse weight with admissibility. The distinction is plain, but cases must occur in which it will be unjust to admit evidence of a character gravely prejudicial to the accused even though there may be some tenuous ground for holding it technically admissible. The desision must then be left to the discretion and the sense of fairness of the Judge."

The existence of this exclusionary discretion has been openly recognised and its importance has been emphasised by the House of Lords in Harris v. D. P. P.2 in which Lord Simon observed that this rule:

"flows from the duty of the Judge when trying a charge of crime to set the essentials of justice above the technical rule, if the strict application of the latter would operate unfairly against the accused."

The law on the subject of the admissibility of similar facts has, after thorough examination of the case-law been summarised in a publication as follows:

Rule 1. Evidence of similar facts, which is relevant primarily, via propensity, that is, such evidence where the tendency of the similar falt evidences

The authority referred to is R. v. Sims, (1946) K. B. 531; (1946) 1
 All E. R. 697 at 701 in which at page 539, Goddard, L. C. J. said: if one starts with the assumption that all evidence tending to show a disposition towards a particular crime must be excluded unless justified, then the justification of evidence of this kind is that it tends to rebut a defence otherwise open to the accused; but if one starts with the general proposition that all evidence that is logically probative is admissible unless excluded, then evidence of this kind

does not have to seek a justification, but is admissible irrespective of the issues raised by the defence, and this we think is the correct view". Apparently their Lordships of the Privy Council were not prepared to accept the method of approach thus

^{2. (1952)} A. C. 694: 36 Cr. App. R. 39: (1952) 1 All E. R. 1044. See also R. v. Straffen, (1952) 112 B. 911: 36 Cr. App. R. 132: (1952) 2 All E. R. 657; R. v. Robinson, (1953) 37 Cr. App. R. 95: (1953) 2 All E. R. 334.

to establish a propensity in the accused, is a link in the process of tending to show that the accused did in fact behave on the instant occasion in the way in which the prosecution alleges, such evidence may be relevant in addition, otherwise than via propensity, is inadmissible unless it is exceptional.

Rule 2. Such evidence is exceptional and therefore admissible provided:

- (i) it has very great real probative value upon any issue upon which the jury is likely to use it; and
- (ii) its admission is not unnecessary (i.e., the issue upon which it is tendered can reasonably be regarded as a real one in the circumstances of the case).

Rule 3. Evidence of similar facts which has substantial relevance otherwise than via propensity (even if as well as via propensity) is admissible, provided it is sufficiently relevant.

Rule 4. In criminal cases the Judge has a discretion to exclude evidence admissible under any of the foregoing rules if their strict application would operate unfairly against the accused.

N. B. It should be remembered that-

- (a) Evidence which is relevant via propensity is of a much wider category than has often been supposed.
- (b) Rule 2 means (obviously) that not all evidence the primary relevance of which is via propensity is excluded.
- (c) The nature of issue to which the evidence is relevant (e.g., that it is to show system, to prove intent, etc.) does not control its admissibility. The nature of the issue may, however, affect the strength of the probative value of the similar fact in evidence and thus indirectly influence its admissibility.⁸

The so-called exceptions (though they are not strictly speaking, such) to this rule consist in the admissibility of evidence of facts showing intention, good faith, and the like4 and of facts showing accident or system.⁵

Judgments also in Courts of Justice on other occasions have been said to form an exception to the exclusion of evidence of transactions not specifically

 Essays on the Law of Evidence by Zelman Conven and P. B. Carter, 1956, pp. 160-161

²elman Cowen and P. B. Carter, 1956, pp: 160-161.

4. See S. 14, post; cf. Steph. Dig. Art. 11, and pp. 162-164, ib.; Phipson, 11th Ed., 181. As to evidence of intention. See Narsing v. Ram, (1903) 30 C. 883, 896; R. v. Bond, (1906) 21 Cox. p. 252; 2 K. B. 389.

See S. 15, post; cf. Steph. Dig., Art. 12; Lawson's Presumptive Evidence, 182; Steph. Dig., 162-164; see also Taylov, Ev., Sc. 327-348: Roscoe, Cr. Ev., 13th Ed., 79, et. seq; Best, Ev., p. 463; Roscoe, N. P. Ev., 85; R. v. Wyatt. (1904) 1 K. B. 188; Hales v. Kerr, (1908) 2 K. B. 601; Times L. R. v. 24, p.

connected with facts in issue.6 On the other hand, and on the same principle, in cases where causation is well-known and regular, as in the case of physical and mechanical agencies, the conditions of mental disease, the propensities of animals, and the like evidence of similar but unconnected acts is often admissible.7 Where, in an action brought in respect of a nuisance alleged to be caused by the construction and maintenance of a hospital for infectious diseases, the plaintiff proposed to call evidence as to the effect of other similar hospitals on the surrounding neighbourhood, it was held that evidence of facts by which the effect (or absence of effect) of such hospitals could be either positively or approximately ascertained was admissible and material.8 Where the discharge of gaseous matter from the chimney of a chemical work was complained of as a nuisance by the proprietor of land in its vicinity, it was held that the effect of the discharge upon other properties in the neighbourhood was legitimate matter of enquiry;9 on the same principle, evidence of the effect of similar discharges from other chimneys would have been admissible.10 When the doings of animals are in question, it is admissible to prove the general character of the species, or of the particular animals, as well as the doings of the same or similar animals on other occasions.11 Further, similar facts may become admissible in confirmation of testimony as to the main fact which would be inadmissible as direct proof. So, an admission of liability on one bill accepted by the same agent is no evidence of a general authority to accept, though it is admissible to confirm independent

Phipson, Ev., 11th Ed., 217; Best, Ev., pp. 463, 464; Taylor, Ev., 319; so in an American case it being in dispute whether a horse was or was not frightened by a certain pile of lumber, evidence that other horses were frightened by the same pile under a variety of circumstances, was held admissible.

Best, Ev., p. 464; for a similar, case, see Brown v. E. & M. Ry.

(1889) 22 Q.B.D. 391; "so where the question was whether A's dog killed a sheep belonging to B; the fact that the same dog had killed other sheep on different occasions belonging to other people was held admissible"; Lewis v. Jones, (1885) 1 T.L.R. 153; Wharton, Ev., s. 1295: so also the question being whether A's premises were ignited by sparks escaping from a railway engine, proof that (1) the same engine, and (2) other engines of similar construction belonging to the same Company had previously caused fires along the same line, is admissible: Aldridge v. G.W.R. Co. (1844) 3 M. & G. 522; Piggot v. E.C. Ry. Co., (1846) 3 C.B. 229; the question being whether the control of ther A was insane at a certain time, evidence that he exhibited symptom of insanity prior and subsequent to such time, and that his ancestors and collaterals had been insane, is admissible: Pope on Lunacy, 392; Phipson, Ev., 11th Ed., 149— 156; as to the presumption of regularity in the case of scientific ins-

larity in the case of scientific instruments, see Taylor, Ev., s. 183.

As to Manorial and Trade Customs, see Taylor, Ev., Ss. 320-322; Roscoe, N.P. Ev., 85, 86: Phipson, Ev., 11th Ed., 216, S. 13, post; acts showing title; see S. 11, post.

8. Metropolitan Asylum District Managers v. Hill, (1882) 47 L.T. (H.L.) 29; per Lord Selborne, L.C., "Evidence relating to collateral facts is only admissible where such facts will, if established, establish reasonable presumption as to the matter in dispute, and when such matter in dispute, and when such evidence is reasonably conclusive." Per Lord Watson; see also Foulks v. Chadd, 3 Dong, 157.

9. Tennawt v. Hamilton (1839) 1 Rob. 821: 7 C.L. & F. 122; R. v. Nevile (1791) 1 H.L. Peake, N.P.C. 91; but see as to this last case. R.v.

Fairie, (1857) 8 E. & B. 886. 10. Metropolitan Asylum District Man-Hill, supra, p:r Lord Watsorr.

Phipson, Ev., 11th Ed., 217 Osborne v. ChocGveel, (1896) 2 Q. B. 109: Williams v. Richards, (1907) 2 K. B. 88.

Steph. Introd , 164; see Ss. 40-44

proof of such authority.12 And proof of particular instances are admissible to confirm a general course of business. And under this Act (though not13 generally speaking, in England) even previous similar statements made by a witness are admissible to corroborate him by showing that he is consistent with himself.14 Similar facts may be admissible in proof of agency. Where the question is whether one person acted as agent for another on a particular occasion, the fact that he so acted, on other occasions, is relevant.15 In a suit for dissolution of marriage, evidence of acts of adultery, subsequent to the date of the latest act charged in the petition, are admissible, for the purpose of showing the character of previous acts of improper familiarity.16

Facts similar to a fact in issue are not, in general, admissible to prove either the occurrence of the fact in issue or the identity of its author. The rule is, however, subject to various exceptions. This rule of exclusion is not based, as it is sometimes said, on the ground that the evidence of similar facts may be res inter alios acta, for such evidence might be inadmissible if it were inter partes; nor is it based primarily on the inconvenience and delay which the admiss on of such evidence might occasion. The rule is based on the ground that evidence of similar facts may be irrelevant. In criminal cases to which this rule is most frequently applied, there is a further ground for exclusion, even though the facts may fall within exception to the rule; this ground is that the judge has a discretion to exclude evidence of similar facts when to admit the evidence would operate unfairly against the accused.

The rule in civil proceedings may be illustrated by a case in which the question was whether a brewer supplied good beer to a publican. The brewer sought to establish this by proving, inter alia, that during the material period he supplied good beer to other publicans. The evidence was rejected, the court remarking that a man might deal well with one and not with others. So where the question was whether a surgeon had been negligent or skilful in performing similar operations on other patients was rejected. In an action against the acceptor of a bill-of-exchange, who defends on the ground that his acceptance is a forgery by a particular person, evidence that he has forged other bills is not admissible.

When evidence of similar facts is relevant, that is, when there is a nexus between the similar fact and the fact in issue, such evidence may be received

Steph, Dig. Art. 13; Blake v. Albion Life Assurance Society, (1878) 4 C.P.D. 94; see also Courteen v. Touse. (1807) 1 Camp. 42; Neal v. Erving, (1793) 1 Ep., 61; Watkins v. Vince, (1818) 2 Stark 368.

16. Boddy v. Boddy, (1860) 30 L. J. P.

& M. 23; Taylor, Ev., 340; see remarks on this case in Phipson, Ev. 80, 1st Ed., omitted in 2nd Ed. It has been held that ante-nuptial incontinence is relevant to prove post-nuptial misconduct charged between the parties. Cantello v. Cantello, Times, Feb. 1, 1896, cited in Phipson. Ev. 11th Ed., 220.

^{12.} Llewellyn v. Winckwarth, (1945) 13 M. & W. 598; Hollingham v. Head, (1859) 4 C. B. (N.S.) 388; Morris v. Bethel, (1869) L. R. 4 C. P. 765; Phipson, Ev., 11th Ed., 112, 113.

^{13.} Bourne v. Gatliff, (1944) 11 Cl. & F. 45; see as to similar facts admissible in corroboration of the main facts: R. v. Pearce, (1791) 1
Peake 106; R. v. Egerton, (1819) R. & R. 375, cited in R. v. Ellis, (1872) 2 B. & C. 145: Cole v. Manning-(1872) 2 Q. B. D. 611 and cases in preceding note. 14. S. 157, post.

to prove either the occurrence of the fact in issue or the identity of its author. When a practice to do or omit an act is in issue, evidence of similar acts or other occasions by the persons concerned is admissible.....

Evidence of similar facts may be resorted to on questions of title to land and its value.....17

6. Dissimilar facts. Similar facts under the present rule are inadmissible, whether proved by the direct admissions of the party himself or by independent witnesses. So, dissimilar facts are admissible to disprove the main fact, e.g., skill on other occasions to disprove negligence,18 honest act to disprove fraudulent one19 or specific acts of bravery to disprove specific acts of cowardice.20

Illustration (a). The facts mentioned in this illustration are relevant as giving occasion or opportunity or being the cause.21

Illustration (b). The facts mentioned in this illustration are relevant as effects of the fact in issue. This is an instance of real evidence.22

Illustration (c). The facts mentioned in this illustration are relevant as constituting the state of things under which the alleged fact in issue happened, and as affording opportunity.

7. Proof of similar acts (criminal and civil). Again, as a general rule, upon a trial of a criminal case, evidence of the commission of other independent and unrelated crimes by the accused is inadmissible to show either his guilt or that the accused is likely to commit the crime with which he is charged. There are two major exceptions, viz., (a) proof of commission of another crime is proper whenever a statute provides for the enhancement of the accused's punishment, if he is a previous offender; and (b) proof of the independent crime is admissible, if it is relevant to the proof of the guilt of the accused for the crime with which he is charged.

The relevant similar acts can be grouped under the following heads:

- (a) when the nature of the case requires cumulative instances of similar facts to prove the main fact, e.g., gang cases under Section 401 and cases in civil matters like custom, assessment of market value of similar properties (Section 9);
- (b) when similar facts are admissible as part of the transaction closely connected with and explanatory of the main fact or form part of a series of continuous facts casually connected (Section 6);
- (c) the question involved is the state of mind in which the act was done, e.g., intention, knowledge, etc. (Section 14);

Halsbury, Simonds Ed., para, 527 pp. 291, 292. Vol. 15,

^{18,} R. v. Whitehead, (1848) 3 C. & K.

R. v. Rowton, (1865) 34 L. J. M.
 C. 57, 67; R. v. Mortimer, (1896)
 L. J. 180; Holcombe v. Hewson, (1810) 2 Camp, 301.

^{20.} Edmondson v. Amery, Times, Janu-

ary 26, 1911. See Norton. Ev., 103, Cunningham Ev., 90; Whitely Stokes, 855. See Norton, Ev., 103; Best Ev., S.

As to proof from foot mark, see Circ. Ev., 96, 214-21, 436.

- (d) to resolve whether an act was accidental or intentional (Section
- (e) experiments made by experts showing similar facts (Section 45); and
- (f) when the doings or the habits of the animals are in question, e.g., Police dogs, evidence of similar acts is admissible (Section 52).

Thus, evidence of an independent and separate crime is admissible, when such evidence tends to aid in identifying the accused as a person who committed the particular crime under investigation. So, when a crime is committed by novel means or in a particular manner, the proof of other distinct crimes may be admitted for the purpose of identifying the accused as the perpetrator thereof, e.g., modus operandi. Evidence of similar offences may be relevant to prove scienter or guilty knowledge or intent of the accused, and negative mistake, accident, lawful purpose or innocent intent or the existence of malice or the motive which suggests the doing of the act, plan, scheme or system.

- 8. Contemporaneous record of conversation. Like a photograph of a relevant incident, a contemporaneous record of a relevant conversation is a relevant fact and is admissible under this section.23 The time, place and accuracy of the tape-recording must be proved by competent witnesses and the voices must be properly identified.24 A tape-recording may be used for the purpose of confronting a witness with his earlier tape-recorded statements. Where the voice is denied by the alleged maker thereof, a comparison of the same with a later tape-record is inevitable and such a comparison is not prohibited under any statute.25 The use of tape-record is not confined to purposes of corroboration and contradiction only, but, when duly proved by satisfactory evidence of what is found recorded and there is absence of tampering, it could, subject to the provisions of Evidence Act, be used as substantive evidence.1
- 8. Motive, preparation and previous or subsequent conduct. Any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact.

The conduct of any party, or of any agent to any party, to any suit or proceedings, in reference to such suit or proceeding, or in refeence to any fact in issue therein or relevant thereto, and the conduct

A.I.R. 1975 S.C. 1788. (A contemporaneous tape record would part of res gestue).

24. Ibid. 25. Dial Singh Narain Singh v. Rajpal Jagan Nath, 1969 Cur. L. J. 325; 71 Punj. L. R. 519; 1969 Cr. L. J. 1422; A.I.R. 9169 Punj. 350, 1. Z. B. Bukhari v. B. R. Mehra A. I. R. 1975 S. C. 1788 at 1795.

^{23.} Yusufalli Esmail Nagree v. State of Maharashtra, (1967) 3 S. G. R. 720; 1968 S. C. D. 347; (1968) 1 S. C. J. 511; (1967) 2 S. C. W. R. 934; 1968 A. W. R. (H.C.) 268; 70 Bom. L. R. 76; 1968 M. L. J. (Cr.) 247; 1968 M. L. W. (Cr.) 12; 1968 Mah. L. J. 179; 1968 S.C. 147, 149; R. M. Malkani v. State of Maharashtra. A. J. R. 1973 S.C. of Maharashtra, A. I. R. 1973 S.C. 157; Z. B. Bukhari v. B. R. Mehra;

of any person an offence against whom is the subject of any proceeding, is relevant, if such conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto.

Explanation 1. The word "conduct" in this section does not include statements, unless those statements accompany and explain acts other than statements; but this explanation is not to affect the relevancy of statements under any other section of this Act.

Explanation 2. When the conduct of any person is relevant, any statement made to him or in his presence and hearing, which affects such conduct, is relevant.

Illustrations

(a) A is tried for the murder of B.

The facts that A murdered C, that B knew that A had murdered C, and that B had tried to extort money from A by threatening to make his knowledge public, are relevant.

(b) A sues B upon a bond for the payment of money, B denies the making of the bond.

The fact that, at the time when the bond was alleged to be made, B required money for a particular purpose, is relevant.

(c) A is tried for the murder of B by poison.

The fact that, before the death of B, A procured poison similar to that which was administered to B, is relevant.

(d) The question is, whether a certain document is the will of A.

The facts that, not long before the date of the alleged will, A made inquiry into matters to which the provisions of the alleged will relate; that he consulted Vakils in reference to making the will, and that he caused drafts of other wills to be prepared, of which he did not approve, are relevant.

(e) A is accused of a crime.

The facts that, either before, or at the time of, or after the alleged crime, A provided evidence which would tend to give to the facts of the case an appearance favourable to himself, or that he destroyed or concealed evidence, or prevented the presence or procured the absence of persons who might have been witnesses, or suborned persons to give false evidence respecting it, are relevant.

(f) The question is, whether A robbed B.

The facts that, after B was robbed, C said in A's presence—"the police are coming to look for the man who robbed B", and that immediately afterwards A ran away, are relevant.

(g) The question is, whether A owes B Rs. 10,000.

The facts that A asked C to lend him money, and that D said to C in A's presence and hearing—"I advise you not to trust A, for he owes B 10,000 rupees", and that A went away without making any answer, are relevant facts.

(h) The question is, whether A committed a crime.

The fact that A absconded after receiving a letter warning him that iny was being made for the criminal, and the contents of the letter, relevant.

(i) A is accused of a crime.

The facts that, after the commission of the alleged crime, he absconded, was in possession of property or the proceeds of property acquired by the me, or attempted to conceal things which were or might have been used in mmitting it, are relevant.

(j) The question is whether A was ravished.

The facts that, shortly after the alleged rape, she made a complaint reating to the crime, the circumstances under which, and the terms in which, he complaint was made, are relevant.

The fact that, without making a complaint, she said that she had been avished is not relevant, as conduct under this section, though it may be relevant as a dying declaration under Section 32, clause (I), or as corroborative evidence under Section 157.

(k) The question is, whether A was robbed.

The fact that, soon after the alleged robbery, he made a complaint relating to the offence, the circumstances under which, and the terms in which, the complaint was made, are relevant.

The fact that he said he had been robbed without making any complaint, is not relevant, as conduct under this section, though it may be relevant as a dying declaration under Section 32, clause (1), or as corroborative evidence under Section 157.

S. 3 ("Fact in issue".).

S. 3 ("Relevant").

s. 3 ("Fact").

Ss. 10, 14, 17-39, 155, 157 (Statements relevant under other sections).

Ss. 17-31 (Oral and Documentary admission).
S. 50 (Opinion on relationship expressed by conduct).

Motive, Preparation and Conduct.—S teph, Dig., Art. 7: Wills' Circumstantial Evidence passim; Best, Ev., ss. 91, 92, 452—467; Burill on Circumstantial Evidence; Alfred Wills on Circumstantial Evidence; Phillip's Famous Cases on Circumstantial Evidence passir*; Phipson Ev., 5th Ed., 121; Norton, Ev., 107; Cunningham, Ev., 93; Taylor, Ev., ss. 104, 1204, 1205; Roscoe, N.P. Ev., 28, 67; Roscoe Cr. Ev. 13th Ed., 7, 14-22, 83; Wills, Ev., 2nd Ed., 63; Wigmore Ev., Ss. 117, 237, et se q. Statements accompanying acts, Steph. Dig. Art. 7, 8; ib. Note v; Best. Ev., S. 495; Green leaf, Ev., S. 108; Wharton, Ev., ss. 528, 259; Phipson, Ev., 5th Ed., 47; Starkie, Ev., 51-53; 87-89, 166-171; Taylor, Ev., ss. 258, 589; Roscoe, N.P. Ev., 51-53; Powell, Ev., 9th Ed., 68-73; Roscoe, Cr. Ev., 13th Ed., 23; Statements affecting conduct—Steph, Dig. Art. 8; Taylor, Ev., ss. 808—816; Best, Ev., ss. 574, 575; Phipson, Ev., 11th Ed., 183, 313; Norton Ev., 106; Roscoe, N.P. Ev., 64—66; Powell, Ev., 9th Ed., 430—439; Wharton, Ev., ss. 1136—1155.

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Illustrations to the section, 31.

1. Scope and principle. This section is an amplification of the preceding one. It embodies, in a statutory form, the rule of evidence, that the testimony of res gestae is always allowable when it goes to the root of the matter.2 A motive is strictly, what its etymology indicates, that which moves or influences the mind. It has been said that an action without a motive would be an effect without a cause, and as, to take for example criminal cases, the particulars of external situation and conduct will, in general, correctly denote the motive for criminal action, the absence of all evidence of an inducing cause is reasonably regarded, where the fact is doubtful, as affording a strong presumption of innocence.3 Preparation is also relevant, it being obviously important in the consideration of the question whether a man did a particular act or not, to know whether he took any measures calculated to bring it about premediated action must necessarily be preceded not only by impelling motives but by appropriate preparations.4 The existence of a design or plan is usually employed evidentially to indicate the subsequent doing of the act planned or designed.5 Preparation is an instance of previous conduct of the party influencing the fact in issue or relevant fact but other conduct also, whether of a party or of an agent to a party, whether previous or subsequent, and whether influencing or influenced by a fact in issue or relevant fact, is also admissible, the conduct of a party being always extremely relevant, for reasons some of which appear in the commentary to this section.

Kalijiban Bhattacharjee v. Emperor, 1986 Cal. 316: I. L. R. 63

Cal. 1053: 163 I. G. 41: 37 Cr. L. J. 775: 63 C. L. J. 222.

8. See notes to S. 3, ante. But it is held that the fact of the evidence of the motive not being clear is no reason for disbelieving a plain straightforward case—Emperor v. Balaram Dass, 49 C. 358; 71 I. C. 685; A. I. R. 1922 C. 382 (2).
4. Wills' Cir., Ev., 6th Ed., 79; Noron, Ev., 109; Cunningham, Ev., 93,

94; Best, Ev., ss. 454-457; the case of Patch cited; ib., and in Steph. Introd., ss. 99-106; Burrill's Circ.

By., 343, also ib., 546.

See Wigmore, Ev., 237. Design or plan should be distinguished from intent. The latter in the substantive law is a proposition in issue. Design or plan is evidence of intent, ib. Design should also be distinguished. Design should also be distinguished from emotion or motive, though the same facts may be evidence of either.

Section 27, which deals with statements made to police officers a highly artificial reservation of the law of evidence peculiar to India, controls and circumscribes the provisions of this section which deals with the proof of conduct.6 See Introduction, ante, and Notes, post.

2. Five allied concepts. Knowledge, motive, intention, preparation and attempt are the five allied concepts.

Knowledge means a state of mind, entertained by a person, with regard to existing facts, which he has himself observed or the existence of which has been communicated to him by another person.7 In the American Cyclopaedia (1928), page 169, knowledge is, defined as: The certain percents of truth; belief which amounts to or results in moral certainty; indubitable apprehension; information, intelligence, implying truth, proof and conviction; the act of state of knowledge; clear perception of fact; that which is or may be known; acquaintance with things ascertainable; specific information; settled belief; reasonable conviction; anything which may be the subject of human instructions.8

Knowledge and actual knowledge have sometimes been held to be . synonymous,9

Knowledge is nothing more than men's firm belief and is distinguished from belief in that the latter includes things which do not make a very deep impression on the memory. Belief is defined by the Century Dictionary as: to be persuaded upon events, arguments and dedutions or by other circumstances other than personal knowledge. The difference is ordinarily merely in degree.

Then the different stages in the development of the mental phenomenon may be represented as follows:

Motive Wish for the end Choice of means or deliberation Desire to do the act Determination or will Intention to do the act (The doing of the act).

Motive is the longing for the satisfaction of desire which includes the mind to wish and then to intend doing something which would bring about the realisation aimed at. Primal motive is always the outcome of an impulse which the mind receives from outside, and which, owing to the peculiar state in which it happens to be, is susceptible of being affected thereby. That impulse calls forth a response in the nature of a wish and an intention. An example perhaps would best illustrate it. The desire for the preservation of life is a primitive desire embedded in the nature of man. This gives birth to a desire for the satisfaction of hunger. The sight of a loaf of bread is an impulse which the mind receives from the outside world, but which, however, would not have been effective had not mind been in the particular state in

Kalijiban Bhattacharjee v. Emperor, 1936 Cal. 316; I. L. R. 63 C. 1053; 163 I. C. 41.
 Emperor v. Zamin, A. I. R. 1932

Oudh 28: 136 I. G. 243.

8. See Ramaatha Iyer's The Law Lexicon, (M. L. J.), p. 688. 9. Ibid, 688.

which it is placed owing to hunger. This impulse creates the motive for intending to steal the bread. The most ulterior 'Motive' can always be traced back to the satisfaction of one or other of the primitive human desires, which form as it were the primary bedrocks at which we must finally arrive. Every 'Motive', however, is not necessarily the direct outcome of an external impulse. For, as will soon appear, there may be a long unbroken chain of motives linked with each other. From the above definition of the 'Motive' it is evident that there must be a motive for every act (except those that are unconscious, for which no responsibility can arise). The Motive produces in the mind a Wish for the end in view. Had this Wish not been generated, the Motive would have failed in its effect altogether, it would then not have been a true Motive at all. As has been noticed before, this Wish can only arise when the mind, owing to its peculiar condition, is susceptible of receiving and responding to the external impulse. The sight of bread supplies the Motive for the satisfaction of hunger, the peculiar circumstances of hunger create the Wish for its satisfaction. The initial Motive and Wish are not one and the same thing, the latter represents the second stage in the operation of the mind.

Now the Wish for the end is, in its turn, succeeded by another phase in the development of the mind. The Wish for the end produces a certain Deliberation of Choice of means to achieve the end wished for. There is an idealisation of some movement which seems likely to procure the realisation. There is within the mind a balance of judgment which carefully measures the practicability and cautiously weighs the probability of its being carried out. The Wish is of a quasi-spontaneous growth, but the Deliberation has an atmosphere of artificiality about it. It manifests the effort of the intellect to co-operate with the mind. It is this state of the mind consulting the intellect and profiting by its advice that constitutes the third stage.

After the Choice of Means has been fixed upon, there follows a Desire to do the act. The Desire to do the act must not be confused with the Wish for the end aimed at. The one leads the Deliberation while the other follows in its trial. The former is a Wish to attain the ultimate consummation whereas the latter is a mere Desire to do the act which the Deliberation considers would lead to the ideal. The bare Desire to do the act itself is oblivious, for the time being, of the ultimate end aimed at.

Next comes a sterner successor-a Determination or will to do the act. Determination must be distinguished from Deliberation which enjoys into cedence. Deliberation concerns itself mainly with the balancing of judgment whereas Determination is the permanent judgment of the reason that some particular course is desirable. Deliberation indicates the process of the activity of the intellect, whereas Determination is the fruition of that activity. "We have resolved or determined on an act" only means that we have examined the objects of the desire, have considered the means of attaining it and that since we think the object worthy of pursuit, we believe we shall resort to the means which will give us a chance of getting it.10 The present Determination is nothing but a present belief that we shall do the act in the future. There is a recognition of the relation which the means adopted bears to the

^{10.} Austin.

result desired and that is accompanied by a present conviction that the act fixed upon will prove efficacious enough to attain the object of desire.

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Lastly, and just preceding the act done, is the Intention to do th€ Act, or as it is often called "Intending the act". This intention is the highest culmination of the mental phenomenon and stands close upon the commission of the act itself. "Intention is stretching towards, fixing the mind upon, the act". It is "the contemplation by the mind of the common result to which many combined movements are directed".¹¹ More accurately, Intention is the setting or aiming of oneself and one's powers to bring about a certain result.

We have given above a sketch of the operation of the mind and have shown the connection between Motive and Intention. One is the direct check of an impulse received and the other is the direct cause of an impulse given out. In this respect, no doubt, the two appear to be distinct. It does not however, follow that they must always remain separate. The effect and the cause may often be so contagious as to be really identified with each other. From the fact that there are so many stages in the processes of the mental development, it cannot be concluded that a considerable interval of time must elapse between the first and the last stages. That is not necessarily the case. Often the one succeeds the other so quickly as to seem to have occurred instantaneously.

Thus motive is that which stimulates or incites an action or some cause or reason which moves the will and induces action. It must be distinguished from intent. Intention is the result of the working of the brain and Salmond has defined it as: Intention is the purpose or design with which an act is done. It is the foreknowledge of the act coupled with the desire of it, such knowledge and desire being the cause of it inasmuch as they fulfil themselves through the operation of the will. An act is intentional if, and in so far as it exists in idea before it exists in fact, the idea realising itself in the fact because of the desire by which it is accompanied.¹² The word 'intent' by its etymology seems to have a metaphorical allusion to archery and implies aim and thus connotes not a casual or a merely possible result—foreseen perhaps as not improbable incident but not desire—but rather connotes the one object with which the effort is made and thus has a reference to what has been called a dominant motive without which the action would not have been taken.¹³

Intention and knowledge are not necessarily identical but mean two different things. Though no doubt in many cases intention and knowledge merge into each other and mean the same thing more or less an intention can be presumed from knowledge, the demarcating line between them should not however be lost sight of. There may be exceptional cases where there may be intention without knowledge, the consequences being desired but not foreknown as certain or even probable. Conversely, there may be knowledge without intention as where a military commander orders his troops into action well knowing that many of them will lose their lives but certainly not desiring and

Stephen.
 Russell on Crimes, 11th Edition, p. 18 and following.
 In re Kuttayan, A. I. R. 1960 Mad. 9: I. L. R. (1959) M. 654.

therefore not intending the consequences.14 The distinction between intention and knowledge is brought out in (a) Fagira v. State 15 and (b) Emperor v. Dhirajia.16

- (a) Knowledge as contrasted with intention would more properly signify a state of mental realisation in which the mind is a passive recipient of certain ideas' and impressions arising in it and passing before it; it would refer to a bare state of conscious awareness of certain facts in which human mind might itself remain supine or inactive. On the other hand, intention connotes a conscious state in which mental faculties are roused to activity and summoned into action for the deliberate purpose of being directed towards a particular and specified end which the human mind conceives and perceives before itself. Mental faculties which might be dispersed in the case of knowledge are in the case of intention, concentrated and converged on a particular point and projected in a set direction.
- (b) In order to possess and to form an intention there must be capacity for reason. And, when, by some extraneous force the capacity for reason has been ousted, the capacity to form an intention must have been unseated too. But knowledge stands upon a different footing. Some degree of knowledge must be attributed to every sane person. Obviously, the degree of knowledge which any person can be assumed to possess must vary. For instance, one cannot attribute the same degree of knowledge to an uneducated as to an educated person. But to some extent knowledge must be attributed to everyone who is sane.

While one way to prove intention is by showing statements of such intention, yet such declarations are not necessarily the equivalent of the intention itself. As Burrill says:17

"It does not necessarily follow, because a man has avowed an intention to commit a crime, that such intention really existed in the mind. The words may have been spoken in mere bravado, or with the view of alarming or annoying the object of them; or, like expression of ill-will may have been uttered in a moment of passion or state of intoxication, without any settled evil purpose."

It is proper for a witness to tell what his intention was as to a material fact in issue. But a witness may not state the intention of another person. Such direct testimony is, of course, hard to disprove, and because of the interest of the witness does not carry the weight that is accorded to evidence of surrounding circumstances which show the character of the transaction. Facts and circumstances accompanying the act are generally considered the most reliable evidence to prove the intent with which the act was done. Conduct, as evidenced by acts, course of dealing, or other like transactions or declarations is always admissible to show intent.

But the common law has always confined itself to objective evidence of intention. It has avoided secret intention of the mind because this is too

^{14.} Mansuri v. State, A. I. R. 1955 Pat. 330.

^{15.} A. I. R. 1955 All. 321.

^{16.} A. I. R. 1940 All. 486: I. L. R. 1940 A. 647: 191 I. C. 328.

^{17.} Treatise on Circumstantial Evidence, p. 545.

subtle for the practical methods of legal proof. The medieval jurist well put it by saying that the devil himself did not know the thoughts of man. Therefore, Pollock has remarked: As the acts of the mind which are not directly manifested in outward performance the law will not generally take account of them, both because they cannot be certainly known and because no certain result can be assigned to them.18

In order to avoid some of these difficulties of proving intention in the traditional manner and yet to secure the evidence of necessary intent, the law has resorted to expediency in place of the usual logic. Sir Frederick Pollock puts this plainly. He says:

"The wrong-doer cannot call on us to perform a nice discrimination of that which is willed by him from that which is only consequential on the strictly wilful wrong. We say that intention is presumed, meaning that it does not matter whether intention can be proved or not; nay, more, it would, in the majority of cases, make no difference, if the wrongdoer could disprove it. Such an explanation as this, 'I did mean to knock you down, but I meant you not to fall into the ditch,' would, even if believed, be the lamest of apologies, and would no less be a vain excuse in law."

The same author makes the same application in another field when he says:

"It was once even supposed, that parties could not make time of the essence of the contract by express agreement; but it is now perfectly settled that they can, the question being always what was their true intention, or rather what must be judicially assumed to have been their intention."19

The result of this attitude has been that when the evidence fails to show what the intention was, then presumptions are used to get the desired result. An iron-clad rule becomes the index of the mental operations. No latitude is given for individual differences. If a person does a certain thing, then, by the rule, he has thought a certain thing. For instance, a person is presumed to intend the natural and probable consequences of his acts.

There are, however, limits to such a broad presumption. Otherwise, no latitude will be given for individual differences and iron-clad rule would become the index of mental operations. Section 106, Evidence Act has been enacted with this difficulty in view. Presumptions are rebuttable. Thus, when a person does an act with some intention other than that which the character and circumstances of the case suggest, it is not for the prosecution to eliminate all the other possible intentions. If the accused had a different intention that is a fact which is specially within his knowledge and which he may prove.20

In law, a man's motives are not unoften irrelevant. As a general rule, no act, otherwise lawful, becomes unlawful because done with a bad motive; and

First Book of Jurisprudence, 3rd edition, p. 144.
 Torts, 6th Ed., p. 34; Principles of Contract, p. 505.

^{20.} See Prof. Glanville Williams, Proo of Guilt, Chap. 7, p. 127 and Kenny's Outlines of Criminal Law 17th Ed., p. 438 and following.

contra, no act, otherwise unlawful, is excused or justified because of the motives of the doer, however good. The law will judge a man by what he does, not by the reason for which he does it.

To this rule, as to irrelevance of motive, there is a very important exception in criminal law, viz., criminal attempts. An attempt to commit an offence is itself a crime. The existence of a motive is of the essence of the attempt. The attempted act in itself may be perfectly innocent but is deemed criminal by reason of the purpose for which it is done. To mix arsenic in food is in itself a perfectly lawful act for it may be that the mixture is designed for the purpose of poisoning the rats. But, if the purpose is to kill a human being the act becomes by reason of this purpose the crime of attempted murder.

What is an attempt? In order to understand this term, we must examine the elements which go to constitute every intentional crime. There are four distinct stages in the commission of an intentional crime. First, I intend to commit the crime; secondly I get ready to commit the crime; thirdly, I try to commit it; and finally, I commit it. In other words, intention, preparation, attempt and completion. To give a concrete illustration of this, take the burning of a haystack. I intend to burn the haystack (intention); for that I buy matches and procure some kerosene and soaked rags (preparation); then I go to the stack and there light one of matches (attempt); and finally complete the act by setting fire to the stack (completion).

The only difficulty which arises is, where does preparation end and attempt begin? The answer to this question is, an attempt is an act of such a nature that it is in itself evidence of the criminal intent with which it is done. A criminal attempt bears criminal intent upon its face. The thing speaks for itself. If this formula is applied carefully, it would be easy to say where preparation ends and attempt begins. The ground of distinction will be merely evidential.

An attempt to do what is impossible may be indictable.21

The principle of those decisions is as follows: In the words of Butler, J., an American Judge, it would be a novel and startling proposition that a known pickpocket might pass around in a crowd in full view of policemen and even in the room of a police station and thrust his hands into the pockets of those present with intent to steal and yet be not liable to arrest or punishment until the policeman has first ascertained that there was in fact money or valuables in some of the pockets.²²

The vexed question as to where preparation ends and the attempt starts has been sought to be resolved by following four different approaches, viz., (a) proximity rule, (b) doctrine of locus penitentiae, (c) equivocality theory, and (d) social danger test.

^{21.} R. v. Brown, (1889) 24 Q. B. D. 357; Rex. v. Ring, (1892) 17 Cox. 251; Queen v. M. Jivaji, 11 Bota. 376.

²² Cited in Huda "The Principle of the Law of Crimes in British India," p. 55.

- (a) The rule is that an act of attempt must be sufficiently proximate to the crime intended and that it should not be remotely leading towards the commission of an offence and that it must contribute an interpenultimate act and that the act done should place the accused into a relation with his intended victim.23
- (b) Abandonment is a defence, if the attempt to commit a crime is freely and voluntarily abandoned before the act is put in process of final execution.24
- (c) The act is criminal, if and only if it indicates beyond reasonable doubt what is the end towards which it is directed.25
- (d) The seriousness of the crime attempted has been one of the criteria in deciding the liability in case of attempt.1
- 3. Motive, meaning of. Motive, according to Murray's Dictionary, is, "that which moves or induces, a person to act in a certain way; a desire, fear, or other emotion, or a consideration of reason which influences or tends to influence, a person's volition; also often applied to contemplated result or object, the desire of which tends to influence volition." This definition may be again abridged as "something so operating upon the mind as to induce or tend towards inducing a particular act or course of conduct."2 Motive is an emotion, a state of mind, but it is often confused with events tending to excite the emotion, the outward facts which may be the stimulus and cause of the emotion. Motive, in the correct sense, is the emotion supposed to have led to the act. The external fact, which is sometimes styled the motive, is merely the possible exciting cause of this "motive" and not identical with the motive itself; and the evidentiary question is not whether that external fact is admissible as a motive, but whether it is admissible to show the probable existence of the emotion or motive.3

The emotion or state of mind which moves a man to act may be produced by a certain belief but whether the belief which produces that state of mind is true or false, the motive remains the same.4

4. Motive and intention distinguished. Motive must not be confounded with intention. Intention is an act of the will directing an act or a deliberate omission. It shows the nature of the act which the man believes he is doing. If he fires at a tiger, and the ball glances off and kills a man, he intends to kill the tiger; he neither intends to kill the man nor to do any act which would have that result. Motive is the reason which prompts the intention. It is the reason which induces him to do the act which he intends to do and does. If his act is absolutely legal, the motive which leads him to do it cannot make it illegal.

^{23.} Glanville Williams, Criminal Law, General Part, p. 477. etc.
24. Inbau and Sowle, Cases and Comments on Criminal Justice, (1960), p. 411.

^{25.} Turner, Modern Approach to Criminal Law, p. 279.

^{1.} Holmes, The Common Law (1881),

Wills, Circ. Ev., 5th Ed., p. 57

^{3.} Wigmore, Ev., s. 117. 4. Grump, J., in Ganga Ram v. Imperator, 1920 B. 371: 62 I. C. 545: 22 Bom. L. R. 1274.

If a man sinks a well in his own land, his act does not become unlawful because his motive is to drain the current of water which supplies his neighbour's well. On the other hand, the presence of a good motive can never be an excuse for the exercise of the will to commit a criminal act. If the act intended is absolutely illegal, it cannot become lawful by being done for an excellent motive. A man who libels another from the loftiest motive, such as to promote the public welfare, is just as criminal as if he had done so for spite.

- 5. When motive is important. But motive is sometimes important as evidencing a state of mind which is a material element in the offence charged.5 If a person kills another under the pretext of self-defence, it is essential to consider whether his real motive was to save his own life or to take a cruel revenge upon a man whom he found in his power. If provocation is set up as extenuation of what would otherwise be murder, the motive under which the act was done is material, as bearing upon the question whether the provocation had deprived the prisoner of self-control.6 "In estimating probabilities motive cannot, in a general sense, be safely left out of the account. When the motive is a pecuniary one, the wealth of the offender is no unimportant cons deration.7 Motive, though not a sine qua non for bringing the offence of murder home to the accused, is relevant and important on the question of intention.8 Generally, the voluntary acts of sane persons have an impelling emotion or motive.9 It has, therefore, been observed that the absence of all evidence of an inducing cause is reasonably regarded, where the fact is doubtful, as affording a strong presumption of innocence.10
- 6. Relevancy of motive. Conceiving an emotion (or motive) as a circumstance showing the probability of appropriate ensuing actions, it is always relevant.11

It is always a just argument on behalf of one accused that there is no apparent motive to the perpetration of the crime. Men do not act wholly without motive, on the other hand, proof of motive tends in some degree to render the act so far probable as to weaken presumptions of innocence and corroborate evidence of guilt.12 The absence of all motive for a crime when corroborated by independent evidence of the prisoner's previous insanity, is not without weight.18 However improbable an alleged motive may be, the prosecution is entitled to call evidence in support of it, and none the less so because such evidence may suggest that the accused has committed some crime

5. Per Lord Watson, in King v. Hen-

7. Per Sir Lawrence Peel, C. J., in R. v. Hedger, (1852) p. 131. Starkie on Ev., 132.

8. Per Mukerji, J., in Hazrat Gul

Khan v. Emperor, 1928 Cal. 430; 109 I. C. 482: 32 C. W. N. 345. 9. See Wigmore, Ev., s. 118: Norton, Ev., 107. In Palmer's case (see Steph. Introd. 107-158) Rolfe, B. in addressing the jury, said: "Had the prisoner the opportunity of administering poison: that was one thing. Had he any motive to do so; that is another." Wills' Circ. Ev., 6th Ed., 356.

10. Wills' Circumstantial Evidence, 6th Ed., 260: Burrill's Circ. Ev., 281, et seq; Best, Ev., s. 453. See illus-

trations (a), (b).

11. Wigmore, s. 118.

12. Woodroffe, J. in Kennedy v. People, 39 N. Y. 245, 254.

13. R. v. Mustaffa, (1864): 1 W. R.

Cr. 19; R. v. Sorab, (1866) 5 W. R. Cr. 28, 31; R. v. Bahar Ali, (1871) 15 W.R. Cr. 56; Dil v. R., (1907) 34 Cal. 686 (absence of motive); R. v. Jaichand, (1867) 7 W. R. Cr. 60 (proof of motive not necessary).

derson, (1898) A. C. 720.
6. Mayne's Criminal Law of India, S. 9 A. See also Phipson, 11th Ed., p. 183.

other than that with which he is charged.14

An emotion may impel against, as well as towards, an act. Thus, a defendant's strong feelings of affection for a deceased person would work against the doing of violence upon him and would thus be relevant to show the notdoing. This is also the significance of evidence that there was "no apparent motive" for a murder; for a state of emotional indifference, i.e., the absence of any anger, jealousy, or the like-is almost equally powerful in its operation against a deed of violence.15 If the crime is alleged to have been committed for a particular motive, it is relevant to inquire whether the pattern of the crime fits in with the alleged motive.¹⁶ The absence of motive is always a circumstance which is relevant for assessing the evidence.17 It is not necessary that motive must be proved by the prosecution in every criminal case. Of course if motive is sought to be established by evidence on record and the motive is found to be false on consideration of the evidence, then it may have some effect on the prosecution case sought to be made out; because no motive has been proved that will not by itself affect the prosecution case.18

7. Adequacy of motive. If there be any motive which can be assigned, the adequacy of that motive is not, in all cases, necessary. Atrocious crimes have been committed from very slight motives.19 Absence of motive, or the existence of an inadequate motive, is of comparative unimportance, where there exists absolutely cogent evidence that a crime has, in fact, been committed by a certain person.20 That is to say, when there is direct evidence of an eye-witness, motive recedes to the background. The absence of motive involves only this, that the other evidence has got to be very closely examined.21

15.

17. Public Prosecutor v. A. Hari Babu, (1975) 1 An. W. R. 304 at 308; (1975) Mad. L. J. (Cri.) 283; Rajendra Kumar v. State of Punjab,

1963 M. L. J. (Cr.) 506. 18. State of Assam v. Upendra Nath,

State of Assam v. Upendra Nath, 1975 Cri. L. J. 354 at 400 (Gau.).
 Per Lord Campbell, C. J., in R. v. Palmer cited in Wills' Circ. Ev., 6th Ed., 63; R. v. Hedger, (1840) 12 Ad. & El. 139.
 Mata Din v. Emperor, 1937 Oudh 236; 167 L. C. 579; Manbodh v. State, 1955 Nag. 97; I. L. R. 1955 Nag. 23.

21. Atley v. State J. P., A. I. R. 1955 S. C. 807. 56 Cr. L. J. 1653: 1956 All W. R. 483; 1956 S. C. C. 159, see also Prem Narain v. The State, A. I. R. 1957 All. 177; Hari v. State, A. I. R. 1958 Cal. 118; 1958 Cr. L. J. 362; Gurcharan Singh v. State of Punjab, A. I. R. 1956 S. C. 460; 1956 Gr. L. J. 827; Sita Ram Pandey v. State of Bibar, I. L. R. (1975) 54 Pat. 5; 1976 Cri. L. J. 800 (Pat.); N. N. Naik v. State of Maharashtra, (1970) 2 S. C. C. 101; 1970 S. C. D. 697; 1970 S. C. (Cri.) R. 516; (1971) 1 S. C. J. 72; 1971 M. L. J. (Cri.) 43; 1971 All W. R. (H.C.) 160; 1971 All Cri. R. 156; 1971 M. L. W. (Cri.) 71 (2); (1971) 1 S. C. R. 133; A. I. R. 1971 S.C. 1656 (If court is satisfied about accused being assailant of victim, court need being assailant of victim, court need not consider question of motive); Paras Ram v. State of U. P., 1973 Cri. L. J. 428 (H.P.); (1972) 1 Cut. L. R. (Cri.) 285: 38 Cut. L. T. 734; 1974 Punj. L. J. (Cri.) 271: 1975 W. L. N. 373 (Raj.); Radha Kishan v. State, 1973 Cri. L. J. 481; State of Assam v. U. S. Rajkhowa, 1975 Cri.L.J. 354 (Gau.); P. Narain v. State of A. P., 1975 Cri. L. J. 1062: A. I. R. 1975 S.C. 1252; Nachhettar Singh v. State of Punjab, 1974 Cri. App. R. being assailant of victim, court need State of Punjab, 1974 Cri. App. R. (S.C.) 307; 1974 Cri. L. R. (S.C.) 634: 1975 Cri. L. J. 66; 1974 S. C. C. (Cri.) 874; 1974 B. B. C. J. 949: (1975) 3 S. C. C. 266; (1975) 1 S. C. W. R. 645; 1975 S. C. Cri. R. 306: A. I. R. 1975 S. C. 118.

Natha Singh v. Emperor, 1946 P.C.
 187: 73 I. A. 195: 227 I. C. 1: 59
 L. W. 650.

L. W. 650.
Wigmore, s. 118.
State of U. P. v. Hari Prasad, 1974
Cri. L. J. 1274 at 1276: 1974
S. G. Cri. R. 106: 1974 S. C. C.
(Cri.) 203: (1974) 3 S. C. C. 673:
1974 B. B. C. J. 163: 1974 Cri. L.
R. (S.C.) 68: (1974) 2 S. C. R.
588; A. I. R. 1974 S. C. 1740;
Mukhtiar Singh v. State of Punjab,
(1974) 1 Cri. L. T. 225: 1974 Punj.
L. J. (Cri.) 338: 1975 Cri. L. J. L. J. (Cri.) 338; 1975 Cri. L. J.

Where there is a positive proof that a person committed a crime, no motive or ill-will is required for sustaining a conviction.22 Lust of land is a very sensitive matter. A very large number of cases have occurred resulting in serious disputes culminating in murders over small land disputes. Various persons react differently in similar circumstances and where the accused was held to have reacted very sharply against what he considered to be an inequitable distribution of the property, this could undoubtedly provide an adequate motive for the murder.28

The possibility of accused having asked the deceased to settle the land held by her upon his sons, or in the alternative to adopt any one of them. Either of these two courses would have ensured the land coming to his family and not being disposed of in favour of any outsider. The refusal by the deceased to comply with the request persistently made and the possibility of the land going out of the reach of the accused could not also be regarded as an inadequate motive.24

It is not possible to enter into any meticulous calculations of proportion between motive and offence, because it is all a matter which can have reference to the degree of mental depravity or discipline of the individual concerned.25

8. Value of motive. Whether the motive of an accused is sufficient, or whether the absence of motive is crucial is to be judged in the whole context of the facts of the case. Motive is of great importance where conclusion rests on circumstantial evidence. But where the circumstances can lead but to one conclusion, of guilt, non-establishment of motive is not crucial. The law on the point is clear enough. The question of motive is of great importance in circumstantial evidence, and where there is absence of such motive, the Court should carefully examine the absence of motive as a circumstance in favour of the accused. But nevertheless, having made proper allowance for it in giving due weight to it, if the Court is satisfied that the circumstances are such that they can lead but to one conclusion which makes the accused guilty, then absence of motive cannot vitiate the conviction.1 In Atley v. State of U. P.,2 it was said that where the evidence, led on behalf of the prosecution, did not clearly establish the motive for crime, the other evidence bearing on the guilt of the accused has to be very closely examined, though where there is clear proof of motive for the crime, that lends additional support to the finding that the accused was guilty. But the absence of clear proof of motive does not necessarily lead to the contrary conclusion.

Motive assumes importance only where direct and credible evidence is not

Appu v. State, 1970 M. L. W. (Cr.) 239; A. I. R. 1971 Mad. 194,

^{23.} Mst. Dalbir Kaur v. State of Punjab, A. I. R. 1977 S.G. 472 at 484: (1977) 1 S. C. J. 54: (1977) M. L. J. (Cri.) 50: (1976) 4 S. C. C. 158: (1976) S. C. C. (Cri.) 527. 24. Shivji Genu Mohite v. State of Maha-

rashtra, 1973 Gri. L. J. 159 at 163; 1973 S. C. C. (Cri.) 214: 1972 Cri. App. R. 432 (S.C.); 1973 U. J. (S.G.) 163: (1973) 3 S. C. C. 219; 1973 Mad. L. J. (Cri.) 462; (1973)

² S. C. J. 303: 1973 Cri. L. R. (S.C.) 288: A. I. R. 1973 S.C.

^{25.} M. S. Srinivasulu v. State of A. P.,

^{(1975) 2} A. P. L. J. 146.

1. Arun Kumar v. The State, A.I.R.
1962 C. 504: See also Upendra Nath
v. Emperor, A.I.R. 1940 C. 561; Radha Kishan v. State, 1973 Cri.

L. J. 481. 2. A. I. R. 1955 S. C. 807: 1955 Cr. L. J. 1653: 1956 All W. R. 483: 1956 S. C. 159.

available and the case rests upon circumstantial evidence.3 Motive for a crime, while it is always a satisfactory circumstance of corroboration when there is convincing evidence to prove the guilt of an accused person, can never supply the want of reliable evidence, direct or circumstantial, of the commission of the crime with which he is charged.4

Facts showing motive are not entirely valueless but are relevant to prove the crime. Thus, where the accused has murdered her brother-in-law by poisoning, evidence that the deceased had threatened to expose the accused and his being beaten by her paramour, would be relevant to prove the previous enmity which led to the murder.5 Motive is not an indispensable link in the chain of circumstantial evidence, nevertheless it is a strand that runs through all the links and helps to forge a complete chain.6

Where the direct evidence as to the commission of the crime breaks down, it is unnecessary for the Court to discuss the evidence for the motive of the crime.7

Mere motive cannot be considered as sufficient evidence of the commission of a crime by a particular person.8 The mere fact, however, of a party being so situated that an advantage would accrue to him from the commission of a crime, amounts to nothing, or next to nothing, as a proof of his having committed it.9 A letter written by the Solicitor of a company of the plaintiff stating that the company declined to continue the negotiations for a contract because of the defendant's threats, was held admissible (though not necessarily conclusive) evidence that the negotiations were in fact discontinued because of the defendant's threats.10 Further, the existence of motives invisible to all except the person who is influenced by them must not be overlooked.11

L. J. (Cri.) 462: (1973) 2 S. C. J. 303: 1973 Cri. L. R. (S.C.) 268: A. I. R. 1973 S.C. 55.

4. Rannun v. King-Emperor, A. I. R. 1926 Lah. 88: I. L. R. 7 Lab. 84: 94 I. C. 901: 27 Cr. L. J. 709; Pratap Singh v. State of Madhya Pradesh, 1970 Jab. L. J. 797: 1970 M. P. L. J. 478: 1971 Cri. L. J. 172; State of Rajasthan v. Manga, 1973 Raj. L. W. 58: 1973 Cri. L. J. J. 1075 (Raj.).

5. Himachal Pradesh Administration v. Mt. Shiv Devi, A. I. R. 1959

v. Mt. Shiv Devi, A. I. R. 1959

Sivarajan v. State, I. L. R. 1959
 Kerala 319: 1959 Ker. L. T. 167:

1959 Ker. L. J. 221.
7. Ghorrao v. Emperor, 1933 Oudh 265: 145 I. C. 470: 10 O. W. N.

8. Dila Ram v. Emperor, A. I. R. 1932 Lah. 195: 137 I. C. 681: 33 Cr. L. J. 501.

9. Best, Ev., s. 453. 10. Skinner & Co. N. Shew & Co., L.R. 2 (1894) Ch. D. 581.

11. As to acts apparently motiveless see R. v. Halvnes, (1859) 1 F. & F. 666, 667; R. v. Michael Stokes, (1848) 3 C. & K. 185, 188 and next note.

^{3.} Bhagoji v. Hydtrabad Government, 1954 Hyd. 196; Udaipal Singh v. State of U. P., 1971 Cri. A. P. R. 427 (S.C.): 1972 U. J. (S.C.) 38: 1972 M. L. J. (Cri.) 259: (1972) 1 S. C. J. 408: (1972) 1 M. L. J. (S.C.) 64: (1972) 1 An. W. R. (S.C.) 64: 1972 All Cri. R. 226: 1972 Cri. L. J. 7: A. I. R. 1972 S. C. 54; Ali Mohidin Cunna v. State, 1972 Cri. L. J. 173 (Goa); Shahabuddin v. State of Rajasthan, 1972 W. L. N. 648: 1972 Raj. L. W. 629: 1973 Cri. L. J. 723 (absence of motive is a strong circumstance in favour of the accused); stance in favour of the accused); Ram Gopal v. State of Maharashtra, 1972 S.C. Cri. R. 169: 1972 U. J. (S.C.) 304: (1972) 2 S. C. W. R. 250: 1972 Cri. L. J. 473: A. I. R. 1972 S.C. 656 (If motive as a circumstance is put forward, it must be fully established like any other incriminating circumstance); alias Dasamant Majhi v. State, (1975) alias Dasamant Majhi v. State, (1975)
41 Cut. L. T. 636; Radha Kishan
v. State, 1973 Cri. L. J. 48.; I. L.
R. (1971) 21 Raj. 419; Shivji Genu
Mohite v. State of Maharashtra,
1973 Cri. L. J. 159: 1973 S. C. C.
(Cri.) 214: 1972 Cri. App. R. 432
(S.C.): 1973 U. J. (S.C.) 163:
(1973) 3 S. C. C. 219: 1973 Mad,

Motive or malice in prosecution may, if established, affect the appreciation of the prosecution evidence but it cannot affect the validity of the investigation and the prosecution if it is otherwise regular.12 The court need not consider the question of motive for the offence of murder if it is satisfied that the evidence that the accused was the assistant of the deceased victim, was acceptable.18

9. Motive not essential. "It is sometimes". Professor Wigmore points out, "popularly supposed that in order to establish a charge of crime, the prosecution must show a possible motive. But this notion is without foundation." Assuming for purposes of argument that "every act must have a motive, i.e., a prior conscious impelling emotion (which is not strictly correct), yet it is always possible that this necessary emotion may be undiscoverable, and therefore the failure to discover it does not signify its non-existence."

"The kinds of evidence to prove an act vary in probative strength and the absence of one kind may be more significant than the absence of another; but the mere absence of any one kind cannot be fatal. There must have been a plan to do the act (we may assume); the accused must have been present (assuming it was done by manual action) but there may be no evidence of preparation; or there may be no evidence of presence; yet the remaining facts may furnish ample proof. The failure to produce evidence of some appropriate motive may be a great weakness in the whole body of proof, but it is not a fatal one as a matter of law. In other words, there is no more necessity in the law of evidence to discern and establish the particular existing emotion or some possible one, than to use any other particular kind of evidential fact."14 When facts are clear it is immaterial that no motive has been proved.15

Motive is not an element essential to prove the guilt in a criminal trial. It is a factor to be taken into account along with other circumstances.16 If there are circumstances in a case which prove the guilt of the accused, they are not weakened because the motive has not been established. It often happens that only the culprit himself knows what moved him to a certain course

16. State v. Ganesh Sahi, 1952 Pat. 1: 1953 Cr. L.J. 145.

P. Sirajuddin v. Government of Madras, I. L. R. (1967) 3 Mad. 659: (1968) 1 M.L.J. 480: 1968 M.L.W. (Cr.) 223: 1968 Cr. L.J. 493: A.I.R. 1968 Mad. 117, 125.

^{493:} A.I.R. 1968 Mad. 117, 125.

13. Narayan Nathu Naik v. State of Maharashtra, 1970 S.C.D. 697: (1971) 1 S.C.J. 72: 1971 A.W.R. (H.C.) 160: 1971 M.L.J. (Cr.) 43: 1971 M.L.W. (Cr.) 71 (2): A.I.R. 1971 S.C. 1656, 1657.

14. Wigmore, Ev., s. 118, citing Poin- (the absence of evidence suggesting a motive is a circumstance in favour of the accused: but proof ter v. U.S., 151 U.S. 396 (Amer.), of motive is never indispensable to conviction): State v. Rathbun, 74 Conn. 524 (Amer.) (the other evidence may be such as to justify

a conviction without any motive being shown); Emperor v. Ram Dat, 1933 Oudh 340; 143 I.C. 129: 10 O.W.N. 585.

Hazrat Gul Khan v. Emperor,
 1928 Cal. 430: 109 I.C. 482: 32
 C.W.N. 345; Kazi Badrul Rahman v. Emperor, 1929 Cal. 1: 115 I.C. 561: 33 C.W.N. 136; Mohna v. Grown, 1925 Lah. 328: 86 I.C. 406: 26 Cr. L.J. 774; Mathura v. Emperor, 1935 Oudh 354: 155 L.C. 527: 1935 O.W.N. 561; Cher Ram v. The State of U.P., 1958 A.L.J. 82; State v. Hadibandhu Mati, (1973) 39 Cut. L.T. 619: 1973 Cut. L. R. (Cri.) 241: I. L. R. (1973) Cut. 601.

of action.¹⁷ Where the positive evidence against the accused is clear, cogent and reliable, the question of motive is of no importance.¹⁸ Even if the genesis or the motive of the occurrence was not proved the ocular testimony of the witnesses as to the occurrence could not be discarded only on that account, if otherwise it was reliable.¹⁹

The illicit connection between the deceased and the wife of the accused's brother, which led to the breaking up of the house of that brother was a provocation which would also be a motive for the accused murdering her husband.²⁰

- 10. Motive as a fact in issue. "Motive may be a fact in issue in some cases. Thus it may be in issue—
 - (1) in the sense of good or bad faith; as where the motive of a transfer is charged to have been in fraud of creditors;
 - (2) in the sense of reason or ground for conduct; as where the motive of a wife for leaving her husband is disputed, or of employees for leaving their employer; and
 - (3) in the sense of malice or criminal intent.21
- 11. Proof of motive. The motives of parties can only be ascertained by inference drawn from facts.²² But the motive should not be inferred from any other than direct evidence of the strictest character.²² Hearsay evidence can never be admitted unless the Evidence Act permits it, as for example under Section 32.²⁴

It is improper for a Court to consider the evidence establishing motive before examining the evidence as to the commission of the crime. The suggestion of a motive, possibly a wrong motive, may well lead the Court astray.²⁵

12. Preparation. Preparation consists in devising or arranging means necessary for the commission of an offence. An attempt is the direct movement towards the commission after preparations are made.¹

- 17. Rajinder Kumar v. State of Punjab. (1963) 3 S.C.R. 281: 1963 S.C.D. 43: (1963) 2 S.C.J. 418: 1963 M.L.J. (Cr.) 506; A.I.R. 1966 S.C. 1322, 1324; Rajendra v. State, 1968 Cr. L.J. 811 (All.); Arundhati Keutuni v. The State, 1968 Cr. L.J. 848, 850 (Orissa); Ramesh Ghandra v. State, 1969 Cr. L.J. 1549: A.I.R. 1969 Tripura 53.
- pura 53.

 18. Gurcharan Singh v, State of Punjab, 1956 Cr. L. J. 827; A, I. R. 1956 S.C. 460; Rajendra v. The State, 1968 Cr. L. J. 811 (All.), at p. 818; State v. Bhola Singh, I.L. R. (1969) 19 Raj. 273: 1969 Cr. L.J. 1002; A.I.R. 1969 Raj. 219; Vinayaka Datta v. State, 1970 Cr. L.J. 1081: A.I.R. 1970 Goa 96, 101 (threats by accused to deceased constitute motive and explain untecedent conduct); Surjan Singh v. State, 1971 W. L. N. 360; Sita Ram v. State of Bihar, 1976 Cr.

- L. J. 800; Dasa Kandha v. State, 1976 Cr. L. J. 2010; (1976) 42 C. L. T. 599.
- Bahal Singh v. State of Haryana, 1976 Cri. L. J. 1568 at 1572: (1976)
 S. C. C. 564: (1976) S. C. C. (Cri.) 461: A. L. R. 1976 S.C. 2032.
- Krishna Wanti v. The State, 71
 P. L. R. 280.
- 21. Wigmore, s. 119.
- Taylor v. Willans, (1830) 2 B. & Ad. 845-857: 1 L. J. K. B. 17.
- 23. R. v. Zuhir, (1868) 10 W. R. (Cr.)
- ib., Venkatasubha Reddi v. Emperor, 1931 Mad. 689: I.L.R. 54
 Mad. 931: 134 I.C. 1143: 34 L.W. 128.
- 25. Dwarka v. Emperor, 1931 Oudh 119: I.L.R. 6 Luck. 475: 131 I.C.
- Jain Lal v. Emperor, 1943 Pat. 82 at p. 87: I.L.R. 21 Pat. 667: 205 I.C. 69.

The reasons which exist for the relevancy of evidence of preparation or design have been already given. Design may be proved by an utterance in which it is asserted; by conduct, indicating the inward existence of design; by evidence of prior or subsequent existence of the design as indicating its existence at the time in question.1-24 Previous attempts to commit an offence are closely allied to preparations for the commission of it, and only differ in being carried one step further and nearer to the criminal act, of which, however, like the former, they fall short.25

The probative force, both of preparation for, and previous attempts to commit, an offence rests on the presumption that an intention to commit the offence was framed in the mind of the accused which persisted until power and opportunity were found to carry it into execution, such evidence is admissible both under this section as showing preparation for the commission of the offence and under Section 14 as exposing the state of mind and intention on the part of the accused to commit the offence.1

In the undernoted case, the accused was charged with cheating for importing goods in port Karachi without payment of the proper customs duty by deceiving the Customs authority. Evidence was adduced of a previous visit of the accused to the port of Okha where, it was said, he tried to make some arrangement with the Customs, whereby he could import other goods without payment of the proper Customs duty. It was held, the evidence was admissible under this section as constituting the motive or preparation for the commission of the offence at Karachi, and previous conduct.2

13. Conduct. Preparation and previous attempts3 are instances of previous conduct of the party influencing the fact in issue or relevant fact; but other conduct also, whether of party or of an agent to a party, whether previous6 or subsequents and whether influencing or influenced by a fact in issue or relevant fact, is also made admissible under this section. A man's conduct is not only what he does, but also what he refrains from doing, and the latter is often the more significant.6 'Conduct' may, in certain circumstances, include statements as well as acts as Explanation 1 to the section shows.7

Where the witness was the first to reach the scene, and he found the accused sitting in the verandah of his house with a fire burning in the hearth. The accused told him that he had "finished his entire family". Another witness who arrived three hours later, was told by the accused that his wife was

^{1-24.} Jainlal v. Emperor, 1948 Pat. 82: Sec. 287 et seq., e.g. possession of tools, materials, preparations, journeys, experiments, enquiries, and the like.

^{25.} Best's Ev., 455: S. 14 post, illusts, (i), (j), (o): as to probative force of and informative circumstances connected with preparation and previous attempt, see Best, Ev., ss. 456, 457.

Abhu v. State, 1970 M.L.W. (Cr.)

^{239:} A.I.R. 1971 Mad. 194, 197. 2. Mohan Lal v. Emperor, 1937 Sind 293: 172 I.G. 374: 39 Cr. L.J.

^{3.} See illustrations (c), (d) and S. 14 illustrations (i), (j) and (o).

^{4.} See illustration (d), (e); as to previous and subsequent conduct,

see Best, Ev., s. 452; Mohan Lal v. Emperor, 1937 Sind 293: 172 I.C. 374: 39 Cr. L.J. 123. 5. See illustrations (e), (i). But see Enayat Karim v. Emperor, 1920 Pat. 255: 54 I.C. 775: 21 Cr. L.J.

Ram Narain v. Chota "Nagpur Banking Association, 1917 Cal. 746: 43 Cal. 332: 36 I.C. 321, also Watson v. Mohesh, (1875) M.W.

^{7.} See Emperor v. Nanua, 1941 All. 145: I.L.R. 1941 All. 280: 193 'I.C. 873.

in the habit of abusing his children when she served meals to them and that despite his persuading her not to do so, she had continued abusing them and, therefore, he had decided to put an end to the entire family. He was further told by the accused that after he murdered his wife and children, he had decided to commit suicide by jumping from a tree, but as his courage failed him, he came down. Thereafter, he climbed an electric pole near his house with the same object, but came down from that also. It was argued that the accused murdered the members of his family, he was suffering from unsoundness of mind, so that he was incapable of knowing the nature of his acts, or that he was doing what was either wrong or contrary to law. Held it was not because of unsoundness of mind that the accused did away with the members of his family. The accused had been ailing for a considerable time, and that he was ill even during the time when the offence took place. The burden of his illness and the constant domestic bickering and unhappiness at home took the accused to the point of ultimate despair when he decided that he could take no more. That culminated in the decision to put an end to himself and his family. The circumstances in which the accused was found in his verandah in the morning still wearing the blood-stained clothes, making no attempt to remove the clothes or other incriminating evidence or to run away, did not necessarily lean to the conclusion that he was of unsound mind. On the contrary, it was wholly consistent with the case that the accused had decided to put an end to his life also. There was no evidence to show that the cognitive faculties of the accused had been impaired, so that he could not judge the consequences of what he was doing. The trial Judge erred in applying Section 84, Indian Penal Code. The accused caused the death of his wife and children with the intention of causing their death and he was liable to be punished under Section 302, Indian Penal Code.8

"It is not competent for the prosecution to adduce evidence leading to show that the accused has been guilty of criminal acts other than those covered by the indictment for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand, the mere fact that the evidence adduced tends to show the commission if other crime does not render it inadmissible, if it be relevant to an issue before the jury." Under this section, conduct is admissible irrespective of the fact whether the conduct was or was not the result of inducement offered by the police. 10

Whether in a particular case, the conduct of the accused is a relevant factor, or it is not, depends for decision on the facts and circumstances of each particular case. In the undernoted case, at the time, when the accused was called upon to produce the money which had been received as bribe from a person, the accused hesitated and he was trembling and perspiring, it was held that the conduct of the accused was a relevant factor which could be taken into consideration.¹¹ But where the accused, while going out, after

The State v. Lal Din. 1973 Cr. L.J. 829 at 830, 831, 832 (H.P.).

^{9.} Makin v. Attorney-General of New South Wales, (1894) A.C. 57; 58 J.P. 48; 63 L.J.P.C. 411: 17 Cox C.C. 704; see also Emperor v. Stewart, 1927 Sind 28: 97 J.C. 1041.

Jagadamba Prasad v. State, A.I.R. 1957 Madhya Bharat 33: 1957 Cr. L.J. 179.

^{11.} M.M. Gandhi v. State of Mysore, A.I.R. 1960 Mys. 111: 1960 Cr. L.J. 934: Shiv Bahadur Singh v. State of Vindhya Pradesh, A.I.R. 1954 S.C. 322: 1954 Cr. L.J. 910: 1954 S.C.J. 362: 1954 S.C.A. 1316: 1954 S.C.R. 1098 and State of Madras v. Vaidyanatha Iyer, A.I.R. 1958 S.C. 61: 1958 Cr. L.J. 232: 1958 Mad. L.J. Cr. 299: 1958 S.C.R. 580 followed.

taking the alleged bribe, was halted and made a statement, that statement was he'd not admissible under this section.12 The conduct of the accused would be relevant under Section 8 of the Evidence Act if his immediate reactions to the illegal overture of the complainant or his action in inserting unwanted something in his pocket were revealed in the form of acts accompanied then and there or immediately thereafter by words or gestures reliably established. There was no evidence to support an innocent piece of conduct.18

14. Person whose conduct is relevant. The second clause applies to the party's agents as well as the party himself. "Party" includes not only the plaintiff and defendant in a civil suit, but parties in a criminal prosecution, that is the complainant and the accused. The section provides that the term "party" is to include any one against whom an offence is the subject of any proceeding, and the reason why the Legislature said this was, probably, the fact that, by a pure legal technicality, the State occupies, in criminal matters, a position analogous to that of plaintiff in a civil suit.14-15

In a murder case, a complaint made by the deceased to the Sub-Divisional Officer about a week before the alleged murder stating that he seriously apprehended danger to his life at the hands of certain persons was held to be admissible under this section as evidence of the conduct of the deceased, an offence against whom was the subject of trial, such conduct being influenced by his fear of injury.16 Where a letter written by a relation of the accused referring to an attempt to raise money to buy off the prosecution was tendered in evidence, it was held, that it could not be received in evidence, as an admission of the accused without proof that it was written with the knowledge and direct authority of the accused.17

Documents filed in maintenance proceedings are relevant and admissible in proceedings under Section 10, Hindu Marriage Act, 1955, as evidence of conduct of the husband towards the wife.18

Letters written by a married sister to her brother complaining of maltreatment by her husband in so far as they point to her conduct are admissible in evidence for the conduct of a party levelling complaints and seeking protection from maltreatment is evidence of res gestae.19

The conduct of an accused is relevant against him but not against his coaccused.20 This is on the principle that the evidence of conduct admissible under this section is of the conduct of a person who is a party to the action. It is thus reasonably clear that evidence of acts, statements or writings of a co-

^{12.} Zwringlee Ariel v. State of M.P., A.I.R. 1954 S.C. 15: 55 Cr. L.J.

¹³ Maha Singh v. Delhi Administration, 1976 Cri. L. J. 346 at 353; A.I.R. 1976 S.C. 449; (1976) 1 S.G.C. 644: 1976 S.C.C. (Cri.) 195: 1976 Cr. A. R. (S.C.) 94; 1976 S.C. Cr. R. 128: (1976) 3 S. G. R. 119.

^{14-15.} R. v. Abdullah, (1885) 7 A. 385, 399, 400: 5 A.W.N. 78 (F.B.); see R. v. Arnali, (1861) 8 Cox.

C.C. 439: 3 Russ. Cr. 489.

Goloke Behari Takal v. Emperor,
 1938 Cal. 51 at p. 58; I.L.R.
 (1938) 1 Cal. 290: 173 I.C. 65.

Laijam Singh v. Empéror, 1925 All. 405: 86 I.C. 817: 26 Cr.L.J. 881.
 Shyam Chand v. Janki, 1966 Cr. L.J. 1438: A.I.R. 1966 Him. Pra. 70, 73.

^{19.} Smt. Chander Kanta v. Dial Chand, 70 P.L.R. 691.

^{20.} Des Raj v. The State, 1951 Simla

conspirator either under trial or not on trial but outside the period of conspiracy would not be admissible in proof of the specific issue of the conspiracy.21

The explanation of any admission or conduct on the part of a party must, if the party is alive and capable of giving evidence, come from him and the court will not imagine an explanation which the party himself has not chosen to give. If the party (the main defendant in the instant case) abstains from entering into the witness-box, it would give rise to an inference adverse to him (alleged adoption).22 The office-bearers of a co-operative society were found swindling funds of society. They agreed before the members who were arbitrating in the affairs to make good the loss and signed the agreement. It was held that though the agreement may not be used as extra judicial confession, the same could be used as evidence of conduct of the office-bearers (accused) .28

15. Conditions of admissibility. The conduct of a party or his agent must be in reference to the suit or proceeding, or in reference to any fact in issue therein or relevant thereto. Again conduct is admissible under this section only if it influences or is influenced by any fact in issue, or relevant fact.24 The conduct of the accused is relevant only for the purpose of proving his guilt. That piece of conduct can be held to be incriminatory, which has no reasonable explanation except on the hypothesis that he is guilty. That is to say, conduct which destroys the presumption of innocence can alone be considered as material.25

When there was not an iota of evidence as to any reason for the appellant to do away with decresed, it was not possible to affirm his conviction under Section 364 of the Indian Penal Code on such evidence adduced by the prosecution. The fact that he had escaped from custody was not sufficient for coming to the conclusion that he was guilty of the charge of abducion of the deceased resulting in his murder.1-2

16. "Influences or is influenced." In the Full Bench case of R. v. Abdullah3 the accused was charged with murder, and it appeared that, shortly before her death, the deceased was questioned by various persons as to the circumstances in which the injuries had been inflicted on her, and in reply she made certain signs in answer to the questions as she was unable to speak. On a question being raised as to the admissibility in evidence of the questions put to the deceased and the signs made by her in answer to them, Mahmood, I. was, in view of illustration (f) to this section, of opinion that the word "conduct" in this section does not mean only such conduct as is directly and immediately influenced by a fact in issue or relevant fact, and that the signs

Sardul Singh v. State of Bombay, A.I.R. 1957 S.C. 747: 1957 S.C.J. 780: 1958 All. W.R. (Sup.) 1: 1957 Cr. L.J. 1325: (1957) 1 M. L.J. Cr. 739.
 Arjun Singh v. Virendra Nath, A.I.R. 1971 All. 29, 35.
 Arjuna Panigrahi v. State, 1974 Cut.

L. R. (Cri.) 203.

See Hadu v. State, 1951 Orissa
 I.L.R. (1950) Cut. 509.
 Anant Lagu v. State of Bombay, A.I.R. 1960 S.C. 500; 1960 Cr.

L.J. 682: 62 Bom, L.R. 371: (1960) M.L.J. (Cr.) 493; State v. Lavinder Singh, (1972) 2 Sim. L.J. 349; 1973 Cri. L.J. 1023; Narsingha Karwa v. State, (1974) 40 Cut, L.T. 491; Dattar Singh v. State of Punish 1974 Cri. L.J. 2008; of Punjab, 1974 Cri. L.J. 908:

A.I.R. 1974 S.C. 1193.
1-2. Narain Mahton v. State, 1974 B.
I. J. R. 642 at 644.
3. (1885) 7 All. 385: 5 A.W.N. 78
(F.B.).

made by the deceased were relevant under this section as conduct of a "person an offence against whom is the subject of any proceeding," and that the questions put to her were admissible in evidence, either under Explanation II of this section or under Section 9 by way of explanation of the meaning of the signs. Petheram, C. J., was of a contrary opinion, and held, that the conduct made relevant by this section is conduct which is directly and immediately influenced by a fact in issue or relevant fact, and does not include actions resulting from some intermediate cause, such as questions or suggestions by other persons. The ruling of the Full Bench, however, was that the questions and signs taken together were admissible under Section 32, as "verbal statements" made by a person as to the cause of her death. This ruling was followed without dissent by the Calcutta,4 Lahore,5 Patna6 and Bombay7 High Courts. But the question of the admissibility of the signs under this section has been left unanswered, although in the Bombay case8 Broomfield, I.,

"I should myself have thought that her gestures as explained by the questions put to her would be relevant as conduct under Section 8, although I must admit that Section 8 is a little difficult to understand; in particular, the precise meaning of the expression 'influences or is influenceed' by any fact in issue or relevant fact."9

If notifications under Sections 3, 4 and 5 of the Minimum Wages Act are construed wrongly by the Labour Welfare Officer, the confusion created by the wrong meaning may be relevant and taken into consideration from the point of view of awarding compensation under Section 20 (3), or for the purposes of prosecution under Section 22 of that Act.10

17. Need not be contemporaneous. As the section itself shows, conduct is relevant, whether it is previous or subsequent to the fact in issue or relevant fact. It need not be contemporaneous, as it was at one time thought necessary in England, and even now considered necessary in America. The rule in England now is that, although concurrence of time must always be considered as material to show the connection, it is by no means essential. Concurrence of time may, however, be important in estimating the weight to be given to the evidence when admitted.11

Emperor v. Sadhu Charan Das, 1923 Cal. 409: I.L.R. 49 Cal. 600: 77 I.C. 993: 25 Cr. L.J. 529.
 Ranga v. Emperor. 1924 Lah. 581: I.L.R. 5 Lah. 305: 84 I.C. 552.
 Chandrika v. Emperor. 1922 Pat. 535: I.L.R. I Pat. 401: 71 I.C. 353: 24 Cr. L.J. 129: 3 P.L.T. 771.

Emperor v. Meti Ram, 1936 Bom. 372: 165 I.C. 422: 38 Bom. L.R.

^{8.} Emperor v. Motiram, supra.

^{9. -} See also Balmakand v. Ghansam, (1894) 22 C. 391, 404, 406; R, v. Ishri, (1906) 29 A. 46; Dalip v. Nawal, (1908) 30 A. 258 (P.C.) (intention inferred from subsequent conduct of accused); R. v. Heeramun, (1866) 5 W. R. Cr. 5;

R. v. Mulla (1915) 37 A. 395 (presumption of guilty intent); Karali v. R., (1917) 44 C. 358: 35 I.C. 984: A.I.R. 1917 C. 824: see as to conduct R. v. Jora Hasji, (1874) 11 B.H.C.R. 245, and Wigmore, Ev., sub. voc.

^{10.} G.S. Dugal and Co. (Pvt.) Ltd., v. Labour Inspector, 1968 Lab. I.C. 338: A.I.R. 1963 Pat. 90, 94.

11. 58 Whitley v. Taylor, Ev., ss. 588, 589: Rouch v. G.W.R. (1841) 1 Q.B. 51: but see also R. v. Bedingfield: (1879) 14 Cov. 341 Agassiz v. field: (1879) 14 Cox. 341, Agassiz v. London Train Co. (1873) 21 W.R. (Eng.) 199; R. v. Goddard, (1882) 15 Cox. 7; Lecs v. Marton (1832) 1 M. & R. 210; Thompson v. Trevanion, (1963) Skin, 402 v.

- 18. Contemporaneous tape-record of conversation. If a statement is relevant, an accurate tape-record of the statement is also relevant and admissible, the contemporaneous dialogue between the complainant and the accused forms part of the res gestge and is relevant and admissible, under this section. The time, place and accuracy of the recording must be proved by a competent witness and the voices must be properly identified. Like a photograph of a relevant incident, a contemporaneous record of a relevant conversation is a relevant fact and is admissible under Section 7. The fact that the tape-recording was done without the knowledge of the person concerned is not an objection to its admissibility in evidence.12 A tape-recorded statement could- be tampered with. If the tape-recorded statement is played and it is re-recorded on another machine then at the will of the party taking the second tape, the portions which it wants to eliminate, could easily be eliminated by stopping the second machine at convenient points and allowing the original to play out at those points. Thereafter the second tape record could yet by edited once again by a similar device. Then in exercising its inherent power the Court may keep in view such other considerations as would have bearing on the administration of justice. Though the application for taking on record the additional evidence was made, the transcripts of the conversation on the tape were not placed on record. If the additional evidence on this ground was desired to be produced then it was the clear duty of the party to place this evidence with the Court to ensure that it would be beyond his reach for the purpose of subsequent trimming or tampering. Therefore, if transcript of tape-recorded conversation is not put on record at the earliest opportunity, it is not admissible.18 Once a tape-recording is admissible, it can be used for confronting a witness with his earlier tape-recorded statements. It can also be used for shaking the credit of a witness.14 It can also be used as substantive evidence.15
- 19. Presumptions from conduct. The illustrations given are so many instances of natural presumptions which the Court or jury may draw. From preparations prior, or flight subsequent to, a crime, may be inferred or presumed the guilt of the party against whom such conduct is proved.16

Other presumptions from conduct arise in the case of flight, 17 silence, 18

^{12.} Yusufalli Esmail v. State of Maharashtra, (1967) 3 S. C. R. 720: 1968 S.C.D. 347: (1968) 1 S.C.J. 511: (1967) 2 S.C.W.R. 934. 1968 A.W.R. (H.C.) 268: 70 Bom. L.R. 76: 1968 M.L.J. (Cr.) 247: 1968 M.L.W. (Cr.) 12: 1968 Mah. L.J. 179: 1968 Cr. L.J. 103: A.I.R. 1968 S.C. 147, at pp. 148, 149; R.M. Malkani v. State of Maharashtra, (1972) 2 S.C.W.R. 776: 1973 Cri. L.J. 228: 1973 Mah. L.J. 92: 1973 Cri. Ap. R. 31 (S.C.): 1973 M.P.L.J. 224: (1973) 1 S.C.C. 471: 1974 Mad. L.W. (Cri.) 121: A.I.R. 1973 S.C. 157 (There was no violation of Article 20 (3) or 21 of the Constitu-Article 20 (3) or 21 of the Constitu-tion, and further the conversation was not within the vice of section

¹⁶² Gr. P. C.); Z. B. Bukhari v. B.R. Mehra, A.I.R. 1975 S.C.

^{13.} Lachhamandas v. Deep Chand, A.
I. R. 1974 Raj. 79 at 82, 83: 1973
W.L.N. 281: 1973 Raj.L.W. 409.
14. Rup Chand v. Mahabir Pfasad,
A.I.R. 1956 Punj. 173: the reasoning of which was approved by the Supreme Court in Yusufalli Esmail v. State of Maharashtra, supra; Dial Singh Narain Singh v. Rajpal Jagan Nath, 71 Punj. L.R. 519: 1969 Cr. L. J. 325: A. I. R. 1969

Punj. 350.

15. Z. B. Bukhari v. B. R. Mehra,
A. I. R. 1975 S. C. 1788 at 1796.

^{16.} Norton, Ev., 107. 17. Illustration (i), ante. 18. v. post.

evasive or false responsion,19 possession of documents, or property connected with the offence.20 Letters, etc., found in a man's house after his arrest are admissible in evidence, if their previous existence has been proved.21 Change of demeanour in, or in the circumstances of, the accused,22 as his becoming suddenly rich, his squandering unusual sums of money, and the like attempts to stifle or evade justice or mislead enquiry23 (as flight, keeping concealed, concealing things, obliteration of marks, subordination of evidence, bribery, collusion with officers and the like) and fear indicated by passive department,24 as by trembling, stammering, staring, etc., or by a desire for secrecy,25 e.g., as by disguising the person, or choosing a spot supposed to be out of the view of others.

20. Subsequent conduct. Subsequent conduct may also be exclupatory conduct of the accused person which is equally admissible because an admission may be proved by or on behalf of the person making it if it is relevant otherwise than as an admission.1 These verbal acts are subject to Sections 24, 25 and 26 of the Evidence Act and Section 162, Cr. P. C. One of the important pieces of subsequent conduct of an accused person in property offences is his change of life, or circumstances not easily capable of explanation excepting on the hypothesis of the possession of the fruits of crime, as for instance, where shortly after a burglary or dacoity or the suspicious death or disappearance of a person in good circumstances a person previously poor is found to be in possession of considerable wealth or the like. In Mayandi v. The State2 it was found that, after burgling the house of one Amina Ammal who had a large amount of cash with her before her murder and which were missing after her murder was discovered, the prosecution was able to show that the accused who was a poor man was found to be suddenly affluent and spending large sums of money. This changing over suddenly to affluence incapable of explanation except on the hypothesis of the acquisition of the fruits of crime was held to be strong piece of evidence against the accused.3

Norton, Ev., 106, 107 and post, Best, Ev., 574; see Moriarty v. L.C. & D. Ry. ante: for an example of inferences from con-

duct of the character above mentioned, see R. v. Sami, (1890) 13 M., 426, 432 (v. post).

20. Illustration (i), ante; see R. v. Couroisier, Norton, Ev., 111; Taylor, Ev., s. 595; R. v. Cooper, (1875) 1 Q.B.D., 19.

R. v. Ameer Khan. (1871) 9 B.L. R. 36; 17 W.R. (Cr. 15; Bharat Chandra Das v. State, 1950 Assam 193 (purchasing and concealing stolen property).

stolen property).

Best, Ev., s. 459.

Arthur P. Wills' Circ. Ev., 138;

Best., Ev., s. 460; Norton, Ev.,

110, 111. Illustrations (e), (i),

antc. R. v. Donellan Gurney's

S.H.R. (1781) in Steph, Introd.

75-81 and Wills' Circ. Ev., 6th

Ed., 376, 380; destruction of

marks, see R. v. Cook Leicester

Sum Ass (1834) and R. v. Green-

acre, C.C.C. Sess Pat. April 1837: 8 C. & P. 35 cired in Wills' Circ. Ev., 6th Ed., 144-46 and Norton, Ev., 111.

24. Best, Ev., s. 466, Trial of Eugene Aram cited in Wills, Circ. Ev., 6th Ed., 121, 122, and Norton, Ev., 111, 112; R. v. Peter, (1865) 3 W.R. Cr. 11 (conduct of accused before and after crime); R.v. Beharee, (1865) 3 W.R. Cr. 23, 24 (conduct of the prisoner since arrest; feigning

insanity; general demeanour). Best, Ev., s. 467; Norton, Ev., 113. Section 21 (3); illustrations (d) 1 Section 21 (3); illustrations (d) and (e) are in point. See Aghnoo Nagasia v. State, A.I.R. 1966 S.C. 119; 1966 Cr. L.J. 100: 1965 Mad. W.N. 216; 1965 All. W.R. H.C. 648; 1965 B. L.J.R. 865; 1966 M.P.I.J. 49; 1966 Mah. L.J. 113; (1966) M.I.J. (Cr.) 134; (1966) I Andh. L.J. 430, 2. 1957 M.W.N. 674 (Cr.) 178, 3. Amarnath v. Emperor. A.I.R. 1931 Lah. 406; 133 I.C. 639.

Evidence of contemporaneous conduct is always admissible as a surrounding circumstance; but evidence as to subsequent conduct of the parties is inadmissible.4

The fact that the accused was seen holding a pistol in his hand by the victim immediately after being shot at goes to show that it was the accused who had fired the shot at the victim. The accused was also identified by the witness when the victim raised an alarm. The conduct of accused in then running away to arhar field lends further assurance to the inference of his complicity. 5-6

21. Absconding or flight. See Illustration (i) to the section. Mere absconding by itself does not necessarily lead to a firm conclusion of guilty mind. The act is a relevant piece of evidence to be considered along with other evidence but its value would depend upon the circumstances of each case. Normally, evidence for sustaining a conviction can scarcely be held as a determining link in completing the chain of circumstantial evidence which must admit of no other hypothesis than that of the guilt of the accused.7 Though the conduct of accused in absconding immediately after the occurrence is relevant evidence as indicating to some extent his guilty mind, it is not conclusive of that fact because sometimes even innocent persons when suspected may abscond to avoid arrest.8 The disappearance of the accused after the commission of the alleged crime is a circumstance which in the absence of any plausible explanation, might be taken against them.9 But absconding is usually but slight evidence of guilt.10 Mere absconding should not form the basis of a conviction. It comes in as a very useful piece of corroborative evidence, if there is other evidence to connect the accused with the crime, but per se absconding is not enough to bring home the charge to the person who has absconded. A person charged with an offence might be nervous, and under the impulse of the moment might consider it desirable that he should leave the country rather than face a trial. Later, in saner moments he might decide that he should come back and have himself cleared.11 Facts tending to ex-

^{4.} Bhaskar Waman v. Shrinarayan, (1960) 2 S.C.R. 117: (1960) 2 S.C.A. 189: 1960 S.C.J. 327: A.I.R. 1960 S.C. 301: 1960 M.P. L.J. 409: (1960) 1 Mad. L.J. (S.C.) 87: 1960 Andh. W.R.S.C. 1787: 1960 S.C.J. 327: (1960) 2 S.C.R. 117. evidence of subsequent conduct of the transferors, as indi-cative of the character of the cative of the character of the transaction as a sale, held not admissible; Sita Ram v. Bashesher Dayal, A.I.R. 1964 Punj. 81: 65 P.L.R. 1064.

P.L.R. 1064.

5-6. Malkhan Singh v. State of U.P., 1975 Cri. L. J. 32 at 33: 1974 S.C. Cri. R. 177: 1974 B.B. C.J. 270: 1974 S.C.C. (Cri.) 919: (1975) 3 S.C.C. 311: 1975 Cri. App. R. 56 (S.C.): (1975) 2 Cri. L.T. 117: (1975) 2 S.C.J. 149: 1975 Mad. L.J. 450: 1975 Cri. L.J. 32: A.I.R. 1975 S.C. 12.

7. Matru v. State of U.P., 1971 S.C. C. (Cr.) 391: (1971) 1 S.C.W.R.

^{465:} A.I.R. 1971 S.C. 1050, 1058 (absconding not inconsistent with

⁽abscolling innocence).

8. Thimma v. State of Mysore, (1971)
1 S.C.J. 726: 1971 M.L.J. (Cr.)
336: A.I.R. 1971 S.C. 1871, 1877.

9. Parmeshwar Din v. Emperor, 1941
Oudh, 517 at p. 519: 195 I. C. 630:

Oudh, 517 at p. 519; 195 I. C. 630; 1941 O.W.N. 981.
R. v. Sorab, (1866) 5 W.R. Cr. 28; R. v. Gobardhan, (1887) 9 All. 528 at p. 568.
Jan Khan v. Emperor, 1936 Pesh. 169: 164 I.C. 630: 37 Cr. L.J. 988; see also Chandrika Prasad v. Emperor, 1930 Oudh, 324: 126 I.C. 684: Rakhal Nikari v. Ousen. Emperor, 1930 Oudh, 324: 126 1.C.
684; Rakhal Nikari v. QueenEmpress, 2 C.W.N. 181; Paramhansa v. The State, A.I.R. 1964
Orissa 144: (1963) 5 O. J. D.
372; Krishna Murthy v. Abdul
Subban, A.I.R. 1965 Mys. 128;
Banwari v. State, A.I.R. 1962
S.C. 1198: 1962 All, L.J. 469:
1962 All W.R. (H.C.) 345: 1962

plain the fact of absconding would be relevant under Section 9, post.12

The fact of absconding is relevant as explaining subsequent conduct. But absence of accused, from his house for a couple of days does not prove that the accused absconded.18

To show that the accused absconded ever since the time of the incident the bald statements of the Police Sub-Inspector are wholly insufficient. In order to lead to the inference that the accused was so absconding, the investigating Police Officer must lay before the court that during the relevant period continued watch was kept on the accused at his house, the place of work and places he frequented.14

The statement of a person recorded under Section 164, Cr. P. C., after being kept in police custody, is not reliable evidence of subsequent conduct under this section.15

Production of articles used by an accused in an assault is relevant as evidence of subsequent conduct under this section and statements accompanying such conduct are also admissible as evidence of res gestue.16

Where the accused gives information to the police head constable and panchas that he would show the stolen goods and he goes to a cowdung hill and takes out the stolen goods from that hill the next day after the commission of the offence, it is evidence of the conduct of the accused under this section. Such evidence can also be said to be evidence under Section 27, post. 17-18 The Supreme Court has pointed out in H. P. Administration v. Om Prakash, 19 that normally Section 27 is brought into operation where a person in police custody produces from some place of concealment some object said to be connected with the crime of which the informant is the accused. The concealment of the fact which is not known to the police is what is discovered by the information and lends assurance that the information was true. No witness with whom some material fact, such as the weapon of murder. stolen property or other incriminating article is not hidden, sold or kept and which is unknown to the police can be said to be discovered as a consequence of the information

⁽²⁾ Cr. L.J. 278: 1962 All. Cr. R. 197; In Gangadharan v. State of Kerala, 1970 Ker. L.J. 146: 1970 Cr. J. J. 1701. As to the obsolete maxim "Fatetur facinus qui fugit judicium" (he who flees judgment confesses his guilt); see Best, Ev., ss. 460-65; Norton, Ev., 110.

See Illustration (c) to S. 9.
 Rama v. State, 1969 Cr. L.J. 1393;
 A.I.R. 1969 Goa 116, 121.

^{14.} Dinkar Bandhu Deshmukh v. State, 72 Bom. L.R. 405: 1970 Mah. L.J. 634: A.I.R. 1970 Bom. 438, 447.

State Government of Manipur v.
 K. G. Sharma, 1968 Cr. L.J. 1890, 1894; Gopisetti Chinna Ven-kata Subbiah In re, A.I.R. 1955 Andhra 61 (statement of person,

eye-witness, in police custody for 5 days); see also Emperor v. Manchik, A.I.R. 1938 Pat. 290 (voluntary nature of statement under S. 164 raises suspicion.

^{16.} Rama v. State, 1969 Cr. L.J. 1393: A.I.R. 1969 Goa 116, 121,

A.I.R. 1969 Goa 116, 121,

17-18. Kacharji Mariji v. State of Gujarat.
1969 Cr. L.J. 471: A.I.R. 1969
Guj, 100 at pp. 101, 102.

19. 1972 Cri. L. J. 606 at 616:
(1972) 1 S. C. C. 249: 1972
S.C.D. 128: (1972) 1 S.C.J.
691: (1971) 1 S.C.W.R. 819:
(1972) 2 M.L.J. (S.C.) 16: 1972
Cur. L.J. 654: (1972) 2 An W.R.
(S.C.) 16: (1972) 2 Um. N. P. 105:
1972 S.C.C. (Gri.) 88: (1972) 2
S.C.C. 765: 1973 M.L.J. (Cri.)
161: I.L.R. (1974) 2 Delhi 73:
A.I.R. 1972 S.C. 975 at 985.

furnished by the accused. These examples however are only by way of illustration and are not exhaustive. What makes the information leading to the discovery of the witness admissible is the discovery from him of the thing sold to him or hidden or kept with him which the police did not know until the information was furnished to them by the accused. A witness cannot be said to be discovered if nothing is to be found or recovered from him as a consequence of the information furnished by the accused, and the information which disclosed the identity of the witness will not be admissible. But even apart from the admissibility of the information under Section 27, the evidence of the Investigating Officer and the panchas that the accused had taken them to P. W. 11 and pointed him out and as corroborated by P. W. 11 himself would be admissible under Section 8 of the Evidence Act as conduct of the accused.

Even if the statement of the accused for some reason is not admissible under Section 27, post, the fact discovered can be proved under Section 8 and if it is relevant, it can be used against the accused.20

22. Pointing out places and producing property connected with crime. The acts as distinguished from statements of the accused in pointing out places where the crime was committed or property connected with the crime was concealed, or in producing such property, is admissible under this section as evidence of conduct.²¹ Although it is not safe to act upon a confession of the accused retracted subsequently, unless it is corroborated by other circumstances in material particulars, yet, where the extra-judicial confession, made by the accused to a witness almost immediately after the occurrence, is in the nature of res gestae it is admissible in evidence as such, and if the truth of that confession is corroborated by the conduct of the accused himself in preparing the ejahar (statement), proceeding to the Police Station and depositing the dao along with the ejahar with the police to take necessary action, it would be safe to act upon such confession, although it has been retracted by him before the Sessions Court.22

L.W. 199: Babulal Beharilal v. Emperor, 1946 Nag. 120; I.L.R. 1945 Nag. 931; 222 I.C. 389; but see Hira Gobar v. Emperor, 1919 Bom. 162: 52 I.C. 601; Turab v. Emperor, 1935 Oudh 1: I.L.R. 10 Luck. 281: 152 I.C. 473; Birja v. Emperor, 1941 Oudh 563: 195 I.C. 493; Narasingha Karwa v. The State, 40 Cut. L.T. 491: (1974) 1 Cut. W.R. 428: 1975 Cri. L.J. 1560 (Conduct of accused in leading the search party to the place of rethe search party to the place of re-covery and bringing out the article from the bush is relevant under section 8); 1973 Cut, L.R. (Cri.) 413 (accused in police custody led the party to open place and recovery was made from place of concealment as a result of conduct of accused. Conduct was held admissible under section 8); Radha Kishan v. State, 1973 Cri. L.J. 481 (But want of recovery would not materially affect the account of the incident when there is other substantial evidence). 22. Nar Bahadur v. The State, A.I.R. 1965 Assam 89.

^{20.} Paras Ram v. State. 1970 A.L.J.
149, 158; 1969 A.W.R. (H.C.) 865;
Emperor v. Misri, 1909 I.L.R. 31 All.
592; 6 A.L.J. 839 (F.B.); Ganu
Chandra Kashid v. Emperor, A.I.
R. 1932 Bom. 286; Emperor v.
Nanna, A.I.R. 1941 All. 145; Ram
Kishan v. State of Bombay, 1955
S.C.R. 903; 1955 S.C.A. 410; 1955
S.C.J. 129; 1955 A.W.R. (Sup.)
41; 57 Bom. L.R. 600; 1955 Cr.
L.J. 196; (1955) 1 M.L.J. (S.C.)
66; 1955 M.W.N. 146; A.I.R.
1955 S.C. 104; Karan Singh v.
State of U.P., 1972 All. Cri. R.
125; I.L.R. 1971 Cut. 466; (1971)
1 Cut. W. R. 351.
21. Emperor v. Misri, (1909) I.L.R. 31
All. 592; 6 A.L.J. 839 (F.B.);
Emperor v. Nanna, 1941 All. 145;
I.L.R. 1941 All. 280; 193 I.C. 837;
Rafique-uddin Ahmad v. Emperor,
1935 Cal. 184; I.L.R. 62 Cal. 572;

Rafique-uddin Ahmad v. Emperor, 1935 Cal. 184: 1.L.R. 62 Cal. 572: 155 I.C. 687 (F.B.); Kalijiban Bhattacharjee v. Emperor, 1936 Cal. 316: I.L.R. 63 Cal. 1053: 163 I.C. 41; (In re) Semalai Goundan, 1925 Mad. 574 (2): 86 I.C. 664; 21

Where the accused after stabbing the deceased goes to the Police Station and makes a confession and inter alia makes a statement that he would show the place where the deceased fell and the tree where the dagger and the stick were kept, the statement is admissible under Section 27. Even otherwise, as the conduct of the accused, immediately after the death of the deceased, is relevant under this section, that conduct is admissible. What is admissible under this section is the conduct of the accused and the statement which affects or influences that conduct. The admissible portion of the statement is merely the statement that he would show the place where the deceased fell and the tree where the dagger and the stick were kept.23

The fact that the accused gave some information about the crime is his conduct and as such admissible against him under this section.24

But where there is no statement made by the accused leading to the discovery of stolen articles, mere discovery, even though it raises a grave suspicion against the accused, will not be sufficient to support conviction.25

Where joint acts of several persons are sought to be proved in order to ask the Court to draw an inference from such conduct, evidence should be led with some degree of particularity so that it may be possible for the Court to draw the necessary inference from the conduct of each one of the persons concerned in the act.1 Otherwise, the evidence cannot be used against any one of the persons.2 The conduct of an accused person is relevant against him but not against his co-accused.3 For admissibility of joint statement, also see the following case.4

Where a woman charged with a murder led the Police to a place where she produced ornaments which the victim had worn at the time of the murder, this was held to be conduct admissible in evidence against her.5 The conduct or demeanour of a prisoner on being charged with the crime, or upon allusions being made to it is frequently given in evidence against him.6 But evidence of this description ought to be regarded with caution.7

To judge the state of mind of an accused, his behaviour immediately after the crime would be relevant.8 In all cases, where legal insanity is set up, it

24. Bhuta v. The State of Rajasthan, 1975 W.L.N. 682 (Raj.).

Rangappa Goundan v. Emperor, 1936 Mad. 426: I.L.R. 59 Mad. 349: 161 I.C. 663; Emperor v. Chokhev, 1937 All. 497: I.L.R. 1973 All. 710; Chavadappa v. Emperor. 1945 Bom. 292: 221 I.C. 86: 47 Bom. L.R. 63; but see Jamunia v. Emperor, 1936 Nag. 200: I.L.R. 1936 Nag. 78: 164 I.C. 964.

1. R. v. Babulal, (1884) 6 All. 509: 1884 A.W.N. 229 (F.B.); Durlav Namasudra v. Emperor, 1932 Cal. 297: I.L.R. 59 Cal. 1040: 138 I.C. 116; Rafiqueuddin Ahmad v. Emperor, 1935 Cal. 184 (F.B.)

2. Faqira v. Emperor, 1929 Lah. 665: 116 I.C. 619.

3. Des Raj Sharma v. The State, 1951

- Simla 14: 1951 A.W.R. (Sup.) 33.
 4. Babu v. State, 1972 Cri. L.J. 815.
 5. Emperor v. Misri, (1909) 31 A.
 592; See also Jamunia v. Emperor,
 I.L.R. 1936 Nag. 78: 37 Cr. L.J.
 1047; A.I.R. 1936 Nag. 200; Kalijiban v. Emperor, I.L.R. 63 Cal.
 1053: 37 Cr. L.J. 775: 63 C.L.J.
 232; A.I.R. 1936 Cal. 316; Neharoo v. Emperor, I.L.R. 1937 Nag. 268: 38 Cri. L.J. 642: 1937 Nag. 220.
- 6. R. v. Smiths, (1832) 5 C. & P. 332; R. v. Bartlett, (1837) 7 C. & P. 832; R. v. Mallory, (1884) 13 Q.B.D. 33; R. v. Tatterall, (1801) 2 Leach 984; R.U.S.S.Q.R. v. Phillips, (1829) 1 Lew C.C. 105; R. v. Tate, (1908) 2 K.B. 680; R. v. Cramp, (1880) 14 Cox. 390. 7. 1 Phillips and Arnold, 10th Ed.,

405; Roscoc, Cr. Ev.,

8. Hemu v. State, 1951 Sau, 19.

^{23.} In re Murugulu, I.I..R. (1961) 1 A.P. 123: A.I.R. 1963 A.P. 87.

is most material to consider the circumstances which have preceded, attended, and followed the crime: Whether there was deliberation and preparation for the act; whether it was done in a manner which showed a desire for concealment; whether after the crime, the offender showed consciousness of guilt, and made efforts to avoid detection; whether, after his arrest he offered false excuses, and made false statements.9

Again, in order to ascertain the real intention of parties to an instrument, evidence of what they have done under it, since its execution, is relevant. The principles upon which such evidence is admitted, is contained in the maxim optimus interpress rerum usus.10 And so, in the case of the Attorney-General v. Drummond11 Lord Chancellor Sugden said: "Tell me what you have done under such a deed, and I will tell you what that deed means."

But "if there is a deed which says, according to its true construction, one thing, you cannot say that the deed means something else, merely because the parties have gone on for a long time so understanding it."12 The conduct of the parties to a contract reduced into writing may not vary or alter it, but their conduct may help to explain or elucidate a contract open to different meanings.18 Subsequently conduct is only admissible, for the purposes of construing a deed, when it is impossible to arrive at a clear finding as to the meaning of the deed from its own terms and from understanding circumstances.14 Such evidence is admissible not only in the case of ancient, but of modern documents, and whether the ambiguity be patent or latent.15

Where the meaning of a document is doubtful16 but not when it is clear17

 Deorao v. Emperor, 1946 Nag. 321: I.L.R. 1946 Nag. 946: 226 I.C. 3' Sau, 19. 377; Hemu v. State, 1951

10. Robert Watson & Co. v. Mohesh Narain, (1875) 24 W.R. 176 in which the question was whether a pattah conveyed an estate for life only or an estate of inheritance, their Lordships of the Privy Council said: "In order to determine this question their Lordships must arrive as well as they can at the real intention of the parties, to be collected chiefly, no doubt, from the terms of the instrument itself, but to a certain extent also from the circumstances existing at the time of its execution, and further by the conduct of the parties since its execution." Hulada v. Kalidas, (1915) 42 C. 536: 1914 Cal. 813: 24 I.G. 899: 20 C.L.J. 312: 19 C.W.N. 542. See generally as to the admissibility of extrinsic evidence to affect docu-ments the introduction to Chapter VI post.

11. Dru. & War. 368. 12. Per Lord Crainworth, L.C. in 12. Per Lord Crainworth, L.C. in Sadlier v. Biggs, (1853) 4 H.L.C. 435: 94 R. R. 172: 10 E.R. 531, cited in Hulada v. Kalidas, A.I.R. 1914 Cal. 813: I.L.R. (1915) 42 Cal. 536: 24 I.C. 899.

13. Ma Thaung v. Ma Than, 1924 P.C. 88: 59 I.A. 1: I.L.R. 51

Cal. 374; see also Secretary of State v. Raja Jyoti Prasad Singh, 1926 P.C. 41: 53 I.A. 100: I.L.R. 53 Cal. 533: for conduct showing intention not to be bound by contract, see Mathura Mohan v. Ram

intention not to be bound by contract, see Mathura Mohan v. Ram Kumar, 1916 Cal. 136; I.L.R. 43 Cal. 700: 35 I.C. 305.

14. Per Ashworth, J., in Badri Singh v. Sadaphal Singh, 1928 All. 34: 111 I.C. 701: 25 A.L.J. 849.

15. Van Diemen's Land Co. v. Table Cape Board, (1906) A.C. 92; Watchman v. Attorney-General, 1919 A.C. 533; Robert Watson & Co. v. Mohesh Narain, (1875) 24 W.R. 176, see also Taylor Ev., ss. 1204—1205; Roscoe, N.P. Ev., 281; see also Girdhar v. Ganpat, (1874) 11 Bom. H.C.R. 129; Nidhee Kristo v. Nistarinee (1874) 21 W.R. 386; Cheetun Lall v. Ghutterdhari, (1873) 19 W.R. 432; see Ranee Radha v. Gireedharee Sahoo, 20 W. R. 243 (1873) in a boundary dispute; Narsingh v. Ram Narain, (1903) 30 Cal. 883, 896.

16. Bourne v. Gaitliffe, (1844) 11 Cl. & F. 45; Forbs v. Watt, (1866-75) L.R. 2 S.C. & D. 214; Harrison v. Barton, (1860) 30 L.J. Ch. 213; Royal Exchange Assurance v. Todd, (1892) 8 T.L.R. 669.

17. N. E. Ry. v. Hastings. (1900)

N. E. Ry. v. Hastings, (1900)
 A.C. 260; Marshall v. Berridge, (1882)
 19 Ch. D. 233.

the sense in which both but not one only, of the parties have acted on it, is admissible in explanation.18 Evidence of previous dealing is admissible only for the purpose of explaining the terms used in a contract and not to impose on a party an obligation as to which the contract is silent.10

As to the admissibility of judgments under this section, see the case noted below²⁰ and as the admissibility of opinion on relationship, expressed by conduct, see Section 50, post.

23. Admission by conduct. Instances of admission by the conduct acts of a party to civil suits are of frequent occurrence. A party's admission by conduct as to the existence or non-existence of any material fact may always be proved against him21 and evidence on his part to explain or rebut such admissions is also receivable.22 Thus evidence of conversion of a Hindu to Buddhism may be corroborated by evidence of his conduct subsequent to conversion. Such member may sign a declaration to the effect that he had embraced Buddhism, or issue a wedding invitation on which the picture of Lord Buddha is inscribed, or instal the image of Buddha; all these would be strong pieces of corroborative evidence of the fact that he ceased to be a Hindu and was converted to Buddhism.23

The plaintiff's title to sue, or the character in which the plaintiff sues or in which the defendant is sued, is frequently admitted by the acts and conduct of the opposite-party, and in some cases, the admission though not strictly an estoppel, is practically conclusive. Thus if B has dealt with A as farmer of the post horse duties, it is evidence in an action by A against B to prove that he is such farmer; and payment of money is an admission against the prayer, that the receiver is the proper person to receive it.24 So also, suppression of documents is an admission that their contents are unfavourable to e party suppressing them (v. ante).

When A brings an action against B to recover possession of land, he thereby admits B's possession of the land.25 Mere subscription of a paper, as

 Phipson, Ev., 11th Ed., 892.
 Hajee Mohammad v. Spinner & Co., 24 B. 510: 2 Bom. L.R. 691: Hulada v. Kalidas. 42 Cal. 536: A.I.R. 1914 C. 813: 14 I. C. 899; as to usage affecting contracts, see Sec. 92, prov. 5, post and note. The Collector.v. Palakdhari. (1889)

12 A. I, 12, 45 and notes to S. 13,

Taylor: Ev., Ss. 804, 806 and cases there cited, The original draft of the Evidence Act contained the following section: "A conduct of any party to any proceeding upon the occasion of anything being done or said in his presence in relation to matters in question, and the things so said or done are relevant facts when they render probable or improbable any relevant fact alleged or denied in res-pect of the person so conducting himself." The provisions of this proposed section are. however, incorporated in other parts of the

present Act; see present sections Sec. 11, and Sec. 114, Illustrations (g), (h) post: Field, Ev., 6th Ed., 120; as to conduct of family showing recognition of family arrangement, see Bhubaneshwari v. Harisaran, (1881) 6 C. 720 at p.

724.

22. Melhuish v. Collier, (1850) 15
Q.B. 878; and Sec. 9, post;
Powell, Ev., 9th Ed., 430, 439.

23. Punjab Rao v. D.P. Meshram, A.
I.R. 1965 S.C. 1179: 1965 M.P.
I.J. 257: 1965 Mah. L.J. 162:
67 Bom. L.R. 812.

24. Roscoe, N.P. Ev., 67 Radford v.
Mc. Intosh. (1710) 3 T.R. 632;
Peacock v. Harris, (1808) 10 East,
104: James v. Biou, 2 Sin. & St.
606: Taylor, Ev., p. 567 note;
Norton, Ev., p. 114; as to estoppel
arising from the acts of a party
see Sec. 115, post.

25. Stanford v. Hurlstone, (1873) 9 Ch.

25. Stanford v Hurlstone, (1873) 9 Ch.

App. 116.

witness, is not in itself proof of his knowledge of its contents.1 When a landlord quietly suffers a tenant to expend money in making alterations and improvements in the premises, it is evidence of his consent to the alterations.2 And when a party is himself a defendant (whether in a civil or criminal proceeding), and is charged as bearing some particular character, the fact of his having acted in that character will, in all cases, be sufficient evidence, as an admission that he bears that character, without reference to his appointment being in writing. Thus, upon an indictment against a letter-carrier for embezzlement, proof that he acted as such was held to be sufficient, without showing his appointment.3 Delay in suing to enforce alleged rights may be construed as an admission of their non-existence.4 Conversations that explain a man's conduct are admissible in evidence.5

A criminal trial is not an enquiry into the conduct of the accused for any purpose other than to determine whether he is guilty of the offence charged. In this connection, that piece of conduct can be held to be incriminatory which has no reasonable explanation, except on the hypothesis that he is guilty, Conduct which destroys the presumption of innocence can alone be considered as material.6 Therefore, an information by the accused that his wife was missing can be used as a circumstance, proving the conduct of the accused, if it destroys the presumption of his innocence.7 In the above-noted case, the accused was charged with the murder of his wife who was missing for some time. On learning that the photograph of the unidentified dead body was that of his wife, the accused made a statement which showed his conduct as an incriminating circumstance against him. The particular statement accompanied and explained acts, showing his reaction of a disturbed mind. It was held to be admissible under this section. Answers given by an accused person to his superior officer in explanation of an official irregularity are admissible under this section as evidence against him.8 As to written and oral admissions, see Section 17, post; and for further instances of admissions by conduct see the next paragraph but one.

24. Explanation I.—Statements accompanying and explaining acts. In English Law such statements are said sometimes to be admissible as forming part of the vague and unsatisfactory terms res gestae. The first explanation declares that mere statements, as distinguished from acts, do not constitute conduct. "It points to a case in which a person whose conduct is in dispute mixes up together actions and statements: and in such case those actions and statements may be proved as a whole. For instance, a person is seen running down a street in a wounded condition, and calling out the name of his assailant and the circumstances under which the injuries were inflicted.

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^{1.} Harding v. Crethorn, (1793) 1

^{2.} Doe Sheppard v. Allen. (1810) 3
Taunt 78, 80; Deo v. Pye (1795)
1 Esp. 366; Neale v. Parkin, (1794)
1 Esp. 228; Stanley v. White, (1811) 14 East 332.

Roscoe, Cr. Ev., 12: R. v. Borrett; (1833) 6 C. & P. 124: see Sec. 91. exception (1) post and notes thereto. See Paylor Ev., Sec. 173. 4. Juggernath v. Syud Shah. (1874)

¹⁴ B.L.R. 386 P.G.: 23 W.R. 99:

Rajendra v. Jogandro. (1871) 14 M. I. A. 67 (P.C.); Rajcoomar v. Debendra Narain, 15 W. R. (P.C.)

<sup>41.
5.</sup> R. v. Gandfield, (1846) 2 Cox. 43.
6. Anant Chintaman v. State of Bombay, A.I.R. 1960 S.C. 500; 1960 Mad. L.J. Cr. 493; 62 Bom. L.R. 371; 1960 S.C.J. 779; 1960 Cr. L.J. 682.

Arun Kumar v. State, A.I.R. 1962 G. 504.
 R. v. Ganesh. (1902) 4 Bom. L.R.

Here what the person says and what he does may be taken together and proved as a whole."9

Where on information contained in the confession of an accused, a visit was made by that accused, together with certain witnesses and police officers, to a spot where arms were concealed, and during the time that the arms were dug up on the information of the accused person in custody various conversations between the accused and the police officers to the detriment of the accused and actually adding to the confession already made by him took place, it was held that not only the conduct but also conversations were admissible.10

A statement by an accused leading to the discovery of articles connected with a crime is admissible not only under Section 27 but also under this section,11 But a statement made by an accused person while pointing out buried property, that he concealed the property is not admissible under this section.12 As to the admissibility of statements preceding and subsequent to the pointing out of places and production of property connected with a crime, see Section 27 and notes thereto, post.

A statement may be admissible, not as standing alone, but as explaining conduct in reference to relevant facts. So, it was held that the answers to his superior officer given by an accused person in explanation of an official irregularity could be proved against him, if subsequently ascertained to be false.18 The evidence of false explanation is not only relevant under this section but it is of considerable importance when it was given soon after the alleged occurrence and it was apparently designed to give to the facts an appearance favourable to the accused. 14' Conduct may be equivocal without statements explanatory and elucidatory of it. Statements accompanying acts are in fact part of the res gestae just as much as the acts themselves. They are often absolutely necessary to show the animus of the actor. They have been styled verbal acts.15 Thus, a payment by a debtor may be explained by his request to apply it to a certain debt. If a debtor leaves home, his intent to avoid his creditors may be shown by what he said when leaving.16 The declarations are not admissible simply because they accompany an act; the latter itself must be in issue or relevant; the admissibility of such a statement depends

10. Kalijiban Bhattacharjee v. Emperor, 1936 Cal. 316: I. L. R. 63 Cal.

^{9.} R. v. Abdullah, (1885) 7 A. \$85. 396, per Petheram, C. J.: "But the case would be very different if some passer-by stopped him and suggested . some name, or asked some question regarding the transaction. If a person were found making such statements without any question first being asked, then his statements might be regarded as a part of his conduct. But when the statement is made merely in response to some question or objection it shows a state of things introduced not by the fact in issue, but by the interposition of something else" ib., 400, per Mahmood, J.

^{1053; 163} I. C. 41. 11. Sadashiva Daulat v. State, 1950 M. B. 104.

Chavadappa Pujari v. Emperor,
 1945 Bom. 292: 221 I. C. 86: 47 Bom, L. R. 63.

^{13.} R. v. Ganesh. (1902) 4 Bom. L. R. 284.

^{14.} Golam Mojibuddin v. State of W. B.,

Golam Mojibuddin v. State of W. B., 1972 Cri. Ap. R. (S.C.) 47: 1971 U. J. (S.C.) 885: 1972 Cri. L. J. 1342 at 1345 (S.C.).
 Norton, Ev., 106; Bateman v. Bailey (1794) 5 T.R. 512; Hyde v. Palmer, (1863) 3 B. & S. 657: 23 L. J. Q. B. 126; Bennison v. Cartwright (1864) 5 B. & S. 1.
 Bateman v. Bailey, supra; Roscoe, N.P. Ev., 52.

upon the light it throws upon an act which is itself relevant.17 The Evidence Act makes "those statements admissible and those only, which are the essential complements of acts done or refused to be done, so that the act itself or the omission to act acquires a special significance as a ground for inference with respect to the issues in the case under trial.18 Filure of an eye-witness to mention the names of accused to the neighbours who came to the scene soon after the occurrence will by itself not render the prosecution story untrue, when the prosecution case does not rest on the statement of that witness arone.19

25. Statements must explain facts accompanied. (a) General. What is relevant is the particular act upon the statement, and the statement and the act must be so blended together as to form part of a thing observed by the witnesses and sought to be proved.20 A statement is not admissible if there is no conduct to be explained.21 A bare statement unaccompanied by any act and not explaining any act is not admissible.22

It is not every declaration that accompanies and purports to explain a fact that will be received e.g., a declaration that is equivocal,23 or is a mere expression of opinion,24 or is obviously concected to serve a purpose.25 In other words, the statements must really explain the acts,1 and the declaration must relate to and can only be used to explain, the fact it accompanies and not previous or subsequent facts2 unless the transaction be of a continuous nature.3 But hearsay evidence relating to statement of admission by one of conspirators could not be admissible even under Section 8 if it did not explain any accompanying conduct of that conspirator.4

R. v. Rama, (1878) 3 B. 12, 17,

20. Mrs. Rigo v. R., 1933 Nag. 136: 143 I.C. 17: 34 Cr. L.J. 505; Chandra Bhan Singh v. State, 1970 All. Cri. R. 243: 1970 All. W.R. (H.C.) 381: 1970 Cri. L.J. 94 (Statement in first information report blanded with conduct of victim port blended with conduct of victim in lodging such report can be

21. Zwinglee Ariel v. State, 1954 S. C. 15: 55 Cri. L.I. 230; Nika Ram v. State of H.P., 1972 Cri. L.I. 204; Pritam Singh. v. State. 1972 All. Gri. R. 332: 1972 All. L.J. 744; 1972 All. W.R. (H.C.) 521. 22. Venkata Subba Reddi v. Emperor, 1931 Mad. 689: I.L.R. 54 Mad.

931: 134 I.C. 1143; Nika Ram v. State, 1972 Cri. L. J. 204 (S.C.).
R. v. Bliss, (1837) 7 Ad. & E.L. 550; R. v. Wainwright, (1876) 13 Cox. 171; Roscoe, N.P. Ev., 53.

Wright v. Tatham, (1838) 5 Cl. &

Thompson v. Trevenion, (1693) Hol. K.B. 286; R. v. Abrahams, (1848)2 C. & K. 550; Brodie v. Brodie, (1861) 4 L.T. 307: Starkie, Ev., and see American Cases, and Authorities in Phipson, Ev., 9th Ed., 85.

I. See remarks in R. v. Rama, (1878) 3 B. 12, 17.

Hvde v Palmer, (1863) 3 B. & S.

3. Bennison v. Cartwright. B. & S. 1: Rawson v. Haig, (1824)

2 Bing. 99.

Bhagwan Das Keshwani v. State of Rajasthan, A. I. R. 1954 S. C. 898 at 902: 1974 U.J. (S.C.) 356: 1974 S.C. D. 759: (1974) 4 S.C.C. 611: 1974 Pun. L.I. (Cri.) 266: 1974 Cri. L.R. (S.C.) 402: 1974 S.C. Cri. R. 186: 1974 Serv. L.C. 449: 1974 W.L.N. 532: 1974 S.C. C. (Cri.) 647: 1974 Cri. App. R. (S.C.) 188: 1974 Cri. L.J. 751. Bhagwan Das Keshwani v. State of

^{17.} Wright v. Tatham, (1888) 5 Cl. & Fin., 670: R. v. Bliss (1837) 7
Ad. & E.L. 550; Iyde v. Palmer,
supra; Roscoe, N.P. Ev., 53;
'When any facts are proper evidence upon an issue all oral or written declarations which can explain such facts, may be received in evidence"; per Baron Park, See Steph. Dig. p. 161.

per West, J.

Harbhajan Singh v. State of J. & K., 1975 Cri. App. R. 298 (S.C.): 1975 S.C. Cri. R. 390: 1975 Cri. L.R. (S.C.) 465: 1975 S.C.C. (Cri.) 545: 1975 U.J. (S.C.) 585: 1975 Cri. L.J. 1553: (1975) 4 S.C.C. 480: (1975) 2 S.C.W.R. 213: A.I.R. 1975 S.C. 1814.

Mrs. Rigo v. R., 1933 Nag. 136:

- (b) Declarations and acts need not be by same person. It is sometimes said that the declaration and act must be by the same person.5 But though such declarations are often the only material, the rule is by no means so strictly confined. It is an everyday practice in criminal cases to receive the declarations of the victim, as well as those of the assailant. So, in cases of conspiracy, riot and the like the declarations of all concerned in the common object, although not defendants, are admissible.6 It has, indeed, been held that unless some such common object be proved, the declarations of participants, if neither parties nor agents, are inadmissible,7 but this limitation cannot be taken as invariable for the exclamations of mere bystanders may sometimes be both material and admissible evidence.8
- (c) Declarations no proof of fact they accompany. "The declarations are no proof of the fact they accompany; the existence of the latter must be established independently."9 As to the admissibility of declaration as evidence of mental and physical conditions, see the fourteenth section, post.
- 26. Complaints, relevancy of. Illustrations (j) and (k) are illustrations of statements accompanying and explaining the conduct of a person an offence against whom is being enquired into. Under these illustrations, the terms in which the complaint was made are relevant.10

The making of a complaint to the police that the complainant apprehended trouble from the accused does not, by itself, constitute motive (for the murder of the complainant) within the terms of the section, especially when it is not the prosecution case that the murder was committed because of the complaint to the police.11 As to the admissibility of such complaint, see the following case.12

27. First Information Reports. The first information report is the statement of the maker of the report, at a Police Station before a Police Officer, recorded in the manner provided by the Code of Criminal Procedure. The first information report is admissible under this section as evidence of part of the conduct of the person making it.13 When the accused himself makes the first information report if it is in the nature of a confession, it is inadmissible.

Howe v. Malkin, (1878) 27 W.R. (Eng.) 340: 40 L.T. 196.

6. R. v. Gordon, (1781) 21 How St. Tr. 535; R. v. Hunt, (1820) 3 B. & Ald. 566; R. v. O'Connell (1844) Arm. & Tr. R. 281; the present section deals only with statements by parties; the declarations mentioned in the text would be admissible under S. 10, post.

7. R. v. Petcherini, (1856) 7 Cox 79; Bruce v. Nicolopulo, (1855) 11 Ex. 129.

8. R. v. Fowkes, (1856) Times, March 8, Milne v. Lesier (1862) 7 H. & N. 786; and see generally Bennison v. Cartwright, (1864) 5 B. & S. 1: 33 L.J.Q.B. 137: 10 L.T. 266: 12 W.R. 425; such evidence may be admissible under S. 6, ante; see S. 6, illustration

(a) and note ante.

9. Phipson, Ev., 11th Ed., 82.
10. As to the English rule on this point, see Steph. Dig. p. 162; Taylor Ev., s. 581; Roscoe, Cr. Ev., 25; Norton, Ev., 114; Whitley v. State, 38 Ga. 50, 70, 827; R. v. Lillyman, (1896) 2 Q.B. 167; R. v. Osborne, (1905) 1 K.B. 551.

11. Dinkar Bandhu Deshmukh v. State, 72 Bom. L.R. 405; 1970 Mah. L.J. 634: 1970 Cr. L.J. 1622: A.I.R. 1970 Borg. 438 (the previous litigation between the deceased complainant and the accused was held to

be motive for the murder).

12. Mohinder Singh v. State of Punjab,
1971 Cr. L.J. 1764 (Punj.).

13. Sce Vallon Kochol v. State, A.I.R. 1956 T.C. 207.

But, if it is not a confession but contains admissions made by the accused, the first information report is admissible under Section 21 of this Act. If the first information report contains several other matters, which are relevant to the trial, besides the confession, the statement about the other relevant matters is admissible. Thus, where an accused states about his preparation for the offence but disowns that he had committed the offence, his statement is exculpatory and is admissible in evidence though it also contains certain self-harming statements. But, if there is a confession, then the statement of confession is inadmissible, including that portion which relates to the preparation for the commission of the offence.¹⁴ If the first information report is given by the accused himself, the fact of his giving the information is admissible against him as evidence of his conduct under this section.¹⁵

The first information report is not a substantive piece of evidence. It can be used either for corroboration or for contradiction of the maker of the statement, but not, if the maker is, dead. A statement containing self-exculpatory matter cannot amount to a confession, if it would negative the offence alleged to be confessed. If the admission is both exculpatory and inculpatory in its parts, the prosecution cannot use in evidence the inculpatory part only. 17

A first information report is, ordinarily, not substantive evidence but it can be used for corroborative purpose, 18 or to remove a doubt, e.g., as to the name of an eye-witness. The report is admissible under this section. 19

28. Complaint and statement, distinction between. A distinction is to be marked between a bare statement of the act of rape or robbery and a complaint. The latter evidences conduct; the former has no such tendency. There may be sometimes a difficulty in discriminating between a statement and a complaint. It is conceived that the essential difference between the two is that the latter is made with a view to redress or punishment, and must be made to someone in authority—the police for instance, or a parent, or some other person to whom the complainant was justly entitled to look for assistance and protection. For instance, a petition impugning the conduct of a police officer and begging that he may be put on trial is a complaint within the meaning of the Criminal Procedure Code."²⁰ The fact that after the occurrence was all over, the woman said that the accused had tried to rape her cannot be taken to be proof that he tried to rape her. Nor is there any force in saying that

^{14.} State of Rajasthan v. Shiv Singh, I.L.R. 1961 Raj. 299: A.I.R. 1962 Raj. 3; Jalam Singh v. State of Rajasthan, (1976) 1 Raj. Cri. C. 1: 1975 Raj. L.W. 542: 1975 W.L.N. 623. (The F. I. R. must be considered as a whole and not in part if it is to be used as an admission of accused).

accused).

15. Aghnoo Nagesia v. State of Bihar, (1966) 1 S.C.R. 134: (1965) 2 S.C.A. 367: 1966 S.C.D. 243: 1966) 1 S.C.J. 193: (1965) 2 S.C. W.R. 750: 1965 A.W.R. (H.C.) 648: 1965 B.L.J.R. 865: 1966 M. P.L.J. 49: 1966 Mah. L.J. 113: 1966 M.L.J. (Cr.) 134: (1966) 1 Andh. L.T. 430: 1966 Cr. L.J. 100: A.I.R. 1966 S.C. 119, 123.

State of Orissa v. Chakradhar,
 A.I.R. 1964 Orissa 262: See Aghnoo
 Nagesia v. State of Bihar, supra.

Aghnoo Nagesia v. State of Bihar, Supra.

Supra.

18. Emperor v. Mohammad Sheikh, I.L.R. (1942) 2 C. 244; 205 I.C. 92; A. I. R. 1943 C. 74; Waris Khan v. Emperor, I.L.R. 15 Luck. 429: A.I.R. 1940 Oudh 209; Umrao Singh v. State of M.P., A.I.R. 1961 M.P. 45; 1961 Jab. L.J. 321

Umrao Singh v. State of M.P., supra.

^{20.} Gangadhar v. R., (1915) 43 C. 173: A.I.R. 1916 C. 867 but see R. v. Phulel, (1915) 35 A. 102 (accusation not made as a complaint).

the accused kept silent when she was making those accusations.21 The distinction is of importance; because while a complaint is always relevant, a statement not amounting to a complaint will only be relevant under particular circumstances, e.g., if it amounts to a dying declaration, or can be used as corroborative evidence,22 or otherwise. In State v. Hiraman23 the raped girl, aged four years, cried and disclosed the name of the accused. Her private parts were swollen and did show that she had been raped, and, further, the stains of blood and semen on the clothing of the accused strongly suggested that he could be the offender. It was held, that all the circumstances put together necessarily led to the only conclusion that it was the accused who committed the crime, and that the girl's and her mother's conduct was relevant under this Section.

The previous statement of the complainant at about the time of occurrence is admissible and relevant as evidence of conduct under this Section. It is also admissible as corroboration of the evidence of the complainant in Court under Section 157. What weight is to be attached to such statement is a different matter. In some cases, its weight may be nil; but in other cases, where corroboration is not essential to conviction, conduct of this kind may be sufficient to justify acceptance of the complainant's story.24

The section, so far as it admits a statement as included in the word "conduct" must be read in connection with Sections 25 and 26 post, and cannot admit a statement as evidence which would be shut out by those sections.25 This section covers the relevancy of conduct. If the conduct of a woman who has been ravished is such that she lodges a complaint, then that conduct is relevant, and the terms in which the complaint was made are relevant as conduct, but they are not relevant as direct proof of the act. There is no reason to suppose that there the statutory law of India departs from the common law of England.1

In England, it is now held that in prosecutions for rape, indecent assault and offences of similar character, a statement in the nature of a complaint made by the prosecutrix to a third person, not in the presence of the accused, may be given in evidence provided such statement is shown to have been made at the first opportunity which reasonably offered itself after the commission of the offence.2

Illustration (k) to this section shows that, in India, the rule is not confined to cases of rape and kindred offences. It was formerly doubted whether the particulars of the complaint could be disclosed by the witnesses for the Crown, either as original or as confirmatory evidence; but it is now settled, that

Nga Aye Maung v. King. 1938
 Rang. 127: 175 I.C. 222.
 Norton, Ev., 114. See Will's Ev.,
 for meaning of "complaint" 11, for meaning of "complaint" with Cr. Pr. Code, 1973, S. 196, see Apurba v. R., (1907) 35 C. 141; R. v. Shamlal, (1887) 14 C. 707 (F.B.).

^{23.} A.I.R. 1965 B. 154; 67 Bom. L.R.

^{24.} State of Orissa v. Parvatisam, A. 1.R. 1963 Orissa 58: 29 Cut. L.T.

^{540;} see Rameshwar v. State of Rajasthan, A.I.R. 1952 S.C. 54: 1952 M.W.N. 150: 1952 Cr.L.J. 597: (1952) 1 Mad. L.J. 440: 65 M.L.W. 351: 1952 S.C.R. 377: 1952 S.C.A. 40.

R. v. Nana, (1889) 14 B. 260. Kappinaiah v. Emperor, 1931 Mad. 233 (2): 131 I.C. 456: 1930 M.W.

N. 702. 2. R. v. Osborne, (1905) 1 K.B.

^{551.}

they may be so given in evidence in this class of cases, but only in this class, not as being evidence of the truth of the charge against the accused, but as evidence of the consistency of the conduct of the prosecutrix with the story told by her in the witness-box and as negativing consent on her part.3

It is now established that such evidence is also admissible in cases of indecency upon boys, and of sodomy and therefore it seems of sodomy or gross indecency with males of any age.4 In Jones v. S. E. Chatham Rly. Co's Managing Committee5 an attempt was made to enlarge the classes of cases in which such evidence is admissible, but it was not countenanced by the Court of Appeal.6 It is not admissible in civil cases, though consent be in issue, as it is in an action for performing a surgical operation without the consent of a female patient,7

It was at one time thought that this evidence was only admissible in cases where non-consent was a material element.8 This, however, is not now the law.9 A statement by a girl alleging that she was raped, made immediately atter the rape is admissible as an explanation of her act of crying under this section as also under Section 157 by way of corroboration. 10

Where a child of 3½ years of age is raped and she complains to her mother, sister and father, but she is not examined as she is not a competent witness, the evidence of the statements made by the child, to her mother, sister and father, or of her conduct amounting to a complaint is admissible, but in the undernoted case, it was said that it was not admissible against the accused, as it was hearsay evidence.11 The mere fact that the statement is made in answer to a question is not of itself sufficient to make it inadmissible as a complaint.12 But it cannot found a conviction under Section 376, I. P. C. It can be used as evidence of the credibility of the girl. 13

The evidence of the prosecution does not require corroboration in all cases.14 In assessing the value of her evidence, the conduct of the complainant, immediately after the offence is committed, is of great value. Not only the fact that the complaint was made by the prosecution shortly after the alleged occurrence, but also the particulars of such a complaint may be given in evidence, not as being evidence of the fact complained of, but as evidence of the

R. v. Osborne, (1905) 1 K.B.
 551; R. v. Lillyman, (1896) 2
 Q.B. 167; R. v. Rowland, (1898)
 62 J.P. 439; see also Richard Gillie v. Posho Ltd., 1939 P.C. 146: 186 I.C. 227: 50 L.W. 81: 41 P.L.R. 622.

^{4.} R. v. Wannell, (1922) 17 Cr. App. R. 53.

^{(1918) 87} L. J. K. B. 775; 118 L.T.

^{6.} See Richard Gillie v. Posho Ltd.,

¹⁹³⁹ P.C. 146 at p. 149.
7. Phipson Ev., 11th Ed., 158, citing Beatty v. Cullingworth, Times, Beatty v. Cullingword January 14, (1897) C.A.

^{8.} R. v. Kingham, (1902) 66 J.P. 393.

^{9.} Taylor, 581. 10. Soosalal v. R., (1924) 25 Cr. L.J. 1214: 82 I.C. 142: R. v. Phagunia, 1926 Pat. 58: 89 I.C. 1043 see

however Sreehari v. 1930 Cal. 132: 124 I.G. 175, (a statement of the girl to her mother did not form part of the transaction).

^{11.} Kashi Nath Pandey v. Emperor, 1942 Cal. 214: 1.L.R. (1941) 2 Cal. 180: 199 I.C. 311: see also R. v. Soopi, 1930 Lah. 84: 120 I.C. 539: 31 Cr. L.J. 149.

^{12.} Rex v. Osborne, (1905) 1 K. B. 551; Raman v. King-Emperor, 1921 Lah. 258: 4 L. L. J. 491.

13. State v. Banamali, 25 Cut. L. 1.

^{14.} Rameshwar v. State, 1952 S.C. 54: 1952 S.C.J. 46: (1952) 1 M.L. J. 440: 1952 M.W.N. 150; In re Boya Chinnappa, 1951 Mad. 760: I.L.R. 1951 Mad. 973: (1951) 1 M. L. J. 110; see also Bechu v. King, 1949 Cal. 613: 51 Cr. L.J. 153 153.

consistency of the conduct of the prosecution with the story told by her in the witness-box. 15

29. Explanation II-Statements affecting conduct. In the second Explanation "statement" includes documents addressed to a person and shown to have come to his actual knowledge.16 Statements to be relevant under this explanation must be made to the person whose conduct is relevant, or though not in his possession within his hearing. Again the statements, whether oral or written, must affect the conduct; if they cannot be shown to have done so, they are inadmissible under this section.17 "Conduct" in this section, according to the Explanation, does not include statements unless those statements accompany and explain acts other than statements. In Khatija v. State,18 the wife was accused of murdering her husband. In the morning, after the murder, she had stated to the brothers of the deceased, when questioned by them, that she did not know the whereabouts of her husband. In the committal Court, she stated that on the night in question she was sleeping with her husband and upon the other accused knocking at the door she opened it and they murdered her husband. It was held that her statement to the brothers of the deceased was not admissible in evidence as it did not accompany and explain an act other than the statement.

"Statements made in the presence of a party are admissible as the groundwork of his conduct. Thus if a man accused of a crime is silent, or flies, or is guilty of false or evasive responsion, his conduct coupled with the statements, is in the nature of an admission, and therefore, evidence against himself. His flight or false responsion would be equivocal per se, and might be unintelligible without the knowledge of what led to it. His act, upon the statement, and the statement are so blended together, that both form part of the res gestae, and on this ground again, the statement is as receivable as the act. In point of fact, it is the conduct of the party upon the statement being made that is material; the statements themselves are only material as leading up to and explaining that."19 The mere fact, that statements have been made in a party's presence and documents found in his possession, though it may render them admissible against him as original evidence-e.g., as showing knowledge or complicity-will afford no proof per se of the truth of their contents; the ground of reception for the latter purpose is that the party has, by his conduct or silence, admitted the accuracy of the assertions made.20

To render documents found in the possession of a prisoner admissible against him in proof of the contents, it must be shown that, by some act, speech or writing, he has manifested a knowledge of all or any of them; this would

In re Boya Chinnappa, 1951 Mad.
 760; I. L. R. 1951 Mad. 973: (1951)
 M.L.J. 110.

Illustration (h), ante; Wright v. Tatham, (1838) 5 Cl. & Fin. 670.

As in the English rule Neile v. Jakle. (1849) 2 C. & K. 709.
 A.I.R. 1962 Guj. 1: (1961) 2 Guj.

I..R. 582. Norton, Ev., 106, 107, "It is a general ruly that a statement made in the presence of the prisoner, and which he might have contradicted

if untrue, is evidence against him" per Field, J. in R. v. Mallory, (1884) 14 Cox, 458; 13 Q. B. D.

^{20.} See Phipson, Ev., 11th Ed., 339 and authorities cited at head of commentary. A party may, on similar grounds, be affected by the acquiescence of his agents or others for whose admissions he is responsible, ib., Haller v. Worman (1860) 3 L.T.N.S., 741; Price v. Woodhouse, (1849) 3 Ex. 616.

apply more strongly when, of the documents in question, some had been received by him and others written by him.21 In the case of statements mad to, or in a party's presence, he may either reply to them or keep silent,22 or hi conduct may be otherwise affected by them.22 When the statement in repl accompanies and explains an act other than the statement, it may be relevan under this section or the section relating to oral or documentary admissions when it is unaccompanied by any act, it may be relevant under the latter sec tions. Such statements made in a party's presence and replied to, will be evi dence against him of the facts stated to the extent that his answer directly o indirectly admits their truth.24

30. Silence. What is admissible under this section is conduct and statement which affected or influenced that conduct. Silence may, in certain circumstances, amount to conduct, but it must be a positive silence which may conceivably be taken to be conduct.25 A party's silence will render statements made in his presence, evidence against him of their truth1 only, when he is reasonably called on to reply to such statements. Care must be taken in the application of the maxim qui tacet consentive videtur (silence gives consent); for in many cases, but little reliance can be placed on the circumstances.2 "Sc statements made in a party's presence during a trial are not generally receivable against him merely on the ground that he did not deny them, for the regularity of judicial proceedings prevents the free interposition allowed in ordinary conversation." Even here, however, cases may occur in which the refusal of a party to repel a charge made in a Court of Justice,4 or to cross-examine or contradict a witness-;5 or to reply to an affidavit6 "may afford a strong presumption that the imputations made against him are correct"; but this cannot be the case when the accurated makes no statement, or no detailed reply in answer to the statutory question of the justice before committal,7 or when asked by the Police to make a statement after being cautioned.8 The caution tells him that he need not reply-not that if he does not reply or state his defence that fact will be used against him as proof of guilt9 and the mere omission to deny a formal charge made by the Police is not evidence from which an inference

Lalit Chandra v. R., (1911) 39 C.
 Wright v. Tatham, (1838) 5 Cl. & Fin, 670.

Cl. & Fin, 670.

22. Illustration (g), ante; Neile v. Jakle. (1849) 2 C. & K. 709.

23. Illustrations (f), (h) ante.

24. v. post Sec. 17 ct. seq; Phipson, Ev., 11th Ed., 342; Taylor, Ev., s. 815; Jones v. Morrell, (1844) 1 C. & K. 266; R. v. John, 7 C. & P. 324; Child v. Grace, (1825) 2 C. & P. 193; R. v. Welsh, (1862) 3 F. & F. 275 and note to this case in 3 Russ. Cr. 488 case in 3 Russ, Cr. 488.

Hadu v. State, 1951 Orissa 53:
 I.I.R. 1950 Cut. 509.

^{1.} Neile v. Jakle, supra; Hayslep v. Gymer, (1834) 1 A. & E. 162; Price v. Burva, (1858) 6 W.R. (Eng.) 40; R. v. Cox, (1859) 1 F. & F. 90; R. v. Mallory, (1886)

¹⁵ Cox, 458: 13 Q.B.D. 33. 2. See Child v. Grace, (1825) 2 C. & P. 193. per Taddy Serjit: "The not-making an answer may under some circumstances be quite as strong as the making-one;" per

Best, C.J. "Really it is most dangerous evidence. A man may say this is impertinent in you and I will not answer your question."
See also Moore v. Smith, 14 Serg.
& R. 393; Lucy v. Maufiet (1860)
5 H. & N. 229; Wiedemann v.
Walpole, (1891) 2 Q.B. 534; Norton, Ev., 113.

Melen v. Andrews, (1829) 1 M. & M. 336; R. v. Appleby, (1821) 2 Starkie N.P.C., 33; R. v. Turner, (1832) 1 Moo. C.C. 347; Child v. C. Grace, supra. See Mash v. Darley, (1914) 3 K.B. 1226, 1233, C.A. per

Kennedy, L.J. 4. Simpson v. Robinson, (1848) 12 Q.B. 511.

R. v. Coyle, (1855) 7 Cox. 74.
 Morgan v. Evans, (1834) Cl. and F. 156, 206; Freeman v. Cox. (1878) 8 Ch. D. 148; Hampden v. Walis, (1884) 27 Ch. D. 251. 7. R. v. Naylor, (1933) 1 K.B. 685. 8. R. v. Leckey, 1944 K.B. 80. 9. Cf. R. v. Tune, (1944) 29 Cr. App. R. 162.

can be drawn unfavourable to the accused.10 Where a Police Officer, who had a written statement in his possession, made to the accused person an oral precis of it and asked for an explanation and cautioned him, it was held that what the officer said was rightly excluded, since the accused's statement after the caution was intelligible without it, but it would be admissible, if necessary, to make that statement intelligible.11 In Sookram v. Growdy,12 Phear, J., said: "It is true that silence on the part of defendant during the trial of a case, in regard to any matter brought against him in the course of the case, might possibly be of some value afterwards irrespective of the decree, as amounting to an admission on his part that that which was alleged and with regard to which he had kept silence was true."18 So, when a Judge, at a trial, made a proposal as to the course of proceedings in the presence of counsel who raised the objection, it was held not open to counsel subsequently to question the propriety of the course to which he had impliedly given his assent,14 "If a client be present in Court and stands by and sees his solicitor enter into terms of an agreement he is not at liberty afterwards to repudiate it."15 Admissions from silence or acquiescence frequently occur with reference to unanswered letters or failure to object to an account. Here the question will also be, whether there was any duty or necessity to answer or object. The rule has been stated by Bowen, L. J., to be that:

"silence is not evidence of an admission, unless there are circumstances which render it more reasonably probable that a man would answer the charge made against him than that he would not."16

The fact of silence may, with all the other circumstances of the case, he taken into account in a proper case; but it should be clearly borne in mind that an accused person always has a right to remain silent, if he wishes. The silence of the accused must never be allowed to any degree to become a substitute for proof by the prosecution of its case. No presumption arises ipso factor from the silence of an accused person.17 If, however, the silence of the accused is to be regarded as an important point for the prosecution, then it is necessary for the trial court to put to the accused, when he is examined under Section 342, Cr. P. C. as part of the case for the prosecution, the fact that he

^{10.} R. v. Whitehead (1929) 1 K.B.

R. v. Mills and Lemon, K.B. 297.
 (1873) 19 W.R. 283-285. v. Mills and Lemon, (1947) 2

^{13.} See Phipson, Ev., 11th Ed., 341 and

Cunningham's Ev., 95 and 96. 14. Morrish v. Murrey (1844) 13 M. &

^{15.} Swinfen v. Swinfen, (1857) 24 Beav. 549, 559; Asiatic Steam Navigation Co. v. Bengal Coal Co., (1908) 35 C. 751.

^{16.} Wiedemann v. Walpole, (1891) 2
Q. B. 534 at p. 539 and see per
Willes, J., in Richards v. Gellatly,
(1872) L. R. 7 C. P. 127 at p. 131
the relation between the parties
must be such that a reply might
be reasonably expected. Norton.
Ev. 113: Edwards v. Towels (1843) Fv., 113: Edwards v, Towels. (1843)

⁵ M. & G. 624. "The only fair way of stating the rule of law is, that in every case you must look at all the circumstances under which the letter was written and you must determine for vourself whether the circumstances are such that the refusal to reply alone amounts to an admission." Per Kay, L. J. in Wiedemann v. Walpole, (1891) 2 Q. B. D. 534 at 541: and see per Jenkins, C.J., in R. v. Bal Gangadhar, (1904) 28 B. at p. 491.

17. Ghura v. Emperor, 1942 All. 47: I. L. R. 1941 All. 912; 198 I. C. 452: see also R. v. U. Damapala, 1937 Rang. 83: I. L. R. 14 Rang. 666: 168 I. C. 193: 38 Cr. L. J. 524 (F.B.) and cases cited therein. circumstances are such that the re-

therein.

remained silent, and to invite his explanation as to why he did so.18

A man is not bound to answer every officious letter written to him. Though unanswered, a letter may be evidence of a demand.19 The mere failure to answer or object will not generally imply an admission.20 But it is otherwise, if the writer is entitled to an answer; so, in the case of a letter written by A to B to which the position of the parties justified A in expecting an answer, as when the subject of it is a contract or negotiation pending between them, the silence of B may be important evidence against him.21 The point, in such cases, is, whether the party in respect of whom such statements are made acknowledges their truth either by words or by conduct.22 Such acknowledgment can be deduced from mere silence. But where a reply cannot reasonably be expected, silence will not justify an inference of assent, e.g., where the party was deaf, ignorant of the language, intoxicated, asleep, in extremis or, where the statement was made in the course of judicial enquiries.23 Among merchants, it has been held, in certain old cases, that an account rendered will be regarded as allowed, if it is not objected to within a second or third post, or at least if it is kept for any length of time by the addressee without his making an objection, it then becomes a stated account. It is said, however, in Taylor on Evidence to be doubtful how far these cases would be followed at the present day, and whether (apart from any special circumstances under which the account is sent in) any valid distinction can be drawn between accounts rendered, between merchants and those between other persons, and that with regard to the latter it now appears to be clear that the mere fact that they have been kept by the addressee without remarks is no evidence that he has acquiesced in their contents.24 The absence of an entry of payment in an account book is a relevant fact either under this or under Section 7 or Section 11.25 Letters and other papers found in a party's possession will, occasionally in a civil suit, be evidence against him, as raising an inference that he knows their contents and has acted upon them, and they are frequently received in criminal prosecutions.1 So also, the opportunity of constant access to documents may sometimes, by raising a presumption that their contents are known, and of non-objection afford ground for affecting parties with an implied ad-

Mg. Hman v. Emperor, 1924 Rang.
 172 (2): I. L. R. 1 Rang. 689; 77
 I. C. 887: 25 Cr. L. J. 487; R. v. U. Damapala, 1937 Rang. 83.
 19. Norton Ev., 113; see also Roscoe, N. P. Ev. 58

N. P. Ev., 53.

20. See Fairlie v. Denton, (1828) 3 C. & P. 103: "what is said to a man's face he is in some degree called on to contradict, if he does not acquiesce in it, but it is too much to say that a man by omitting to answer a letter, admits the truth of the statements it contains," per Lord Tenderen; or "that every paper a man holds purporting to charge him with a debt or liability is evidence against him". Doe v. Frankis, (1840) 11 A. & E. 792, per Lord Denman. and see Richards v. Gellatly. (1872)
L. R. 7 C. P. 127; Wi demann v.
Walpole, (1891) 2 Q. B. 534, 541.
21. Lucy v. Moufit, (1860) 5 H. & N.
229; Edwards v. Towels. (1843) 5

M. & G. 624: Richardson v. Dunn. (1841) 2 Q. B. 218; Gaskill v. Skene, (1837) 14 Q. B. 664; Fairlie

Denton, supra; Freeman v. Cox, (1879) 8 Ch. D. 148; Hampden v. Wallis, (1884) 27 Ch. D. 251.

22. See R. v. Christie, (1914) A. C. 545 at p. 565; Wiedemann v. Walpole, (1891) 2 Q. B. 534, 539; R. v. Tate, (1908) 2 K. B. 680.

23. Halsbury's Laws of England, Simonds Ed. Vol. 15, page 541, pp. 208

Ed., Vol. 15, para, 541, pp. 298,

Taylor, Ev., s. 810, and cases there

^{25.} Kasam v. Firm of Haji Jamal, 1924 Nag. 22: 76 I.C. 327; Sagarmull v. Mauraj, (1900) 4 G. W. N. 207 (notes); but see R. v. Grees Chun der Banerji, 10 Cal. 1024, for

Lalit Chandra v. R., (1911) 39 C.

mission of the truth or correctness of such contents.2 Thus, the rules of a club, or the proceedings of a society recorded by the proper officer and accessible to the members,3 or an account book kept openly in a club-room,4 are evidence against the members. On similar grounds, books of account which have been kept between master and servant, tradesman and shopman, banker and customer or co-partners,5 will occasionally be admitted as evidence even in favour of the party by whom they have been written, provided that the opposite party has had ample opportunities for testing from time to time the accuracy of the entries.6 In the case cited below, the accused was convicted of theft on the evidence of an accomplice which was treated as corroborated in material particulars by the depositions of a Police Officer and the complainant to the effect that the accused pointed out the house which he had entered on the night of the offence and the various places in the house connected with the offence. It was held, (1) that the evidence of the Police officer and the complainant, as to the pointing out the various places by the accused, was really evidence of the confession of his guilt made while he was in the custody of the Police Officer and was therefore inadmissible under Sections 25 and 26 of the Evidence Act of 1872; (2) that the evidence could not be treated as evidence of conduct apart from the accompanying statements under this section; and (3) that the statement made by the Police Officer to the complainant in the presence of the accused that he (the accused) was going to show the various places connected with the theft, was not admissible under Explanation 2 to this section, because the conduct apart from the accompanying statements was not shown to be relevant and, secondly, because, under the circumstances, such a statement could not be said to affect the conduct of the accused.7 Statements inadmissible under Section 8 may be admissible under Section 32.8

31. Illustrations to the section. Illustration (a). See also R. v. Buckley,9 R. v. Shippey,10 R. v. Clewes.11

Illustration (c). See R. v. Palmer.12

Illustration (d). Where the factum of a will is in dispute the question whether the testator had made a will before is relevant to show that he had disposing mind.13

Illustration (e). "A party who gives or produces false evidence may by

Taylor, Ev., s. 812. See notes to

S. 14, post.
Raggett v. Mugrave, (1827) C. &
P. 556; Alderson v. Clay. (1816) 1
Stark 405; Aspitel v. Sertombe,
(1850) 5 Ex. 147.

4. Wilzie v. Adamson, (1789) 1 Phillips,

Ev., 339.

5. See Lindley, Partnership, 536, 5th Ed., and cases there cited and note

to S. 18, post.
6. Taylor, Ev., S. 812, and cases there cited as to books of a Company, see Lindley: Company Law, 312; Phipson, Ev., 5th Ed., 243, 244, and books of Corporations, Taylor Ev., ss. 1781–1783; Phipson, Ev., 5th Ed., 243–244, 352; Roscoe, N. P. Ev., 123, 214-215; Grant on Corporations, 317-319 and note to S. 35,

- post. 7. Hira v. Emperor, 21 Bom. L. R. 24: 52 I. C. 601; 20 Cr. L. J. 681, But see Kalijiban Bhattacharjee v. Emperor, 1936 Cal. 316; I.L.R. 63 Cal. 1053: 163 I.C. 41 in which this case has been distinguished.
- Lalji v. R., (1927) I. L. R. 6 Pat. 747: 106 I. G. 698; A. I. R. 1928 Pat. 162
- 9. 10.
- (1873) 13 Cox. 293. (1871) 12 Cox. 161. (1830) 4 C. & P. 221: 5 Cox. C. C. 11.
- 214; Best, Ev., s. 92. (1856) Steph. Gr. W. L. Vol. 111, 389: Steph. Dig. Art. 7, illust.
- 13. In the goods of Bhuggobutty (deceased). Cal. H. C. 9th Febru-ary, 1900.

so doing give rise to a general presumption against the truth of his case."14 Where the question was whether A suffered damage in a railway accident, the fact that A conspired with B, C and D to suborn false witnesses in support of his case was held to be relevant, as conduct subsequent to a fact in issue tending to show that it had not happened.15 The conduct of a party to a cause may be of the highest importance in determining whether the cause of action, if he is plaintiff, or the ground of delence, if he is defendant, is honest and just as it is evidence against a prisoner that he has said one thing at one time and another thing at another time, as showing that the recourse to falsehood leads fairly to an inference of guilt. So, if it can be shown that a plaintiff has been suborning false testimony, and has endeavoured to have recourse to perjury, it is strong evidence that he knew perfectly well that his case was an un unrighteous one. But it is not conclusive; it does not always follow, because a man, not sure that he shall be able to succeed by righteous means, has recourse to means of a different character, than that which he desires, namely, the gaining of the victory, has not good ground for believing that justice entitles him to it. It does not necessarily follow that he has not a good cause of action, any more than that a prisoner making a false statement to increase his appearance of innocence is necessarily a proof of his guilt; but it is always evidence which ought to be submitted to the consideration of the tribunal which has to judge of the facts; and therefore, the evidence is admissible inasmuch as it goes to show that the plaintiff thought he had a bad case.16

Illustration (f). See R. v. Abdullah17 and notes ante.

Illustration (g). See in the petition of Surat.18

As to the inferences to be drawn from absconding, see Illustration (h). R. v. Sorob Roy. 19

Illustration (i). See Steph. Dig. Art. 7, Illust. (d), and Section 9, Illust. (c), post.

Where it is established that the gun belonging to the deceased had been taken away by the dacoits in course of the commission of the crime, the concealment of such a gun is relevant under this Section in terms of illustration (i).20

Illustration (j). The statement of a prosecutrix, victim of rape, soon after the alleged rape, is legally admissible as evidence of conduct.21

Illustration (k). The absence of the accused at the time when a complaint

^{14.} Girish Chunder v. Iswar, (1869) 3 B.L.R. 337: 12 W.R. 226. See also R. v. Patch in Steph. Introd., 99-106 and Wills Circ., Ev., 6th Ed., 445; R. v. Palmer, (1856) Steph. Cr. L.W. 111, 389: Setph. Dig. Art. 7, illust. (b). Steph. Dig. Art. 7, illustration (c); Dig. Art. 7, illustration (c); sec S. 124, illustration (g), post. 15. Moriarty v. L. C. & D. Ry. Co., (1870) L. R. 5 Q. B. 314. 16. ib. Gockburn, C. J., sec Taylor, Ev.,

s. 804; as to conduct of a party in a case of malicious prosecution, see Taylor v. Williams, (1832) 2 B. & Ad., 845; as to admission inferred from the conduct of parties, see S. 58., post; see also Taylor, Ev., S.

^{804:} Roscoe, N. P. Ev., 62: Melhuish v. Collier, (1850) 15 Q. B. 878; Best, Ev., s. 524. (1885) 7 All. 385. (1884) 10 Cal. 302 and Bessela v. Stern, (1877) 2 C. P. D. 265. (1866) 5 W. R. Cr. 28, 30. State v. Ramchandra, A. I. R. 1965 Orissa 175. Rameshwar Kalvan Singh v. State of

^{17.}

^{18.}

^{19.}

^{20.}

Rameshwar Kalyan Singh v. State of Rajasthan, 1952 S. C. R. 377: 1952 S. C. J. 46: (1952) 1 M. L. J. 440: 65 M.L.W. 351: 1952 M.W. N. 150: 1952 Cr. L. J. 547: A. I. R. 1952 S. C. 54, 58; State of M.P. v. Surendra Prasad Dave, 1969 M. P. W. R. 890: 1968 Jab. L. J. 992: 1970 M. P. L. J. 242.

is made against him, in cases coming within this illustration, does not affect the relevancy of such complaint and therefore does not exclude it.²²

9. Facts necessary to explain or introduce relevant facts. Facts necessary to explain or introduce a fact in issue or relevant fact, or which support or rebut an inference suggested by a fact in issue or relevant fact, or which establish the identity of anything or person whose identity is relevant, or fix the time or place at which any fact in issue or relevant fact happened, or which show the relation of parties by whom any such fact was transacted, are relevant in so far as they are necessary for that purpose.

Illustrations

(a) The question is, whether a given document is the will of A.

The state of A's property and of his family at the date of the alleged will may be relevant facts.

(b) A sues B for a libel imputing disgraceful conduct to A; B affirms that the matter alleged to be libellous is true.

The position and relations of the parties at the time when the libel was published may be relevant facts as introductory to the facts in issue.

The particulars of a dispute between A and B about a matter unconnected with the alleged libel are irrelevant, though the fact that there was a dispute may be relevant if it affected the relations between A and B.

(c) A is accused of a crime.

The fact that, soon after the commission of the crime, A absconded from his house, is relevant under Section 8, as conduct subsequent to and affected by facts in issue.

The fact that at the time when he left home he had sudden and urgent business at the place to which he went, is relevant, as tending to explain the fact that he left home suddenly.

The details of the business on which he left are not relevant, except in so far as they are necessary to show that the businesss was sudden and urgent.

- (d) A sues B for inducing C to break a contract of service made by him with A. C, on leaving A's service, says to A: "I am leaving you because B has made me a better offer." This statement is a relevant fact as explanatory of C's conduct, which is relevant as a fact in issue.
- (e) A, accused of theft, is seen to give the stolen property to B, who is seen to give it to A's wife. B says as he delivers it: "A says you are to hide this." B's statement is relevant as explanatory of a fact which is part of the transaction.
- (f) A is tried for a riot and is proved to have marched at the head of a mob. The cries of the mob are relevant as explanatory of the nature of the transaction.

^{22.} R. v. Macdonald, (1872) 10 B. L. R. App. 2.

s. 3 ("Fact".). s. 3 ("Fact in issue.")

s. 11 (Rebuttal of inference." etc.) s. 3 ("Relevant,").

Steph. Dig. Art. 9; Steph. Introd; Phipson, Ev., 5th Ed. 77; Cunningham, Ev., 98; Norton, Ev., 115; Wills Ev., 2nd Ed., 65; Wigmore, Ev., ss. 410-416.

SYNOPSIS

Principle.
 Scope.

Facts necessary to explain or introduce relevant facts.

> (a) General.

(b) Illustrations.

(1) Illustration (a). (2) Illustration (b).

(3) Illustration (c).

(4) Illustrations (d) and (e).

(5) Illustration (f).

(c) Cases. 4. Facts which support or rebut inference suggested by fact in issue or relevant facts.

5. Facts which establish the identity of anything or person whose identity is relevant

(a) Identity evidence.

(b) General principles. (c) Identity of person.

(d) Voice, identification by.

(c) Utterances, identification by,

(f) Beard, identification by,

- (g) Finger-prints, identification by,(h) Foot-marks, identification by, (i) Photographs, identification by.
- (i) Family likeness or resemblance.
- (k) Direct testimony. (l) Similar transactions. Identity of things. (m)
- (1) General.
- (2) Cases.
- (n) Identification parade.

(1) General.

- (2) Power to identify. (3) Evidentiary value.
- (4) Identification parade not essential,

- (5) Procedure and precautions.(6) Who can hold a test identification. (7) Legal effect of identification memo.
- (8) Precautions to be taken by Magistrate and Police to ensure that the test was a fair one.

(9) Inference that accused was shown to identifying witnesses should not be based on surmises.

(10) What was the state of the prevailing light?

(11) What was the condition of the eyesight of the identifier?

(12) What was the state of his mind? (13) What opportunity did he have of

seeing the offender? (14) What were the errors committed by

him? (15) Was there anything outstanding in the features of conduct of the accused which impressed him?

fare at other (16) How did the identifier test identifications held in respect of the same offence?

(17) Was the 'quantum of identification evidence sufficient?

(18) Witness unable to give reasons for identification.

(19) Non-identification by other witnesses.

(20) Identification by single witness.

(21) Witness not able to identify an accused in the Sessions Court.

(22) Examination of identifier in Sessions Court but not in Committing Magistrate's Court.

(23) Examination of identifier in the Committing Magistrate's Court.

(24) Identification at the instance of the

(25) Presence of Counsel at test identifications,

(26) Test identification of an accused on

(27) Identification parade and Article 20(3)

of the Constitution of India. (28) Memo of identification not a record o. dvidence.

(29) Delay, omission, etc., in identification,

effect of. parades with long or (30) Identification short intervals.

(31) Joint identification parades.

(32) Accused not put up for identification, effect of.

(83) Identification evidence, doubtful or worthless.

(34) Evidence based on personal impres-

6. Facts fixing time or place.

7. Facts showing relation of parties.

1. Principle. As the 7th and 8th sections provide generally for the admission of facts causative of a fact relevant or in issue, the present section may be said generally to provide for facts explanatory of any such fact.23. There are many incidents which, though they may not strictly constitute a fact in issue, may yet be regarded as forming a part of it, in the sense that they accom-

^{23.} Cunningham's Ev., 98.

FACTS NECESSARY TO EXPLAIN OR INTRODUCE RELEVANT FACTS

pany and tend to explain the main facts, such as identity,24 names, dates, places the description, circumstances and relations of the parties and other explanatory and introductory facts of a like nature.25 The particulars receivable will necessarily vary with each individual case; it is not all the incidents of a transaction that may be proved, for the narrative might be run down into purely irrelevant and unnecessary detail.1 By the answers to some of such questions, if sufficiently particular for the purpose, the fact is individualized.2

- 2. Scope. The facts made relevant by this section may be classified as follows:
 - (1) facts necessary to explain or introduce a fact in issue or relevant fact;
 - (2) fact which support or rebut an inference suggested by a fact in issue or relevant fact;
 - (3) facts which establish the identity of anything or person whose identity is relevant;
 - (4) facts which fix the time and place at which any fact in issue or relevant fact happened;
 - (5) facts which show the relation of parties by whom any fact in issue or relevant fact was transacted.

These five categories of facts are admissible, but not generally. They are relevant only, in so far as they are necessary for the purpose indicated in each category.3

- 3. Facts necessary to explain or introduce relevant facts. (a) General. The 7th section, ante, provides for evidence of the state of things under which relevant facts or facts in issue happened, and the 14th and 15th sections, post, for evidence of similar facts, closely connected with the main fact, and explanatory of it. Evidence in support and particularly in rebuttal, of inferences, is of a similar explanatory character.4 The 11th section is very like the present one as to rebutting an inference, and forms an instance of sections overlapping one another.5 All the abovementioned facts qualify, explain, or complete the main fact in some material particular.
- (b) Illustrations. The illustrations to the section furnish examples of facts necessary to explain or introduce a fact in issue or a relevant fact.
- (1) Illustration (a). In illustration (a), the state of A's property and of his family at the date of the alleged will may be relevant facts, as explanatory

See Norton, Ev., 119; R. v. Rickman, (1789) 2 East P.C. 1035; R. v. Rooney, (1836) 7 C. & P. 517; R. v. Fursey, (1833) 6 C. & P. 81; Wills' Ev., 47.
 See R. v. Amir Khan, (1871) 9 B. L. R. 36, 50, 51; 17 W. R. (Cr.)

^{1.} Phipson, Ev., 11th Ed., 77, the facts are relevant, "in so far as they

are necessary for that purpose," S.

Bentham cited in Norton, Ev., 44.
 Lakshmandas Chaganlal Bhatia v State, 69 Bom. L. R. 808; 1968 Cr. L. J. 1584: A. I. R. 400. 1968 Bom.

Illustration (c) 4.

Norton, Ev., 115, and Introduction,

or introductory. Also, when the question is will, or no will, such facts may contradict or support the terms of the alleged will, whence forgery might be presumed or negatived. Such facts would then "rebut or support an inference suggested by a fact in issue."6 It is to be observed that the factum and not the construction of the will is here the matter in issue. As to evidence of surrounding circumstances in aid of construction, see Introduction to Chapter VI,

- (2) Illustration (b). The object with which what would otherwise be collateral matter is receivable in illustration (b) is to show-the malice or animus of the libeller, though to go into the full details of a quarrel would be too remote and would waste too much time. It is sufficient to show that there was a quarrel.7
- (3) Illustration (c) .- In illustration (c), the presumption or "inference", arising from the act of absconding, is thus "rebutted". The fact of absconding is in itself equivocal. It may be the result of guilty knowledge or conscience, or it may be perfectly innocent. Anything, therefore, that the party says, at the time of the act, is receivable as explanatory of a relevant fact. It would also be receivable as part of the res gestae and as a declaration accompanying an act. The question frequently arises in insolvency, when it is necessary to decide, whether leaving the house is an act of insolvency or not. In order to prove the intent with which the insolvent departed from his dwelling-house, evidence of what he said is admissible as forming part of the res gestae.8 The details, just as in Illustration (b), are not admissible generally, except as corroborating the allegation of the suddenness and urgency of the emergency which caused the departure. Declarations made or letters written, during absence from home, are admissible as original evidence, since the departure and absence are regarded as one continuing act.9
- (4) Illustrations (d) and (e) -Illustrations (d) and (e) show that a statement, which can be shown to be explanatory under this section, may be admissible, irrespective of whether the person, against whom it is given, heard it, or was present when it was made. This may appear to be a departure from the rule against hearsay. But it is necessary to distinguish the purpose, for which it is admissible. It is presumed that the statement made by C in the one case, and B in the other, are only to be receivable as evidence that such statements were made, as declarations accompanying, and explaining an act, not of the truth of them as affecting B or A, respectively. Without some proof of authority, given by the parties to be affected, to those making the statements, it is clear that a very dangerous innovation is introduced, whereby persons may suffer in life, person or property, by statements put into their mouth behind their back, a principle which the Law of Evidence has hitherto entirely eschewed."10 Justice Cunningham criticizes this statement saying: "Whether this is a dangerous innovation is a matter of opinion. The framers of the Act apparently thought otherwise. They may have considered that though such statements might weigh heavily against the man on some occasions, they might weigh strongly in his favour on others and that if evidence

Norton, Ev., 116.

Norton, Ev., 117; Simpson v. Ro-binson, (1848) 12 Q. B. 511; see S.

^{14,} Illustration (c) post. Norton, Ev., 118, Roscon, N. P. Norton, Ev., 118, Roscos, N. P. Ev., 52; Bateman v. Bailey, (1794)
 T. R. 512; Ambrose v. Clendon.

¹⁷⁹⁶ Castemn Hardw, 269; Rouch v. G. W. Ry. Co., (1841) 1 Q. B. 51; Smith v. Cramer, (1935) 1 Bing N.C. 585. 9. Taylor, Ev., ss. 588, 589, 10. Norton Ev., 118, 119.

of a fact is to be given at all, it is desirable that what was said about it at the time of the occurrence should be proved as well as the other parts of the transactions. At any rate, there is no question as to their admissibility under the present section."11 But it will be seen from the illustrations themselves that the statement in illustration (d) is relevant as explanatory of C's conduct; and in (e) of "a fact which is part of the transaction". Thus, in a prosecution for abduction, the statement of the abducted woman's brother that she denounced the accused as one of the abductors, was held to be admissible under this section, as explaining the circumstances of the accused's arrest and also for the purpose of establishing his identity, and not for the purpose of proving the truth of the facts contained in the statement.12 "It seems however, that if such a statement be once admitted, and the Court believes that it was in fact made, it must be extremely difficult to exclude its purport from consideration. A jury at least can hardly be relied upon to observe so fine a distinction.

- (5) Illustration (f). This illustration is founded on the case of R. v. Lord George Gordon. 13 "In the case put, the cries would be made in the presence of the leader, though they were the cries of third parties, not of himself; his silence would be equivalent to an admission that he accepted and acquiesced in those cries as explanatory of the common objects of himself as well as those he led. Under the effect of the next section such cries would be evidence against the accused, even if he was not present, upon proof of a conspiracy between himself and the rioters, joint and common, for the perpetration of a wrongful act."14 In R. v. Hunt,18 evidence given of banners and inscriptions was held to be properly admissible to show the general character and intention of an assembly.
- (c) Cases. A telegram received by a person cannot be presumed to have been sent by a particular person, nor is it proof by itself of its contents. But, it may be admissible under this section to explain other evidence in the case,16 such as the conduct of the accused who asked his co-conspirator why he had not complied with the telegram.17 In a prosecution on a charge of cheating for importing goods in port Karachi by deceiving the Customs authorities, the evidence that, before the fraud in question, the accused visited another port and tried to come to an arrangement with the Customs authorities there, was held to be admissible under Section 8, as constituting the motive or preparation for the commission of the offence at Karachi, and under this section as facts necessary to introduce or explain the fact in issue or to support an inference.18

Where a mother was murdered and her child's cries attracted the passersby, it was held that the witnesses could speak not only of the nature of the child's cries, but also as to what the child said, and the evidence was admissible not as evidence of the truth of what the child said, but as explaining the conduct of the witnesses.19

^{11.} Cunningham's Ev., 100.

^{12.} Nur Muhammad v. Emperor, 1944 Sind 38: I. L. R. 1944 K. 86: 211

I. C. 403.

13. 21 How St. Tr. 514, 529.

14. Norton Ev., 119.

15. 3 B. & Ald. 566, 567.

16. Emperor v. Abdul Gani, 1926 Boin.

^{17.}

^{71: 49} Bom. 878: 91 I. C. 690. Raghunath Pandey v. Emperor, 1933 Pat. 96: 142 I. C. 809.

Mohanlal Bhanalal v. Emperor, 1937 Sind 293: 172 I. C. 374: 39 Cr. L.

Rahan Lalu v. Emperor, 1938 Sind 97; 175 I. C. 324; 39 Cr. L. J. 618. 19.

The report of the Court of Enquiry appointed under Rule 75 of the Aircraft Rules, 1937, is admissible as a fact under this section, because it is a fact necessary to explain or introduce a fact in issue or relevant fact, or which supports or rebuts an inference suggested by a fact in issue or relevant fact or fixes the time and place at which any fact in issue or relevant fact happened.20 The plaint of the suit, the contract and correspondence that passed between the parties about the very transaction regarding which subsequent case of cheating was filed, would be relevant papers for considering a prayer for quashing of criminal prosecution,21

Statement of a witness in Committing Court admitted on record of session court under any provision of law is substantive evidence.22

- 4. Facts which support or rebut inference suggested by fact in issue or relevant facts. This section renders relevant facts, which support or rebut an inference suggested by a fact in issue or relevant fact, whereas Section 11 post renders relevant facts, which are inconsistent with a fact in issue or relevant fact, or which make the existence or non-existence of a fact in issue or relevant fact highly probable or improbable. Where the fact of absconding suggests an inference of guilt, facts furnishing a motive other than a guilty conscience for the conduct are relevant under this section.23 Where persons are charged with committing or conspiring to commit a dacoity, evidence to show, that prior to dacoity the accused were closely and intimately associating with the approver, is relevant as supporting the approver's statement that a conspiracy existed.²⁴ Where the question is whether a payment was made or not, the existence or absence of an entry relating to the payment in account books is relevant.25 To arrive at the letting value of a building, evidence afforded by the return or the accepted assessment of the neighbouring premises, is relevant under this section.1
- 5. Facts which establish the identity of anything or person whose identity is relevant. (a) Identity evidence. Indentity may be thought of as a quality of a person or thing,-the quality of sameness with another person or thing.
- (b) General principles. The essential assumption is that two persons or things are first thought of as existing, and that then the one is alleged, because of common features, to be the same as the other. The process of inference operates by comparing common marks, found to exist in the two supposed separate objects of thought, with reference to the possibility of their being the same. It follows that its force depends on the necessariness of the association

20. Indian Airlines Corporation v. Madhuri, A. I. R. 1965 C. 252.
21. S. R. Luthru v. Father R. P. Sah, 1973 B. L. J. R. 51.
22. Ghanshyam v. State of U. P., 1974 All. Cri. R. 119: 1974 All W. R.

(H.C.) 167, 23. Ganga Ram v. Imperator, 62 I. C.

545 at 571; State v. Jawan Singh. 1971 Cri. L. J. 1656. 24. Emperor v. Imperator, 1930 Bom. 157: I. L. R. 1954 Bom. 524; 127

I. C. 189.
25. Ganga Ram v. Lachhi Ram, 28 I.
C. 705: 19 C. W. N. 611; A. I. R.
1916 C. 61; Imam Bandi v. Mutsad-

di, I. L. R. 45 Cal. 878: 28 C. L. J. 409: 47 I.C. 513: A. I. R. 1918 P. C. 11.

1. Calcutta Corporation v. Province of Bengal, 1940 Cal. 47 at p. 51: I, L, R. 1940 C. 168: 189 I. C. 717; see also Pointer v. Norwich Assessment Committee, (1922) 2 K. B. 471: 91 L. J. K. B. 891: 86 J. P. 149: 20 L. G. R. 673, Ladies Hosiery & Underwear Ltd. v. West Middlesex Assessment Committee, (1932) 2 K. B. 679: 101 L. J. K. B. 632: 147 L. T. 390: 96 J. P. 336.

^{20.} Indian Airlines Corporation v. Ma-

between the mark and a single object. Where a circumstance, feature or mark, may commonly be found associated with a large number of objects the presence of that feature or mark in two supposed objects is little indication of their identity, because, on the general principle of relevancy, the other conceivable hypotheses are so numerous, i.e., the objects that possess that mark are numerous, and therefore any two of them possessing it may well be different. But, where the objects possessing the mark are only one or a few, and the mark is found in two supposed instances, the chances of the two being different are nil or comparatively small. Hence in the process of identification of two supposed objects. by a common mark, the force of the inference depends on the degree of necessariness of association of that mark with a single object. For simplicity's sake, the evidential circumstances may thus be spoken of as a mark. But, in practice, it rarely occurs that the evidential mark is a single circumstance The evidencing feature is usually a group of circumstances which, as a whole, constitute a feature capable of being associated with a single object. It is by adding circumstance to circumstance that we obtain a composite feature, or mark, which, as a whole, cannot be supposed to be associated with more than a single object. Each of these circumstances, by itself, might be a feature of many objects, but all of them together make it more probable that they coexist in a single object only. Each additional circumstance reduces the chances of there being more than one object so associated.2 It may also be noted that a mark of identity may be negative as well as affirmative, i.e., where a certain circumstance would be necessarily associated with an object in issue, the lack of that feature in a particular object offered tends to show that it cannot be the object in issue.8

Where a gun is recovered under the Arms Act and the recovered article is not sealed, and there is no link evidence to identify the gun recovered, evidence of recovery can be accepted, even though the gun had not been sealed soon after the recovery, provided that Court is satisfied, on consideration of the material on record and the circumstances of the case, that the gun produced before the Court is the same which had been recovered from the possession of the accused.4

(c) Identity of person. When a party's identity with an ascertained person is in issue, it may be proved or disproved not only by direct testimony. or opinion evidence, but presumptively by similarity or dissimilarity of personal characteristic, e.g., age, height, side, hair, complexion, vice, handwriting, manner, dress, distinctive mark, faculties, or peculiarities including blood group, as well as of residence, occupation, family relationship, education, travel. religion, knowledge of particular people, places, or facts, and other details of personal history.6 In this connection, too, identity of mental qualities, habits and dispositions may become relevant, though it would be excluded in more specific enquiries. Where, however, a party's identity is only material showing that he did some particular act, the range of facts is much narrower. In civil cases, a party's identity most frequently comes in question as having executed a particular document; and here identity of name, handwriting, resi-

Wigmore's Ev., S. 411.
 Wigmore, Evidence, Sec. 412.
 State of U. P. v. Dhanwan, A. I. R. 1965 A. 260: 1964 A. L. J. 621.

^{5.} Ramsdale v. Ramsdale, (1945) 178

L. T. 393. 6. R. v. Orton, (1874); unreported.

dence and occupation, or even of name and handwriting alone, will generally suffice.7

The presence or absence of motive,8 of means, opportunity, preparation, or previous attempts on the part of the accused to do the act; his knowledge of circumstances enabling it to be done; his declarations of intention or threats, to do it, or his enmity towards the injured party9 are admissible to prove identity.10 Generally all preliminary facts, whether criminal or not, rendering the crime more easy, safe, certain and effective, are receivable, as in the nature of preparations. On the other hand, similar facts, merely showing habits or disposition, and character, are generally inadmissible to identify the doer of an act.

(d) Voice, identification by. It is not safe to rely on the identification of a person by his voice alone. Such an experiment becomes risky, when a culprit is identified in a pitch dark night. But, a well-acquainted person can be recognized without mistake by voice and face-to-face talk, more especially in flashes of torch-light.

According to the Mysore High Court there is no inflexible rule that in no case can the evidence of a witness who has identified the assailant by his voice form the foundation of a conviction. The question whether such evidence is or is not sufficient to support the conviction must depend on the facts and circumstances of each case. In the instant case, the testimony was not discarded.¹⁸

In Kirpal Singh v. The State of U. P., 14 it was said that the evidence about identification of a person by the timbre of his voice, depending upon subtle variation in the overtones, when the person recognising is not familiar with the person recognised, may be somewhat risky in a criminal trial. It is different, where the person recognized by voice had for more than a fortnight before the date of the offence, met the person recognising the voice on several occasions. In the abovenoted case, in the examination-in-chief the witness had deposed as if he had seen the actual assault by the accused, but, in cross-examination, he stated that he had not seen the face of the assailant. He asserted, however, that he was able to recognise the accused and his two brothers from

of personal history.

8. R. v. Ball, 1911 A. C. 47, 68, R. v. Ellowood, (1908) 1 Cr. App. 181; R. v. Adramovitch, (1914) 7 Cr. App. R. 145, 147.

9. R. v. Ball, 1911 A. C. 47 at pp.

10. Phipson Ev., 11th Ed., p. 165.

11. Bhagtu v. Emperor, 1928 Lah. 925 at p. 926: 29 Cr. L. J. 758: 110 I. C. 790; Nga Aung Khin v. Emperor, 1937 Rang. 407 at 408: 172 I. C. 56: 39 Cr. L. J. 34; see also Arshed Ali v. Emperor, 92 I. C. 890: 27 Cr. L. J. 378: 30 C. W. N. 166 at p. 169; Niram Baraik v.

State, 1972 Cri. L. J. 177 (Pat.) (Dark night and it was raining and accused not intimately known to witnesses).

Jamser Ali v. State, 1954 Tripura
 11.

13. In re Saibanna Trippanna, 1966 Cr.
L. J. 1155: A. I. R. 1966 Mys.
248, 259 distinguishing the cases
cited in F. N. 13 on the ground
that one of the infirmities in those
cases was that the witness never
mentioned it at the earliest point of
time though there was an opportunity to do so; Tarlok Singh v. State
of Punjab, (1974) 76 Punj. L. R.
84 (accused and witness were resident of same village—Evidence was
believed).

14. (1964) 3 S. C. R. 992; (1964) 1 S. C. J. 411; I. L. R. (1963) 2 All. 945; A. I. R. 1965 S. C. 712.

^{7.} Phipson, 11th Ed., p. 164, see also Wigmore's Ev., S. 413—circumstances identifying persons are corporeal marks, voice, mental peculiarities, clothing, weapons, name, residences and other circumstances of personal history.

their gait and voice. Shah, J., observed, that it cannot be said that identification of the assailant by the witness, from what he heard and observed, was so improbable as to justify disagreement with the opinion of the Court which saw the witness and formed its opinion, as to his credibility, and of the High Court which considered the evidence against the appellant and accepted the testimony.

- (e) Utterances, identification by. It often happens that a place or a time is marked significantly by an utterance, there and then occurring, so that the identification of it may alone be made, or not be made by permitting the various witnesses to mention the utterance as an identifying mark. utterance, not being used as an assertion to prove any fact asserted therein, is not obnoxious to-the hearsay rule and may, therefore, be proved like any other identifying mark. The utterance cannot, however, be used as having any assertive value. From this use of identifying utterances, the following superficially similar uses should be distinguished,-
- (a) mentioning a third person's utterance as a reason for observing a particular fact.
 - (b) mentioning it as a reason for recollecting a particular fact,
- (c) using one's own prior utterances of a fact to corroborate one's present testimony and repel the suggestion of recent contrivance.15

The identity of the machine on which two letters have been typewritten would not by itself show that the writer of the two is one and the same person.16

- (f) Beard, identification by. An identification made of a man who is said to have been wearing a beard at the time, and whose beard is concealed or absent at the time of identification, is by no means convincing, and when it stands alone, must be regarded as an unstable piece of evidence.17
- (g) Finger-prints, identification by. The accepted conclusion of Science, after widest observation, is that several fixed and typical varieties of papillary ridges on finger tips are clearly distinguishable, and that, by the mathematical theory of probabilities, the chance of two individuals bearing the same combination of such marks is so small as to be negligible. Hence, identity of a combination of such fixed and typical marks is strongest evidence of identity of person and such evidence is admissible.18 No two impressions of the same digit of the same individual are ever identical, even if taken at the same time and under the same conditions, but the pattern and sequence of ridges are always the same. Difference in pattern is conclusive proof of the impressions being of different persons. If the various ridge characteristics are in the same order in the impressions under comparison, it can be safely stated that the impressions are from the same finger or thumb of the same individual. Likewise, the ridge characteristics are also determined from the delta as a starting point, and the ridges intervening between the core and delta may also be counted.19

Wigmore, Ev., S. 416.
 S. H. Jhabwala v. Emperor, 1933
 All. 690: 145 I. C. 481.
 Laijam Singh v. Emperor, 1925
 All. 405 at p. 407: 86 I. C. 817;

^{18.}

²⁶ Cr. L. J. 881. 18. Wigmore, Ev., s. 414. 19. Smt. Kamla Kunwar v. Ratan Lal, A. I. R. 1971 All. 304.

Where one of the main questions for determination in a case was, whether a document impugned was or was not presented before Registrar by one N S, a comparison of the thumb-impressions of the person who presented the document with that of N S. was held to be admissible under this section, if the similarity of those impressions could establish the identity of that person with N S.20 Although the comparison of thumb-mark is admissible in law to establish identity, it has been held that such comparison should be made by the Court itself.21 A jury is not bound to accept the opinion of an expert upon thumb-impression without corroboration of their own intelligence as to the reasons which guided him to his conclusion.22

(h) Foot-marks, identification by. In the case of foot-marks and bootmarks, the inference, from the combination of features in the mark found, to the person bearing the same combination of features, is apt to be weak because the features, usually taken as the basis of inference-size, depth, contour, etc.may not be distinctive and fixed in type for every individual, but may apply, even in combination, to many individuals. Hence, their probative significance is apt to be small. This, ordinarily, should not negative admissibility, it merely affects weight.23 Where a tracker compared the admitted footprint of the accused with the impression that was left on him of the footprints which he saw two months earlier when he first came to the scene of occurrence, it was held, that such a comparison made two months after the occurrence when the original tracks were no longer preserved, could not have much value.24

Evidence in regard to the foot-prints of an accused may be relied upon as a corroborative circumstance to establish the identity of the accused as a culprit.25

(i) Photographs, identification by. "Witnesses may state their belief as to the identity of persons, whether present in Court or not; and they may also identify absent persons by photographs produced and proved by any competent testimony, not necessarily, of course, that of the photographer, to be accurate likenesses.1 In matrimonial cases, however, the Court will not, unless under very special circumstances, act upon identification by photograph alone."2

It is well settled that, for certain purposes, photographs may be received in evidence. Thus, whenever it is important that the locus in quo should be described to the jury, it is competent to introduce in evidence a photographic view of it. So, in an action to recover damages for assault committed with a raw-hide, a plaintiff was allowed to introduce a ferrotype of his back taken three days after the injury, the person taking the same having testified that it was a correct representation.3

R. v. Faquir Mohd. Sheikh, (1896)
 C. W. N. 33, 34.
 Wigmore, Ev., s. 414.

^{22.} K. E. v. Abdul Hamid, (1905) 9 G. W. N. 520.

^{23.} Wigmore, Ev., s. 415. 24. Chanan Singh v. Emperor, 1933 Lah. 299; see also Rajput Bhima Karasan v. The Kutch Government, 1950 Kutch 9: 51 Cr. L. J. 396. 25. Pritam Singh v. State of Punjab,

¹⁹⁵⁶ Cr. L. J. 815: A. I. R. 1956

S.C. 415; Mangilal v, State of Raj-

s.C. 415; Mangilal v. State of Rajasthan, 1970 Raj. L. W. 1.

1. R. v. Tolson, (1864) 4 F. & F. 103: Frith v. Frith, (1896) L. R. P. D. 74; Hindson v. Ashby, (1896) 2 Ch. 21, 27; Hill v. Hill, (1916) 31 T. L. R. 541.

2. Phipson, Ev., 11th Ed., p. 526.

8. Rogers on cit Harris, Law of Identification.

^{3.} Rogers, op. cit. Harris. Law of Identification, Ss. 12, 157-178, 352, 590,

Photographs are admissible in evidence to prove also the contents of a lost document,4 or configuration, as it existed, at a particular moment.5 In the last cited case, A. L. Smith, L. J. and other Lords Justices demonstrated the necessity of careful delimitation of the uses for which upon mere production of them, photographs can be accepted as means of proof of matters of fact. Clearly, a photographic picture cannot be relied upon as proof in itself of the dimensions of the depicted object or objects, and cannot be made properly available to establish the relative proportion of such objects, except, by evidence of personal knowledge or scientific experience, to demonstrate accurately the facts sought to be established.6

Photographs can properly be used for identification, but they cannot be used for showing similarity of features or perfect facial resemblance or family likeness, to prove parentage. Parentage cannot be inferred from such a family likeness or a facial resemblance, nor negatived from such want of resemblance or likeness in a photograph of the admitted person taken together and along with the disputed person.7 Indeed, family likeness or facial resemblance cannot be taken as a true guide for inferring parentage, because two sons of the same father and mother may be so much dissimilar in likeness and resemblance, that it would be difficult for a person, who has no personal knowledge to say whether they are own brothers, born of the same parents, or not. The question of such likeness is a deceptive criterion.8 Evidence of personal resemblance, however perfect and notable it may be, of the disputed person with the admitted one, cannot be received or acted upon in law to prove the suppositious character of the disputed person. Such evidence of personal resemblance is loose and fanciful, and, therefore, evidence let in on similarity of features should be rejected as worthless.9 A photograph print, therefore, of the admitted person along with the disputed person taken together, or taken separately, even when there is a striking similarity between the two and there is family likeness, this similarity in features and the special resemblance between them is not admissible in evidence either under this or any other provision of this Act, for deciding the question of the parentage of the disputed person, and, as such, any conclusion drawn from such likeness or unlikeness of the disputed person to the admitted one is very unsafe and conjectural.10

(1) Family likeness or resemblance. Family likeness has often been insisted upon as a reason for inferring parentage and identity,11 where the question is whether A is the child of B, evidence of the resemblance, or want of resemblance of A to B is admissible.12 In the Dunglas Peerage case,12 Lord Mansfield said:

M'Cullough v. Mann, (1908) 2 I.
 R. 194 (C.A.) As to photographic copies of writing for purposes of comparison, see Sec. 73, post.

^{5.} R. v. United Kingdom Electric Telegraph Co. Ltd., (1826) 3 F. & F. 73; Hindson v. Ashby, (1896) 2 Ch. 21: 65 L. J. Ch. 515: 74 L. T. 327: 45 W. R. 252: 60

J. P. 484. United States Shipping Board v. 6. United States Snipping
The Ship "St. Albans", 1931 P.C.
189: 131 I. C. 771.

Khedia v. Turia. A.I.R. 1962 Pat. 420: 1962 B. L. J. R. 323.

Ibid.

^{9. 1}bid. 10. Ibid.

^{11.} Wills on Circumstantial Evidence,

⁶th Ed., p. 188.

12. Bagot v. Bagot, (1878) I. L. R.
Ir. 308; Burnaby v. Baillie, (1889)
42 Ch. D. 282, 290, Hubb, Ev., 384.

13. 2 Harg v. Collectanea Juridica 402;

Drck's Medical Jurisprudence, 7th Ed., p. 402.

"I have always considered likeness as an argument of a child's being the son of a parent; and rather as the distinction between individuals in the human species is more discernible than in other animals, a man may survey ten thousand people before he sees two faces perfectly alike, and in an army of a hundred thousand men everyone may be known from another. If there should be a likeness of feature, there may be a discriminancy of voice, a difference in the gesture, the smile and various other things, whereas a family likeness runs generally through all of these, for in everything there is a resemblance, as of features, size, attitude and action."

Lord Mansfield certainly put the case of family likeness very high: it is, to say the least, questionable whether a view so extreme would find judicial support in the present day.14

- (k) Direct testimony. Where the second Kumar of Bhowal disappeared in 1909, and the plaintiff revealed himself as the Kumar in 1921 and the question was whether the plaintiff is the Kumar who disappeared, it was held that the evidence of witnesses who said that they had recognized the plaintiff as the second Kumar of Bhowal was admissible, as it related to the perception of the witnesses when they saw the plaintiff after his appearance in 1921, and the recollection of their past perception of the Kumar before his disappearance in 1909,15
- (1) Similar transactions. Evidence of subsequent events, which occurred some time after, to show identity, design and motive and illegal association and the system, is not admissible in evidence. In the undernoted case, A and B were charged with theft committed in 1914 in the house of a prostitute; evidence was brought forward to show that C and D committed thefts in the houses of other prostitutes in 1916 and 1918 in somewhat similar circumstances. It was held, that the evidence was not admissible under this section or under Section 11 to prove that A and B were the same persons as C and D.10

When market-value of land for acquisition is determined on the basis of sales of similar property at or about the same time, what is relevant under this section or Section 11 is the price actually paid for the property and not whether there was a valid transfer of title.17

(m) Identity of things. (1) General. The identity of articles of property like that of the human person, is capable of being established not only by direct evidence, but by means of numberless circumstances which it is not possible to enumerate18 though the identification of property stands on a different footing from the identification of person.19 Where the articles are of ordinary kind found with anybody in a village and the witnesses do not point out any

929 (S.B.). State of Kerala v. Mariamma Abraham, I. L. R. (1969) 1 Ker. 455:
 A. I. R. 1969 Ker. 265, 269.
 Wills' Circumstantial Evidence, 6th

Ed., p. 222; State of Assam v. V. N. Rajkhowa, 1975 Cr. L. J. 353 (identification by washerman' mark is sufficient).

State v. Ram Bilas, A. I. R. 1961
 A. 614: 1961 A. L. J. 402; I. L.
 R. (1971) 21 Raj. 52; 1970 W. L.
 N. Post 518.

^{14.} Wills on Circumstantial Evidence, 6th Ed., p. 189, note (o); see also Wigmore, Ev., Ss. 166 and 1154; Anand Bahadur Singh v. Dy. Com-missioner, Bara Banki, 1933 Oudh 242; 143 I. C. 568: 10 O. W. N. 412.

^{15.} Smt. Bibhabati Devi v. Kumar Ramendra Narain Roy, 1942 Cal, 498 at p. 503: 202 I, C. 551: 47 C. G. W. N. 9 (S. B.). 16. Emperor v. Panchu Das, 1920 Cal, 500; I. L. R. 47 Cal. 671: 58 I.C.

special features or marks of identification on then, no value can be attached to their testimony.20

The identification, in a rape case, of a dhoti without evidence that it belonged to the accused or was worn by him when he took away the victim of rape and particularly in a house where ladies resided, is not of any use.21 But, it should not be forgotten that small and even nice points of difference distinguishing one thing from others of the same kind may, merely by the frequent sight of them and without any special attention to them make an impression on the mind. They are component parts of the thing and go to make the whole of which the mind receives an impression. In such cases, the impression is the general appearance of the thing. This sort of impression is exceedingly common; a workman has it of his tools and most people have it of their dress, jewellery, and other things, they are frequently seen handling or using. It occurs everyday that by remembrance of their general appearance a carpenter, mason, or other workman, recognizes his tools, and dress, jewellery, or other property is known by its owner. Undoubtedly, animals and things may be identified by those familiar with them. Observation teaches that such identification may be safely relied upon even though the witness is not able to formulate any cogent or intelligent reason for the identification.22 Thus, women can identify their own necklaces, even without marks of identification.23 At any rate articles need not be put up for identification under this section which is applicable both to identification of person and property; for identification in Court assumes more importance.24 The reliability of evidence relating to identification or recovery of incriminating articles depends to a large extent upon the fairness or otherwise of the investigation.25

(2) Cases. Where the property to be identified is not sealed at the time of the recovery, little value can be attached to the test identification proceeding.1 If articles in question were shown to identifying witnesses by the police before they identified the same before the Magistrate sanctity of identification would be lost altogether.2 But when witness identifies an article correctly out of a large number of articles and it was not suggested to Magistrate in crossexamination that police was there or that the identification was not conducted

^{20.} State v. Wahid Bux, 1953 All. 314: 1953 Cr. L. J. 705: 1952 A. L. J. 568; see also State of Vindhya Pradesh v. Saruamumi Dhiman, 1954 V. P. 42; State of Rajasthan v. Rama, 1973 W. L. N. 934 (Raj.) (Common features are of no value).

^{21.} Karan Singh v. State, 1966 A. W.

R. (H. C.) 208, 210. 22. Public Prosecutor v. India China Lingiah, 1951 Mad. 433; 1953 M. W. N. 918; State v. Pareswar Ghasi, 1. L. R. 1967 Cut. 980; 33 Cut. L. T. 1193; 1968 Cr. L. J. 201; A. 1. R. 1968 Orissa 20, 23 (cases of identification of gold ornaments without particular identifying

marks); Tillu v. State, 1971 Raj. L. W. 456: 1971 W.L.N. (Part 1) 74. State of Rajasthan v. Prabha, 1971 Raj. L. W. 311.
23. Sadasiv v. State, A. I. R. 1958 Orissa 51: 1958 Cr. L. J. 534.
24. Gundla Narayana in re, A. I. R. 1959 Andh. Pra. 387, 1959 Cr. L.

¹⁹⁵⁹ Andh. Pra. 387; 1959 Cr. L. J. 947.

^{25.} State of U. P. v. Jagney, 1971 An.

W. R. (11.C.) 163.

1. Chimna v. State, 1. L. R. (1960) 10 Raj. 921: A. I. R. 1961 Raj. 35; State of U. P. v. Dhanwan, A. I. R. 1965 A. 260.

^{2. (1975) 2} Cri. L. T. 285 (Him. Pra.).

in a proper manner, the identification of articles is reliable.³ But, even a total failure to hold a test identification proceeding does not make inadmissible the evidence of identification in Court.⁴

It may be noted that Section 164 of the Code of Criminal Procedure and this section deal with different situations. Section 164 of the Code of Criminal Procedure prescribes a procedure for the Magistrate recording statements made by a person during investigation or before trial. This section, on the other hand, makes certain facts which establish the identity of a thing as relevant evidence for the purpose of identifying that thing. If a statement of a witness, recorded by a Magistrate in derogation of the provisions of Section 164, will go in as evidence under this section, the object of Section 164 will be defeated. It is therefore, necessary to resort to the rule of harmonious construction, so as to give full effect to both the provisions. If a Magistrate speaks to facts which establish the identity of anything, the said facts would be relevant under this section; but if the Magistrate seeks to prove statements of a person not recorded in compliance with the mandatory provisions of Section 164, such part of the evidence, though it may be relevant under this section will have to be excluded.5 A Magistrate may depose to relevant facts, if no statute precludes him from doing so, either expressly or impliedly. Neither this Act nor the Code of Criminal Procedure prohibits a Magistrate from deposing to relevant facts within the meaning of this section.8

In Ram Lochan v. State of West Bengal⁷ a superimposed photograph showed the shape and contour of the bones of the face underneath the fact, as it looked when the deceased was alive, and the prosecution sought by means of this document to establish the identity of the skull as that of the deceased, or in any event to dispel any positive argument for the defence that the skull was not that of the deceased. It was contended that this protograph was not admissible in evidence, but their Lordships held that it was admissible under this section. Their Lordships said that the question at issue in the case is the identity of the skeleton. That identity could be established by its physical or visual examination with reference to any peculiar features in it, which would mark it out as belonging to the person whose bones or skeleton it is stated to be. Similarly, the size of the bones, their angularity or curvature, the prominences or the recessions would be features which on examination and comparison might serve to establish the identity of a thing within the meaning of this section.

In Julumdhari v. Devi Rai,8 it was held, that, in a suit regarding land, to establish its identity, the survey plot number is important, and no mention or wrong mention of khata number makes no difference.

If a Magistrate speaks to facts which establish the identity of any property, the said facts are relevant within this section. Thus a memorandum prepared

 ^{(1975) 2} Cr.L.T. 285 (Him, Pra.)
 Kanta Prashad v. Delhi Administration. A. I. R. 1958 S. C. 350: 1958 Cr. L. J. 698: 1958 Mad. L. J. (Cr.) 508: 1958 All. W. R. (H.C.) 588: 60 Pun. L. R. 583: (1958) 2 An. W. R. (S.C.) 113: 1958 All Cr. R. 387: 1958 S. C. J. 698.

^{5.} Deep Chand v. State of Rajasthan,

A. I. R. 1961 S.G. 1527; 1961 All W. R. (H.C.) 550; (1961) 2 Cr. L. J. 705; (1961) 2 Ker. L. R. 500; 1961 All Cr. R. 339; 1973 Cut. L. R. (Gri.) 413.

^{6.} Ibid.

^{7. (1964) 1} S. C. J. 82: A. I. R. 1963 S. C. 1074.

^{8.} A. I. R. 1965 Pat. 279.

by a Magistrate describing the present condition of a house when the victim of abduction was confined and the evidence given by him on the basis of that memorandum would be relevant under this section, but the statements made by the victim, describing the details of the house and how he was confined, to the Magistrate, not recorded in the manner prescribed by Section 164, would be inadm ssible.9 Memorandum of verification prepared by Magistrate showing places where murders took place would be admissible along with index, but the confessional statement contained in it would be inadmissible.10

In a case where the finding was that the accused died as the result of gunshot injuries and the common case of the parties was that there was only one gun at the time of the occurrence and that gun belonged to the accused, it was not further necessary for the prosecution to establish that injuries caused by the gun-shot were from the gun of the deceased.11

If a hansli (ornament for the neck) is distinguished from other hanslies mixed with it by having four rings attached to it, the recovery by identification cannot lead to the conclusion that the hansli recovered was the one removed from the body of the girl raped and murdered.12

- (n) Identification Parade. (1) General. Identification parades have a twofold object, viz.:
 - (i) to satisfy the investigating authorities that a certain person not previously known to the witness was involved in the commission of the offence or a particular property was the subject of the crime; and
 - (ii) to furnish evidence to corroborate the testimony which the witness concerned tenders before the court.13

In a civil suit, identification parade cannot be held in order to see whether plaintiff could identify the defendant.14

In criminal cases it is improper to identify the accused only when in the dock; the police should place him beforehand, with others, and ask the witness to pick him out. The witness should not be guided in any way, nor asked, "Is that the man?"15

Facts which establish the identity of an accused person are relevant under this section. As a general rule, the substantive evidence of a witness is the statement made in court. The purpose of a prior test identification is to test and strengthen the trustworthiness of that evidence. It is accordingly considered a safe rule of prudence to generally look for corroboration of the sworn testimony of witnesses in court as to the identity of the accused, who are

Deep Chand v. State of Rajasthan,
 A. I. R. 1961 S.C. 1527; 1961 All
 W. R. (H.C.) 550; (1961) 2 Cr.
 L. J. 705.

State of Assam v. V. N. Rajkhowa,
 1975 Cri. L. J. 354.
 Paramananda Mahakud v. State,

L. R. 1969 Cut. 53: 1970 Cr.
 J. 931, 933.

^{12,} Karan Singh v. State. 1966 A. W.

R. (H.C.) 208, 210.

Harnath Singh v. State of Madhya Pradesh, 1970 B. L. J. R. 417 13. (S.C.) 420.

I.L.R. (1972) 1 Delhi 714.
 Phipson, Ev., 11th Ed., p. 526;
 R. v. Cartwright, (1914) 10 Cr.
 App. R. 219; R. v. William, William, (1912) 8 Cr. App. R. 84.

strangers to them, in the form of earlier identification proceeding. There may be, however, exceptions to the general rule where, for example, the court is impressed by particular witness on whose testimony it can safely rely without such or other corroboration.16 The identification during police investigation can only be used for corroborating or contradicting the evidence of the witness concerned as given in court.17

Test identification parades are held by the police in the course of their investigation for the purpose of enabling witnesses to identify the properties which are the subject-matter of the offence, or to identify the persons who are concerned in the offence. A test identification is designed to furnish evidence to corroborate the evidence which the witness concerned tenders before the Court,18 When the accused person is not previously known to the witness concerned then identification of the accused by the witness soon after the farmer's arrest is of vital importance because it furnishes to the investigating agency an assurance that the investigation is proceeding on the right lines in addition to furnishing corroboration of the evidence to be given by the witness later in court at the trial.19 It is important both for the investigating agency and for the accused and a fortiori for the proper administration of justice that such identification is held without avoidable and unreasonable delay after the arrest of the accused and that all the necessary precautions are effectively taken. It would, in addition, be fair to the witness concerned who was a stranger to the accused because in that event the chance of his memory fading is reduced and he is required to identify the alleged culprit soon after the ocurrence. Thus, justice and fairplay can be assured both to the accused and to the prosecution.20 Identification tests do not constitute substantive evidence which is the evidence given by the identifying witness in court.21 They are not held merely for the purpose of identifying property, or persons irrespective of their connection with the offence. Whether the police officers interrogate the identifying witnesses or the Panch witnesses who are procured by the police do so, the identifying witnesses are explained the purpose of holding these parades, and are asked to identify the properties which are the subject-matter of the offence or the persons who are concerned with the offence.

The process of identification by the identifying witnesses involves the statement by the identifying witnesses that the particular properties identified were the subject-matter of the offence, or the persons identified were concerned in the offence. The statement may be express or implied. The identifier may point out by his finger or touch the property or the person identified, may either nod his head or give his assent in answer to a question addressed to him in that behalf, or may make signs or gestures which are tantamount to saying that the particular property identified was the subject-matter of the offence, or the person identified was concerned in the offence. All these statements, express or

^{16.} Budhsen v. State of U. P., 1970 Cr. A. R. 337: (1971) 1 S. C. I 223: 1971 M. L. J. (Cr.) 131: 1970 Cr. L. J. 1149: 1970 Jab. L. I. (S. N.) 141: A. I. R. 1970 S.C. 1321, 1324,

^{17.} Rameshwar Singh v. State of Jammu and Kashmir, 1971 C. A. R. 416 (S.C.).

Asharfi v. State, A. I. R. 1961 A.
 153: I. L. R. (1960) 2 A. 488.
 Rameshwar Singh v. State of Jammu and Kashmir, 1971 C. A. R.

^{416 (}S.C.); see also Matru v. State of U. P., (1971) 1 S. C. W. R. 465; 1971 S. C. Cr. R. 391; A. I. R. 1971 S.C. 1050, 1057; State of M. P. v. Padam Singh, 1973 M. P. L. I. 129; 1973 Jab. L. J. 156; 1978 Cr. L. J. 877.

^{20.}

Matru v. State of U. P., (1971) 1 S. C. W. R. 465; 1971 S. C. Cr. R. 391: A. I. R. 1971 S.C. 1050, 1057, 5 (n) 3 Evidentiary value,

implied, including the signs and gestures amount to a communication of the fact of the identification by the identifier to another person.22

There had been a conflict of opinion between various High Courts in regard to the admissibility of evidence concerning these test identification parades. The Calcutta High Court28 and the Allahabad High Court24 had taken the view that identification of a person amounts to a statement within Section 162 of the Criminal Procedure Code, and that therefore the fact of such identification is not admissible in evidence. The High Court of Madras²⁵ and the Judicial Commissioner's Court at Nagpur¹ had taken the contrary view. This conflict has now been resolved by the Supreme Court approving the view taken by the Calcutta and Allahabad High Courts in preference to the view taken by the Madras High Court and the Judicial Commissioner's Court at Nagpur. The distinction to be made between the mental act of identification and the communication thereof by the identifier to another person is logical and such communications are tantamount to statements made by the identifiers to a police officer in the course of investigation and come within the ban of Section 162. The physical fact of identification has thus no separate existence apart from the statement involved in the very process of identification, and in so far as a police officer seeks to prove the fact of such identification, such evidence of his would attract the operation of Section 162 and would be inadmissible in evidence, the only exception being the evidence sought to be given by the identifier himself in regard to his mental act of identification, which he would be entitled to give by way of corroboration of his identification of the accused at the trial. It must, however, be remembered that every statement made to a person assisting the police, during an investigation, cannot be treated as a statement made to the police and as such excluded by Section 162.8 If, after arranging the test identification parade, the police completely obliterated themselves and the Panch witnesses or a Magistrate thereafter explained the purpose of the parade to the identifying witness and the process of identification was carried out under their or his exclusive direction and supervision, the statements involved in the process of identification would be statements made by the identifiers to the Panch witnesses or the Magistrate and would be outside the purview of Section 162. But if the whole of the identification parade was directed and supervised by the police officer and the Panch witnesses took a minor part in the same, and they were only for the purpose of guaranteeing that the requirements of the law in regard to the holding of the identification parade were satisfied, the statements made by the identifiers would be hit by Section 162.4

24.

Darvao Singh v. State. 1952 All. 59: 53 Cr. L. J. 265. Gurusami Tevan v. Emperor. 1936 M. W. N. 177: In re Kshatri Ram Singh. 1941 Mad. 675: 196 I. C. 342: 1941 M. W. N. 521.

1. Ramadhin v. Emperor, 1929 Nag.

36: 29 Cr. L. J. 963; 112 T. C. 51. 2. Ram Kishan v. State of Bombay, 1955 S.C. 104 at p. 114; 1955 S. C. I. 129; State of U. P. v. Ramji
 I.al, 1968 All Cr. R. 224; 1968 A.
 W. R. (H.C.) 344, 345.

supra.

^{22.} Ramkishan v. State of Bombay, 1955 S. C. 104: 57 Bom. L. R. 601: (1955) 1 M. L. J. (S.C.) 66: 1955 All W. R. (Sup.) 41.

23. Khabiruddin v. Emperor, 1943 Cal. 644: 210 I. C. 409: 45 Cr. L. J. 258: Sutendra Dinda v. Emperor, 1949 Cal. 514: I. L. R. (1945) 2 Cal. 513.

Shiv Bahadur Singh v. Vindhya Pradesh, 1954 S. C. 322 at pp. 333-334; 1954 Cr. L. J. 910; 1954 S. G. J. 362; 1954 S. C. A. 1316; 1954 S. C. R. 1098, Abdul Kader v. Emperor. 1946 Cal. 452: 228 I. G. 24: 50 C. W. N. 88. 4. Ram Kishan v. State of Bombav. 1955 S.C. 104 at pp. 114-115.

An identification parade, if it has to have any value, must be held in the absence of the police.5 It is not absolutely necessary that it should be held in the presence of a Magistrate.6

- (2) Power to identify. The power to identify varies according to the power of observation and the observation may be based on small minutiae which a witness cannot describe himself or explain. It has no necessary connection with education or mental attainments. An illiterate villager, may be, and frequently is, much more observant than an educated man.7
- (3) Evidentiary value. The actual evidence, regarding identification, is that which is given by the witnesses in Court. The fact that a particular witness has been able to identify the accused at an identification parade is only a circumstance, corroborative of the identification in Court. The earlier identification made by a witness at the identification parade has, by itself, no independent value.8 This view has now been affirmed in a number of cases by the Supreme Court.9 The value of identification parade can however be not denied because unless it is there to support the fact of identification in Court it would be unsafe to act on the identification in Court (unless there is some exceptional circumstance such as description of the accused given earlier to someone b ythe witness).10 Identification parade evidence is not to be rejected simply because the accused was on bail. The main consideration is, whether the parade was conducted in a fair manner and whether the witnesses in fact saw the accused before the commission of the offence and the identification parade.11 Where a person identifies one suspect correctly but commits several mistakes, that identification would not be a fact 'proved' under Section 3 of the Evidence Act, and hence would lose its probative value.12 It is very difficult for one who has seen a dacoit during dacoity to give detailed description unless he has distinguishing conspicuous marks; still more so, for villagers and young boys to give detailed descriptions of those whom they have seen for a short while. The fact that, in a dacoity, everyone of the identifying witnesses was not able to identify everyone of the accused in the case does not eletract from the evidence of those witnesses who had identified particular accused.12 Where, however, the accused was identified by only one witness, the identification was held not sufficient to corroborate the statement made by an accomplice before his death. In an assault at dead of night, in an intermittent light, with a large number of people being amongst those who were assaulting

overruling Ganga v. State, A.I.R. 1956 All, 122

12. Bechu v. - Stote of U. P., 1957 Cr.

I. J. 113. 13. Aziz Khan v. State. 1958 Raj. L. W. 527. See also Narpat v. State, 1960 A.I. J. 567.

^{5.} Chatru v. State, 1953 Bilaspur 3 at D. 6.

^{6.} Mor Mahomud v. Emperor, 1940 Sind 168: 1.L.R. 1940 Kar, 487:

¹⁹⁰ I.C. 499.

7. Khilawan v. Emperor, 5 O.W.N. 760: 112 I.C. 337: 29 Cr. L.I. 1009; A. I. R. 1928 Oudh 430, 43d; Prabhati v. Stote, I. L. R.

^{430:} Prabhati V. Stote, I. L. R. (1966) 16 Raj. 44: 1966 Cv. L. J. 1332: A.I.R. 1966 Raj. 241. 8. Satya Narain v. State: 1958 All. 385: 1953 Cr. L. J. 848; In re Sangiah, 1948 Mad. 133: I.L.R. 1948 Mad. 667: (1947) 2 M.L. I. 252; Kanailal v. State, 1950 Cal.

^{9.} Sampat Jatvada Shinde v. State of Maharashtra. 1974 U.J. (S.C.) 177: 1974 Cri. L.J. 674: 1974 Cri. L. R. (S.C.) 221: 1974 S.C.C.

⁽Gri.) 382: (1974) 4 S.C.C. 213: 1974 S.C. Cri. R. 210: A.I.R. 1974 S.C. 791 at 793; Hasib v. State of Bihar, 1971 Cri. Ap. R. 410 (S. C.): (1971) 2 S. C. W. R. 446: 1971 U.J. (S.C.) 830: 1972 Cri. L. J. 233: A.I.R. 1972 S.C. 283: Santokh Singh v. Izhar Hussain. A.I.R. 1973 S.C. 2190: 1973 Cr.L.J. 1176.

10. State of Orissa v. Chhaganlal, 1977 Cr. L. J. 319.

11. State v. Kulawat. 1959 A.I.J. 548, overruling Ganga v. State. A.I.R. (Gri.) 382: (1974) 4 S.C.C. 213:

and the natural fear and confusion that the presence of dacoits creates in the hearts of men and women, persons would not be in a position to so carefully note the features of those who were assaulting them, as to enable reliance to be placed upon their identification parades, after a long time, particularly, when upon a total view of their picking out, they had picked out an equal number of suspects and non-suspects.14 As stated by Viscount Haldane, L. C. in Rex v. Christie.15

"Its relevancy is to show that the witness was able to identify at the time and to exclude the idea that the identification of the prisoner in the dock was an after-thought."

As Lord Moulton said:16

"Identification is an act of the mind and the primary evidence of what was passing in the mind of the man is his own testimony, where it can be obtained."

Evidence of identification is, in fact, the evidence of mental impression made by the witnesses of the appearance of the accused at the time of the occurrence. The evidence of even one good identifying witness may be treated as sufficient, but as a matter of precaution, the Court acts on the rule of caution that the larger the number of witnesses correctly identifying an accused and lesser the number of errors made by them, the margin of error is reduced and the probability that the accused was seen by the witnesses at the place of occurrence becomes greater. Identification (Latin: idem-the same) means the process of establishing the identity of a person, or in other words, the determination of his individuality, by proving that he is the man he purports to be, or if he is pretending to be someone else, the man he really is, or in case of dispute, that he is the man he is alleged.17

The evaluation of identification evidence is perhaps one of the most difficult problems which confront a judge, when we remember the extent of human fallibility and the fragility of memory and the tricks played by our senses. It can cause us no surprise that in England and America it has been found that the major sources of miscarriage of justice are due to wrong identification. Dwight McCarty's American Classic Psychology for the Lawyer (New York Prentice Hall in C. 1929 in Ch. VII, p. 2051 foll.) and Professor Glanville Williams in Proof of Guilt (Hamlyn Lectures at page 83 and foll.): "Identification evidence" has expounded the manifold inaccuracies of recall. Therefore, identification evidence should be examined with great care.

In criminal cases, identification parades have to be held to establish the identity of the culprit. Identification parades are held, not for the purpose of giving defence advocates material to work upon, but in order to satisfy investigating officers of the bona fides of the P.Ws. and that they are on the right

The result of the identification parade conducted at the stage of investigation is not a piece of substantive evidence and cannot be the basis of a convic-

Gokul v.State, A.I.R. 1958 All.
 616: 1958 Cr. L.J. 996.

^{15. (1914)} A.C. 545, 551.
16. ib., at p. 558.
17. Kamaraj Gounder v. State, 1959 M.

W.N. 569, 573: 1959 M.W.N. Cr. pp. 133-136.

^{18.} State v. Ghulam, A.I.R. 1951 All. 475.

tion by itself,181 The evidence against the accused must be the evidence given by the identifying witness in the witness-box. It, however, provides a very good piece of corroborative evidence and greatly enhances the credibility of the evidence of identification given in court.19 In fact, mere evidence of identification in court in the absence of a prior identification test is of very little consequence. The mere fact that a person is in the dock as an accused is likely to influence the mind of a witness and makes him think that the person in the dock is the person he had seen committing the crime and thus reduce the evidentiary value of the identification evidence given in court.20 Although the accused may have no right to claim an identification parade, if the prosecution turns down his request for identification, it runs the risk of the veracity of the eyewitnesses being challenged on that ground.21

The whole idea of a test identification parade is to see if the witness who claims to have seen the accused at the time of the occurrence can identify him from amongst others without aid from any other source. If he can, then it becomes more or less certain that the evidence of identification as deposed to by the witness is genuine. Before the evidence of identification given in court can be accepted as sufficient to establish the identity of an unknown accused, it is necessary to see that there is some good corroborative evidence in support of the evidence of identification in court. And such corroborative evidence usually comes from the evidence of the test identification where the witness picks up the accused from amongst a number of persons with whom he is mixed up. True, the evidence of the witness having identified the accused at a test identification parade has no substantive value, but is very important corroboration of his testimony in Court.22 Thus, in the absence of test identification proceedings, the mere ipse dixit of the witness that the accused was one of the culprits could not be believed at all.23 But failure to hold a test identification parade does not make inadmissible the evidence of identification in court. The weight to be attached to such evidence is a matter for the court of fact.24

So, where the culprits are unknown to the witnesses but the witnesses say in course of their examination by the investigating officer that they would be able to recognise some of the criminals, if shown, a test identification parade of the suspects ought to be held at the earliest possible opportunity, whenever possible, before a Magistrate. In Awadh Singh v. The State25 it was held, that non-holding of a test identification parade, though it may not be a ground to vitiate the trial, is undoubtedly a very important feature in considering the credibility of the witnesses on the point of identification.

It need hardly be said that evidence of identification whether of the accused or of the recovered properties, before a Police Officer amounts to a statement

^{18-1.} Bechan Singh v. State, 1973 All, Cr.

Vaikuntam Chambrappa v. State of

A. P., A.I.R. 1960 S. C. 1340; (1960) Cr. L. J. 1681. Shiam v. Rex, 1953 Cr. L. J. 367. See also Prof. Glanville Williams: 20. Proof of Guilt,

^{21.} Lajja Ram v. State, (1955) Cr.L. 1. 1547.

Prayash Kumar v. The King, (1951) 22. 52 Cr. L.J. 819; I.L.R. (1974) 2 Delhi 701; Sadha Beg v. State,

³⁸ Cut. L.T. 291: 1972 Cut. L. R. (Cr.) 173: 1972 Gr. L.J. 1113. Birey Singh v. State, 1953 Cr.L.J. 1817

Kanta Prashad v. Delhi Administra-21. Kanta Prashad V. Delhi Administra-tion, A.I.R. 1958 S.C. 350; 1958 Cr. L.J. 698; 1958 Mad. L.J. (Cr.) 508; 1958 All. W.R. (11.C.) 588; (1958) 2 Andh. W.R. (S.C.) 113; 60 Punj. L. R. 583; (1958) 2 M.L.J. (S.C.) 113. 25, 1954 Cr. L.J. 1546.

within the meaning of Section 162 of the Code of Criminal Procedure and as such becomes inadmissible in evidence.1

The suspect should be mixed up with a fairly large number of persons of similar status and dress and the witnesses should be called one by one so that identification by one witness may be conducted out of the sight and hearing of other witnesses. The proportion of outsiders to be mixed with the persons to be identified must be sufficiently large to eliminate the chance of the accused being picked up by chance. Where, therefore, six suspects were mixed up with only seven outsiders, it was held that the chances were all in favour of the witnesses picking up the accused in view of their number being almost equal to the number of outsiders and as such the court would not rely much on this sort of an identification parade.2 It should also be remembered that if too large number of persons are mixed up with the suspects, there might be a danger of putting too much strain on a witness's ability to pick up a suspect. In such a case, he will get easily bewildered. Where the proportion of suspects to undertrials bore the ratio of 5:1 it was held that the identification parade was a fair one.3 In Satya Narain v. State,4 Desai. J. has, however, held that the proportion should at least be 9: 1. In Sadhu Bag v. State,5 the High Court of Orissa held that identification parade was a fair one when 13 undertrials were mixed with two suspects.

It has been held in a number of cases that the value of a test identification parade is much less, if it is held a considerable period after the arrest of the accused.6 So also is the case if the test identification parade is held long after the occurrence. Where, therefore, the test identification parade was held fifteen months after the occurrence, the evidence of identification was looked at with an eye of suspicion. "Human memory is fallible. It is sometimes difficult to identify a person not very well known whom one sees with a rather different appearance about 15 months later after the crime has occurred."7

Test identification parade should be arranged early, at any rate, before the accused goes on bail.8 In fact, courts ought to refuse bail if an identification parade is going to be and ought to be held. So ,not only the test indentification parade has to be arranged at the earliest possible opportunity but bail will have to be opposed strenuously until the test identification parade is finished.

As regards the actual conduct of the identification proceedings, the following hints or precautions should be noted or observed: (a) Selection for parade

Bhagu Ranchhod v. State, 1955
 Gr. L. J. 31.
 Dal Chand v. State, 1953 Cr. L. J.

- L.W. 192.

 1953 Cr. L.J. 848.

 38 Cut. L. T. 294: 1972 Cut. L.

 R. Cri.) 173: 1972 Cri. L. J. 1113.

 38 Cut. L.T. 294: 1972 Cut. L.R.

 (Cri.) 173: 1972 Cri. L. J. 1113.

 Debi v. State, 1953 Cr. L. J.

 447, Kasim Rizzi v. State of Hvderabad, (1951) 52 Cr. L. J.
- Darvao Singh v. State, (1952) Cr. T. I. 265
- 8. Hazara Singh v. State. (1951) 52 Cr. I. I. 492: Ganga Singh v. State, 1956 Cr. I. J. 181.

^{1.} Ram Kishan 'v. State of Bombav. 1955 S.C. 104: 1955 Cr. L.I. 196: 57 Bom, L.R. 600: 1955 Mad. W.N. 146: 1955 All. W.R. (Sup.) 41: (1955) 1 Mad, L.J. (S.C.) 66. See also In re Venkata Subbiah. (1955) Cr. L.J. 1152: Santa Singh v. State of Punjab. 1956 Cr. L.J. 930; State of Rajasthan v. Rama. 1973 W.L.N. 934 (Raj.).

^{356;} Ranjha v. State. 1952 Cr. L.J. 15: State v. Wahid Bux. 1953 Cr. T. J. 705: Gope v. State of Rajas-

than, 1974 W.L.N. 78: 1974 Raj. L.W. 192.

of only non-suspects of the same religion, (b) Securing of privacy from view at parade, (c) Exclusion of everyone, especially the police from the proceedings, (d) Seclusion till the completion of the proceedings of each witness finished with from others whose evidence has to be taken yet. This precaution should exclude possibility of prearranged signals like touching the ear, or cough, etc., when the identifying witness reaches the culprit in the parade. We may point out here that the value of the identification parade is very much depreciated, if held in sub-jails, where cells are directly visible to the public. Secondly, the Police guard may not unoften be privy to surreptitious identification beforehand of suspects by the witnesses. Thirdly, suspects, when being exercised or taken to the latrine or kitchen run the risk of being pointed out beforehand to the identifying witnesses. In such cases, a searching examination of the identifying witnesses as regards the time of their arrival, the place where they stayed, their visits to the Police, etc. may prove useful. (e) Changing the place or places of persons to be identified at discretion before arrival of each witness, (f) Definite information is required in cases where witness admits prior acquaintance of meeting with any subject he identifies. (g) Recording any well founded objection by any suspect to any point in the proceedings.

In Abdul Munim Khan v. State of Hyderabad, it has been said that the desirability of exercising a most careful scrutiny about identification parades cannot be over-emphasised. It is the duty of the Magistrate, conducting the test identification parade, to see that all precautions are taken in the matter of satisfying himself that the witnesses had no opportunity to see the accused before. Even the omission to observe a minor necessary procedure, at the time of holding the identification parade would detract from its value. proceedings should be conducted in such a way as not to leave any room or loophole to create the slightest suspicion in the mind of the court. The officer conducting the test identification parade should therefore exercise the utmost scrutiny and vigilance at the time of the test identification parade.10 Precautions must be taken so that identifying witnesses do not have opportunity to see the suspects before the parade and that unfair aid or assistance is not provided to the witnesses, otherwise identification parade will lose its value.11

If the evidence of identification is satisfactory and leaves no doubt that the witnesses who claim to have identified the accused must have done so, there is no reason why conviction should not be recorded merely on the strength of that evidence.18

Where, however, the suspect is known to the identifying witness, the parade is a farce and unreliable.18

See also Samunder Singh, v. State, 1953 Cr. L.J. 1452.
 Hasib v. State of Bihar, (1971) 2 S.C.W.R. 446: 1972 Cr. L.J. 233:

swami, J.).
Dashirai v. State. A.I.R. 1964
(Tri. 54; Ram Charan v. State. 1972) All, Cr. R. 272 (distance between residences of witness and accused only two miles, possibility of witness knowing accused cannot be excluded). (State of U. P. v. Jagney, 1971 All.W.R. (H.C.) 163 (If part of the statement of witness not found to be true, his statement that accused was not known to him cannot be safely relied upon).

⁽¹⁹⁵³⁾ Cr. L.J. 785.

A.I.R. 1972 S.C. 283. Madan Singh v. State, 1953 Cr.L.J. 100; see also Anwar v. State on general principles of assessment of identification evidence—Anwar v. State, A.I.R. 1961 All. 50: 1961 (1) Cr.L.J. 22. See also Kamrai Gounder, In re. 1959 M.W.N. Cr. 129 : A.I.R. 1960 Mad. 125 (Rama-

Aithough human memory is fallible and it is sometimes difficult to identify a person not well known, whom one sees with a rather different appearance at the time of identification proceedings, yet this does not necessarily cause any infirmity in the evidentiary value of the witnesses, who do find it possible to identify the accused even after lapse of a long time after commission of the offence. The evidence of the identification has to be dealt on the basis of various facts and circumstances of each particular case. It is not possible to lay down any hard and fast rule, as to when a particular identification should or should not be accepted.14

Although, in assessing the evidence of identification, there are no hard and fast rules for guidance, yet the basic principle of criminal law is, that a fact or circumstance must be proved against the accused before it can be relied upon and used against him. The evidence of identification is as much subject to the definition of the word "proved", and it must satisfy the test provided by Section 3. The Court-should approach the evidence with reasonable doubts, and accept it only, if those doubts are removed. Evidence of identification can be accepted only, if the Court is satisfied that-

- (1) a witness had at least a fair, if not good opportunity, of seeing the accused;
- (2) the identification parade was held within a reasonable time of the incident !
- (3) the witness has reliable powers of observation to be judged from the facts, that the parade was not made too easy for him to pick out the suspect and that he did not commit so many mistakes that it would create a doubt in the mind of a reasonable man;
- (4) the statement of the witness that he did not know the suspect from before is believable; and
- (5) the witnesses were not, given an opportunity to see the accused after their arrest, and that the investigation conducted inspires confidence.15

The evidence of identification at its best is weak, for the chances of mistake are far greater in this type of evidence than where the witness deposes about facts within his knowledge.16 Where the investigation is tainted, the statement of the witness cannot be accepted at its face value.17

If the intention is to rely on the identification of a suspect by a witness, his ability to identify should be tested without showing him the suspect or his photograph or furnishing him the data for identification. Showing a photograph prior to the identification makes the identification worthless. 18 Where

^{14.} Sheo Nandan v. The State, A.I.R. 1964 A. 139.

^{15.} Anwar v. State, I.L.R. (1958) 1 A. 151: A.I.R. 1961 A. 50.

^{16.} Ibid.17. Ibid.18. Laxmipat Choraria v. State, (1968)

² S.C.R. 624: (1968) 1 S.C.A. 682: 1968 S.C.D. 743: (1968) 2 S.C.J. 589: 70 Bom. L.R. 595: 16 Law Rep. 473: 1968 M.L.J. (Cr.) 614: 1968 Cr. L.J. 1124: A.I.R. 1968 S.C. 938, 947.

photographs of the accused have been shown to the witness, the value of any subsequent identification by the witness only is impaired.19

The purpose of test identification is to test the substantive evidence in court. The sworn testimony of witnesse as to the identity of the accused who are strangers to the witnesses, generally straking, requires corroboration, which should be in the form of an earlier identification proceeding. There is an exception to this rule, where the Court is satisfied that the evidence of a particular witness can be relied on without an earlier identification proceeding.20 It is desirable that in those cases where the prosecution case depends upon the evidence of identification, the Committing Magistrate should examine witnesses if only for giving an opportunity to identify accused persons to obviate the argument in the trial court that there was insufficient corroboration of the evidence of identification.21 In cases. where there are no such exceptional circumstances, identification evidence should always be examined with great care.22

(4) Identification parade not essential. But simply because the statements made by the witnesses before the Magistrate conducting the identification proceeding are admissible in evidence as previous statements to corroborate their evidence in Court, it cannot be said that if such evidence is lacking the evidence given in Court is no evidence. The Evidence Act does not require any particular number of witnesses to prove any fact nor does it require that the evidence of any witness should be corroborated.23 The question at all times is of believing or not believing the witness.24 But, in practice, it is not safe to accept the statement of a witness about the complicity of an accused in the crime if he did not describe him by name or other particulars during the investigation and still was not made to identify him out of a group. The evidence of a witness that he recognizes the accused whom he had not seen before the occurrence, as the offender is inherently weak, and prudence and discretion dictate that there must be corroboration before it is accepted.25 If a witness has not identified the accused at a parade or otherwise during the investigation the fact may be relied on by the accused, but there is nothing in law which confers a right on the accused to demand that an identification parade should be held at or before the enquiry or the trial.1 Identification parades are held not for the purpose of giving defence advocates material to work on, but in order

526 (Gauhati). 21. Abdul Rashid v. State. 1964 A.W. R. (H.C.) 6: 1966 Cr. L.J. 200.

Orissa 37.

23. Satya Narain v. State, 1953 All. 385 at p. 393 : 54 Cr. L. J. 848.

24. Dhaja Rai v. Emperor, 1948 All.

1. In re Sangiah, 1948 Mad. 113, see also Satya Narain v. State, supra; Ali Jan Imam Ali v. State. 1968 Cr. L. J. 9: A.I.R. 1968 All. 28, 31; Lajjaram v. The State, A.I.R. 1955 All, 671.

Sharaf Shah Khan v. State of A.P., I.L.R. 1962 A.P. 96: A.I.R. 1963 A.P. 314.

Vaikuntam Chandrappa v. State of A.P., A.I.R. 1960 S.C. 1340: 1960 Cr.L.J. 1681; Budhsen v. State of U. P. 1970 Cr.A.R. 337: 1970 Cr. L.J. 1149: 1970 Jab.L.J. (S.N.) 141: A.I.R. 1970 S.C. 1321, 1324; Sheik Habile v. State of Bihar, 1971 Cr. A.R. 410, (reversing judgment of High Court); Ram Nath v. State, 1966 A.L.J. 478: 1965 A.W.R. (H. C.) 811, 812; 1965 All. Cr. R. 543; Dhan Singh v. State, 1966 A.W.R. (H.C.) 584; Ahmad Ali v. State, 1969 Cr. L.J. 833 (All.); Maji Taha v. State, 1973 Cr. L.J.

^{22.} State of Orissa v. Mahcshwar, I.L. R, 1963 Cut. 762: A.I.R. 1964

^{241: 49} Cr. L.J. 287: 1947 A.L.J.

^{25.} Satya Narain v. State, 1953 All. 385 at p. 393; Sarjug Mehton v. State of Bihar, 1971 Pat. L.J.R. 107; 1975 W.L.N. (H.C.) 139 (Raj.); State of Orissa v. Chagan Lal, 1977 Cr. L.J. 319.

to satis'y investigating officers of the bona fides of the prosecution witnesses."2 But save in the most exceptional circumstances the Court should direct an identification parade if it is necessary in the interest of justice. Especially when the accused persons definitely assert that they were unknown to the prosecution witnesses either by name or by face and they requested the authorities concerned to have the test identification parade held.4 If the witnesses do not give the name of the accused, it is necessary to hold a test identification parade; also if the accused holds out a challenge. There is however one exception. If the accused is arrested on the spot, and he is in custody from that time up to the date of his trial, there is no question at all about his identity.5 It is not necessary for the State to hold identification parade when the accused were arrested at the spot. In such a case, if the accused felt that the witnesses would not be able to identify them, they should have requested for an identification parade.6 There can be no question of identification where the accused is apprehended or caught red-handed in the presence of a number of persons who are produced by the prosecution as witnesses in the case.7 The absence of test identification is not fatal in all cases and if the accused person is well known by sight, it would be waste of time to put him up for identification.8 The nonholding of a test identification parade, though it may not vitiate the trial, is undoubtedly a very important feature in considering the credibility of the witnesses on the point of identification. But having regard to the peculiar facts and circumstances of a case, especially when the identifying witness is corroborated by another, the evidence of the identifying witness will not be rendered incredible.10 As was pointed out in Nagina v. Emperor11 for a Magistrate or other officer to come into Court and depose that a particular witness in his

 Public Prosecutor v. Sankarapandia Naidu, 1932 M.W.N. 427.
 Amar Singh v. Emperor, 1943 Lah. 303: 209 I.C. 231: 45 Cr. L.J. 48; Sajjan Singh v. Emperor, 1945 Lah. 48: I.L.R. 1944 Lah. 236: 219 I.C. 259: 46 Cr. L.J. 550. 4. Awadh Singh v. State, 1954 Pat.

Awadh Singh v. State, 1954 Pat. 483: see also Provash Kumar Bose v. The King, 1951 Cal. 475: 52 Cr. L.J. 819; Joginder Singh v. State of Punjab, 75 Punj. L. R. 786: 1974 Chand L. R. (Cri.) 588: 1974 Cri. L. J. 240; 1972 All C. R. 101.
 State v. Dhanpat, A. I. R. 1960 Pat. 582: 1960 Cr. L. J. 1650.
 State of U. P. v. Rajju, 1971 S. C. C. Cr. 228: 1971 Cr. L. J. 642: A. I. R. 1971 S.C. 708; 710.
 Dhan Singh v. State of U. P., 1966 A. W. R. (H.C.) 584, 585. The standard of judging the identification of such persons differs from that applicable to general identification normally held of culprits long after the crime (State of U. P.

long after the crime (State of U. P. v. Jagnoo, 1968 Cr. L. J. 1320; A. I. R. 1968 All. 333, 337).

8. Jadunath Singh Sowann v. State of U. P., (1971) 1 S. C. W. R. 151, 159, (followed in Har Bhajan Singh v. State of J. & K. 1975 Cri. L. J. 1553; A. I. R. 1975 S. C. 1814);

Mehtab Singh v. State of M. P., 1974 Cri. App. R. (S.C.) 374: 1975 S. C. G. (Cri.) 33: 1975 Cri. L. T. 290: 1975 Cri. L. R. (S.C.) 31: 1975 S.C. Cri. R. 44: (1975) 3 S.C.C. 407: A. I. R. 1975 S.C. 3 S.C.C. 407: A. I. R. 1975 S.G. 274; Gulam Majibuddin v. State of W. B., 1972 Cri. Ap. R. (S.C.) 47: 1971 U. J. (S.C.) 885: 1972 Cri. L. J. 1342 (when it was not even the case of accused that he was not known to witnesses previously); Meera Puri v. State of Nagaland, 1971 Cri. L. J. 539, Assam L. R. (1971) Assam 22; Kuruchiyan Pillai v. State of Kerala, 1974 Ker. L. T. 328; Surya Muni v. State of U. P., 1971 U. J. (S.C.) 126: (1970) 3 S.C.C. 530, 9. Awadh Singh v. State, 1954 Pat. 483; Mahavir Singh v. State of U. P., 1973 All. Cr. R. 139.

1973 All. Cr. R. 139.

10. Johri Lal v. State of M. P., 1971 Jab. L. J. 165: 1971 M. P. L. J. 64; 7911 M. P. W. R. 129; A. I. R. 1971 Madh. Pra. 116, 118; I. L. R. (1975) Cut. 1384 (corroboration could be by the fact that witness has given earlier adequate particulars descriptive accused).

11. (1921) 19 A. L. J. 947: 95 I.C. 477: A. I. R. 1921 A. 215.

presence identified one of the accused as having taken part in the dacoity is nothing more than hearsay evidence. The Magistrate's evidence amounts in substance to this:

"The witness said in my presence that a particular accused whom he pointed out took part in the dacoity."

The statement of the witness is not made on oath, and it is not made in Court. The statement can only be proved, either to corroborate the evidence which the witness afterwards gives in Court, in accordance with Section 157 of the Evidence Act, or under some other provision of the Evidence Act. If the witness at the trial is no longer able to recognize the accused, there are two ways in which his previous statement can be rendered admissible. The statement made by the witness before the committing Magistrate may be brought on the record under Section 288, Criminal Procedure Code. This was the course adopted in Nagina v. Emperor. 12 It is only available where the witness was able to pick out the accused before the committing Magistrate though he could not do so before the Judge. The other method is to elicit from the witness at the trial a statement that he identified certain persons at the jail and that the persons whom he there identified were persons whom he had seen taking part in the dacoity. If the witness is prepared to swear to this, then it is open to the Court under this section to establish by other evidence the identity of the accused, whom the witness identified at the jail. For this purpose, the best evidence be that of the Magistrate who conducted the identification, and his evidence will be strictly relevant under the provisions of this Act. 18 The safe rule is that the sworn testimony of witnesses in Court, as to the identity of the accused who are strangers to them, requires corroboration which should be in the form of an earlier identification parade. If the eyewitnesses fail to pick up in the identification parade and in the committing Court, it would not be safe to accept his belated identification in the Sessions Court.14 Evidence of a witness against accused becomes doubtful if he failed to identify him at the parade,18 but if he was not sent to take part in identification parade there is no reason o doubt his evidence.16

There are certain principles which a Court has to bear in mind in deciding whether the identifying witnesses are worth relying upon or not. Among other things, what the Court of law has to see, can be catalogued as follows:

- (1) The number of wrong persons picked out by the identifying
- (2) Consistency of the identification made at different times;
- (3) Sufficiency of number of men paraded; and
- (4) Number of witnesses correctly identifying the accused.

Apart from what is stated above, the other facts which weigh with the Judge in scrutinising the identifying evidence is whether the witnesses had known the accused and whether they were close enough to the accused about the time of the alleged occurrence and whether the accused had taken some

Abdul Wahab v. Emperor, 1925 All. 223; I. L. R. 47 All. 39.

^{(1921) 19} A.L.J. 947; 95 I.C. 477; A.I.R. 1921 A. 215 (This course is not available under the new Cr. P. C. as there is no equivalent provi-

^{14.} Vaikuntam v. State of U. P., A.

^{1.} R. 1960 S.C. 1340: 1960 Cr. L. J. 1681. 15. 1972 Cut. L. R. (Cri.) 554; State of Punjab v. Rameshwar Das, 1975 Cri. L. J. 1630 (Punj.). 16. 1972 Cut. L. R. (Cri.) 554.

prominent part which impressed the witnesses in the matter of identification.¹⁷ The weight to be attached to the identification of a suspect by a witness should ordinarily not depend upon his failure to identify other suspects. It follows that it should not depend upon the mistakes committed by him, i.e., upon the number of innocent men picked out by him as other offenders.

When identification at a parade is sought to be established, it is better that a large number of under-trials are mixed up with the accused, although one cannot expect the same ratio between the accused put up for identification and the person mixed with them in a case where the number of accused is one or two, because there is a greater probability of a single accused being identified by chance, if he is mixed up with only two or three other persons. There is much less probability, where the number of accused is large and are mixed up with twenty or twenty-five other persons. But that does not mean that the identification was accidental or casual.18 When questions of identification airse during the trial, it may be stated that the credibility of prosecution witness does not arise at the stage when he identifies the accused during the examination-in-chief. Therefore, at that stage, the accused cannot subject him to any test. In chief-examination, he is under the control of the State counsel. The accused cannot require the Magistrate to have an identification parade or to collect men to stand. It is only when the witness is being cross-examined that he can put questions to test the truth of his statement that he had identified him only on account of seeing him committing the crime.19

(5) Procedure and precautions. Many Judges are justly sceptical of the genuineness of many identification results. Having regard to the general level of intelligence among villagers they find it difficult to believe that dacoits seen only in the light of a torch or a lantern from a distance of several yards should be recognized by the witnesses after some months. It is high time that the identification proceedings were conducted genuinely and properly. In order to inspire confidence not only in the Court but also in the public, it is necessary that every attempt should be made to hold them in circumstances similar to those in which the crime was committed.20 No presumption attaches to identification proceedings conducted by Magistrates, and it is for the prosecution to prove affirmatively that every possible precaution was taken to ensure fair identification and the proceedings were not only fairly conducted but were correctly recorded.21 Magistrate found 15 persons sitting with identifying witne ses outside jail, persons of same age group not mixed with accused and Magistrate did not himself write identification memo. No reliance was placed on such identification.22

In a Bench decision of the Allahabad High Court.28 the various aspects of test identification parades have been conveniently collected together giving a comprehensive picture well worth studying in extenso furnishing as it does

^{17.} Hari Narain v. State. 1953 Bhopal 8 at p. 9: see Sheo Sahai v. Emperor, 1952 Oudh 287: 141 I. C.

Aziz Khan v. State 1957 Raj. L.

W. 527. 19. State v. Madan Lal, A. I. R. 1959 All, 504; 1959 Cr. L. J. 934.

Satya Narain v. The State, 1953 All, 385 at p. 397; 54 Cr. L. J. 848.

^{21.} State of Vindhya Pradesh v. Sarua Munni Dhimar, 1954 V.P. 42 (the procedure to be followed and the precaution to be taken are fully stated in this case); 1973 Cut. L. R. (Cri.) 413.

^{22. (1972) 1} Cut. W. R. 464 23. Asharfi v. State. I. L. R. (1960) 2 A. 488: A. I. R. 1961 All. 153 (James and Takru, JJ.)

all the answers to the multifarious problems relating to procedures and precautions and the correct legal inferences to be drawn from them.

This would be no ground for rejecting identification evidence that the parade accused and persons mixed with them were not similarly dressed.24

Even though a person is arrested under the Arms Act, 1878, if he is suspected of having taken part in a dacoity case, normal precautions for identification in a dacoity case should be taken.25

(6) Who can hold a test identification. Their Lordships of the Supreme Court pointed out that the communication of the fact of identifications by the identifier to the person holding the proceedings is tantamount to a statement made by the identifier to that person. The note or memo of the proceedings prepared by the person in question is, therefore, a record of the statement of the identifying witnesses. But since there is no legal bar to any person recording the statement of another (provided the statement has been voluntarily made) any person can conduct a test identification. Other conditions being satisfied, identification proceedings may be conducted by panch witnesses who are all ordinary citizens.1 If after arranging the parade, the police leave the field, and allow identification to be made under the exclusive direction and supervision of panch witnesses Section 162 is not attracted.2

A test identification may be held either by panch witnesses or Magistrate having power.8

An identification parade held by a Police Officer and not a Judicial Magistrate has no legal value. Any statement by the identifying witnesses would be hit by Section 162, Cr. P. C.4

A Magistrate has no power to interfere with the number and method of investigation by the police.5 The holding of a test identification parade is merely a step in the investigation of a crime and it is entirely up to the investigation agency to decide as to whether it would hold a test identification parade or not and if it decides to hold one, the venue for it.6

(7) Legal effect of identification memo. We have already seen that a test identification furnishes evidence to corroborate the evidence which the witness tenders before the Court, and that the identification memo is nothing more than a record of the statement which the witness has expressly or impliedly made before the person who conducted the identification. Determination of the legal effect of the memo should therefore present little difficulty. The persons who can conceivably hold identification proceedings are (a) the police, (b) ordinary citizens, and (c) Magistrates. The laws applicable to these categories of persons are different.

78, 81.

^{24.} Ram Chandra v. State of Orissa, (1976) 42 C. I., T. 228.

^{25.} Tahir v. State, 1969 Cr.L.J. 680 (All.) 681.

1 Ramkishan Mithanlal v. State of Bombav. A.I.R. 1955 S. C. 104.

2. Santa Singh v. State of Punjab. A.

I. R. 1956 S.C. 526; 1955 Cr. L. J. 930.

Asharfi v. The State, I. L. R. (1960) 2 A. 488: A. I. R. 1961 A.

^{4.} Leofred Lobo v. State, 1967 Cr. L. J. 746: A. I. R. 1967 Goa 60, 65.

Abhinandan Jha v. Dinesh Mishra. (1967) 3 S. C. R. 668; (1967) 2 S.C.A. 610; 1967 S.C.D. 985; (1967) 2 S.C.A. 610; 1967 S.C.D. 985; (1967) 2 S.C.W.R. 321; 1968 A. L. I. 373; 1968 B. L. J. R. 273; 15 Law Rep. 448; 1968 Cr. L. I. 97; A. I. R. 1968 S.G. 117. Seralso K. E. V. Nazir Ahmad, A. J. R. 1945 P.C. 18 and State of W. Bengal v. S. N. Basak, A. I. R. 1963 S.C. 447.
 State v. Raghuraj Singh, 1963 A. W. R. (H.G.) 855; 1970 Cr. L. J. 78, 81. 5. Abhinandan Jha v. Dinesh Mishra.

In theory, there is no objection to a test identification being held by the police. But, in such an event the express or implied statement made by the identifier before them would be a statement which would immediately be hit by Section 162. Cr. P. C., whereunder it can be used only for the purpose of contradicting him under Section 145 of the Evidence Act and cannot at all be used for corroborating him. Consequently, a test identification held by the police nullifies the object of using the identification for corroborating the testimony given by the identifier before the Court. It is for this reason that such proceedings should never be held by the police.

As to ordinary citizens, e.g., Panch witnesses, there is no legal objection to their holding identification proceedings even though these are arranged for by the police. But as pointed out by the Supreme Court in Ramkishan v. State of Bombay (supra), it is essential that the process of identification be carried out under the exclusive direction and supervision of the citizens themselves, and the police should completely obliterate themselves from the parade before the statements made by the identifiers could fall outside the purview of Section 162, Cr. P. C.

Where the Magistrates have the power to act, they must do so under Section 164 or not at all.8

Where the proceedings have been held before a Magistrate of the 2nd class not specially empowered, or a Magistrate of the 3rd class, the statement is one under the unwritten general law. There is a difference between the legal status of the two kinds of statements. Nevertheless, the statement, irrespective of the powers of the Magistrate before whom it is made remains a formal statement of the witness which can be used, not only for the purpose of contradicting him under Section 145 or 155 of the Evidence Act, but also for corroborating him under Section 157 of the Act.

As a record of the statement of the witness, the identification memo can be utilised under Section 159, Evidence Act for refreshing the memory of the person who prepared it. But Section 157 is of greater consequence, for it provides specifically for corroborating the testimony of the witness. It reads:

"In order to corroborate the testimony of a witness, any former statement made by such witness relating to the same fact, at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved".

For purposes of the present discussion, the term 'any authority legally competent to investigate the fact' in the second part of the section can be safely ignored. But what is material is the first part, viz., 'any former statement made by such witness relating to the same fact, at or about the time when the fact took place'. The fact is not that the accused is guilty of the offence; it is that before the Court the witness identifies the accused, that is to say, points to him in the dock and states on oath that in his opinion he was the offender. But, at the test identification held earlier, he had expressly

^{7.} See Jamna Das v. State, A. I. R. 8. Asharfi v. The State. I. L. R. 1963 M. P. 1064 P. L. (1960) 2 A. 488; A. I. R. 1961 A. 188

or impliedly stated the same and this 'former statement' of his was recorded in the identification memo prepared by the person who conducted the proceedings. Indisputably, the memo was prepared 'at or about the time' of the identification. It follows that, by virtue of the first part of Section 157, the identification memo becomes admissible for corroborating the witness's testimony given before the Court. In Bhogilal Chunilal v. State of Bombay,9 although the point at issue before the Supreme Court was somewhat different, their Lordships arrived at a similar conclusion.

It will have been noticed that on this reasoning, except for the police (in whose case the special law embodied in Section 162, Cr. P. C. would remain an insurmountable obstacle), an identification memo prepared by anyone, be he a private person or a Magistrate exercising any powers or jurisdiction, can be used for corroborating the testimony regarding identity subsequently given by the witness before the Court.

There remains to consider the legal status of an identification memo prepared on the one hand by a Magistrate of the first class or a Magistrate of the second class specially empowered, and on the other by the remaining kinds of Magistrates. In the case of the former, the memo, as already shown, is the record of a statement taken under the provisions of Section 164, Cr. P. C. It is, therefore, evidence given 'before any officer authorised by law to take evidence'.

In consequence, Section 80 of this Act applies, whereunder the Court must presume the genuineness of the memo. And not only this. Under the same section there is also a legal presumption as to the circumstances under which the memo was prepared, so that it becomes evidence not only of the fact that the witness identified the suspect but also of the various steps or precautions taken by the Magistrate to ensure a fair and just identification proceeding. On the practical plane, the result is that where a test identification has been held by a first class or a specially empowered second class Magistrate, it is not necessary to cal! him in evidence; his memo, under the terms of Section 80, is evidence of everything that it contains. He should be called only, if it is desired to obtain clarification of doubtful matters in the memo or matters omitted therefrom. Even if a question is raised as to the identity of the witness who appears at the identification, it is unnecessary to call the Magistrate; the doubt can be resolved by summoning the police or jail official who produced him, as was held in Sadulla v. Emperor.10 Rajasthan High Court however held that the memo is not a record of evidence under Section 80 and happenings at identification parade cannot be proved by production of the memo.11

As to the remaining kinds of Magistrates, their memo does not fall under Section 164, Cr. P. C.; hence Section 80 of the Evidence Act is not attracted to them, so that their deposition in Court is necessary. The same applies to ordinary citizens, or Panch witnesses.

^{9.} A. I. R. 1959 S.C. 356: 1959 Cr. L. J. 389: 6 Bom. L. R. 746: (1959) 1 Mad. L. J. S. C. 101: 1959 All W. R. (H.C.) 156: 1959 Andh. W. R. S.C. 101: 1959 S.

A. I. R. 1938 Lah. 477: 39 Cr. L. J. 864: 177 I. C. 32.
 Gopi v. The State of Rajasthan, 1974 W. L. N. 78: 1974 Pai L. W. 192 (also see page 402, Note 481

To sum up, any person can conduct a test identification,12 but Magistrates are preferred. This identification memo is a record of the statement which the identifier expressly or impliedly made before them. The statement is a former statement of the identifier and in Court is usable not only for contradicting him under Section 145 or Section 155 of the Evidence Act but also for corroborating him under Section 157, except when it was made before the Police, in which case it is hit by Section 162, Cr. P. C., and is, therefore, not admissible for purposes of corroboration.

To reiterate, if the person holding the identification is a Magistrate of the first class, or one of the second class specially empowered, Section 164, Cr. P. C. applies and his identification memo is admissible in evidence under Section 80 of the Evidence Act without proof. But, if other Magistrates, or private persons, hold it, they must be called in evidence to prove their memo. Where Section 164, Cr.P.C., operates, the proceedings are independent even of the territorial jurisdiction of the Magistrate concerned.

(8) Precautions to be taken by Magistrate and Police to ensure that the test was a fair one. The various precautions the Magistrate should take have already been dealt with. There is no presumption that the necessary precautions were taken, and it is always for the prosecution to prove that they were. But it is not the duty of the prosecution to show that prior to identification every precaution possible was taken for concealing the identity of the suspect who, while being moved by train, was exposed to the gaze of witnesses who were railway servants.12

It is for the police authorities to specify administratively the precautions to be taken to avoid the accused being seen by the identifying witnesses, prior to the test identification, so that the value of their identification may not be lost. It is not necessary for the Court to lay down rules for the conduct of the police in a matter of this nature. Much depends upon the circumstances of each case in evaluating the evidence of identification.14 When suspect was seen by identifying witnesses before test identification parade, and he was put up in the parade with tape on his neck but no other person similar in appearance was included in the parade identification evidence is a farce. 15 When the identification is not conducted properly, there remains no reliable corroborative evidence regarding-identification in court and accused is entitled to benefit of doubt.16 One accused had distinguishing features (brown eyes) but persons with such features were not mixed in the parade. He is entitled to benefit of doubt, but other accused who did not have such features though identified by lessor number of witnesses are not entitled to benefit of doubt.17

^{12.} In 1e Narayan Singh, A. I. R.

¹⁹⁶⁵ M. P. 225. 13. Palaniswamy Vaiyapuri v. State, 68 Bom, L. R. 941: 1967 Mah, L.J. 25; A. I. R. 1968 Bom. 127. See also State of Rajasthan v. Ranjita, I. L. R. (1961) 11 Raj. 1010: 1962 Raj. L. W 24: 1962 (1) Cr. L. J. 461: A. I. R. 1962 Raj. 78, 82 (F.B.) holding that the proposition laid down in Dhokal Singh v. State, I. L. R. (1953) 3 Raj. 762: 1954 Raj. L. W. 154, that such duty

exists, was stated too broadly.

14. State of Rajasthan v. Ranjita, I. L.
R. (1961) 11 Raj 1010: A I R

¹⁹⁶² Raj. 78: 1962 Raj. L. W. 24: 1962 (1) Cr. L. J. 461 (F.B.).

15. Yashwant v. State of Maharashtra, (1972) 3 Un. N. P. 298: (1972) 3 S. C. C. 639: 1972 U. J. (S.C.) 923: 1972 S. C. C. (Cri.) 684: (1973) 1 S. C. R. 291: 1972 Cri. L. J. 1254: A. I. R. 1973 S.C. 537.

^{17.} Chander Singh v. State of U. P., (1972) 2 S.C.W.R. 790: 1973 S. C.C. (Gri.) 133: (1973) 3 S.C.C. 55: 1973 U. J. (S.C.) 254: 1973 Cri. L. J. 926: A. I. R. 1973 S. C.

The value of evidence obtained by Identification Parades as corroborative evidence of identification in court is great only when they are held in the manner and under conditions which preclude even faint possibility of collusion or machination during investigation. To hold such parades in the precincts of the police court would be violation of reasonable guarantee against any collusion.¹⁸

- (9) Inference that accused was shown to identifying witnesses should not be based on surmises. If inferences are drawn on mere possibilities, then there is a possibility in every case of an accused being shown to the witnesses before they are put up for identification. But a judicial finding cannot be based on such surmises. It must be based on proof, that is, after considering the matters before it, the Court must either believe it to exist, or consider its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. It is only then that the Court should hold that that fact has been proved.¹⁹
- (10) What was the state of the prevailing light. In the case of every offence committed during the hours of darkness the prevailing light is a matter of crucial importance. In such cases, the stock argument is that owing to inadequate light the witnesses could not see the faces of the culprits. The argument frequently finds favour with Courts and it is held that merely because no source of light was mentioned in the first information report, the crime was committed in darkness, so that its perpetrators could not be seen. Difficulties would be alleviated, if those who have to deal with such arguments keep certain basic facts in mind.

To begin with, a crime, like dacoity, by its very nature, cannot be committed in pitch darkness, for the criminals (being strangers) have to find their way about, have to discover the whereabouts of goods, have to sort out those articles which they intend to appropriate, and have to take precautions to guard against counter-attacks by the villagers. All this makes the presence of adequate source of light imperative. Rising standards of living have enabled villagers to replace their old fashioned divas with kerosene lamps and also to provide themselves with electric torches. Again, increasing lawlessness in the countryside has obliged villagers, specially those in more affluent circumstances, to keep lights burning all night.

Such lights are not kept burning, to enable criminals to be identified, but to keep them away. The existence of the sources of light, just mentioned, must, therefore, be taken as normal these days: Moonlight too cannot be ignored, and the Court should always consult the calendar in order to determine the state of the moon at the time of the offence. Even making allowance for the increase in the distance in tropical countries, the distance of moonlight recognition cannot go from 12 yards or 17 yards to 45 yards and 52 yards.²⁰ Dacoits invariably arm themselves with electric torches both for enabling them to see their way and to facilitate their work of plunder. It is true that, if a dacoit flashes his torch into the face of a witness, the latter will get dazzled and for some moments will not be able to see anything.

Panchu Gopal Das v. State, 1968
 Cr. L. J. 40; A. I. R. 1968 Cal.
 38, 48.

Sheo Nandan v. The State, A. I.
 R. 1964 A. 139.

R. 1964 A. 139.

20. Kunnummil v. State, A. I. R. 1963 Ker. 54: 1962 Ker. L. T. 120.

But inevitably, a torch has to be flashed in various directions, so that frequently some of the dacoits themselves come in the way of its beams and must, therefore, be seen by some of the witnesses. As to the flashing of a torch inside a room, more specially the small rooms, which characterise village houses, the light diffused by the walls is bright enough for the offenders' features to be marked. Also, when village people rush to the scene of the crime, those who own electric torches invariably bring them, and further for the purpose of scaring off the bandits, some villagers set alight a convenient heap of straw thereby illuminating the entire area.

Thus, no scene of dacoity can be without sources of light sufficient to enable the witnesses to see the faces of miscreants. This does not mean that there is a presumption of the existence of such sources of light-that has always to be proved by the prosecution; but, if evidence with regard to them is led it is prima facie believable. Punjab High Court has however held that existence of artificial light in an occurrence of dacoity during night should be presumed in absence of negative circumstances.21 This case went in appeal to Supreme Court but that observation was not disputed. As to burning straw, perhaps its strongest proof is a patch of ash found by the police when they visit the scene of the occurrence. With regard to the recital in the first information report, any omission from it of a normally existing source of light should not be deemed to be a fatal defect.

In cases of crimes, where the only evidence is of identification, the ques tion of light is of paramount importance. This should be approached in a careful and judicious manner.22 Where the dacoits had remained at the scene of occurrence for over half an hour and witnesses had taken up their positions around house, and there was adequate light and opportunity to see the faces of the miscreants, the evidence of identification is reliable.28

A known person can be recognised from a short distance even in the light of stars and where testimony of witnesses could not be shaken in cross-examination and nothing had obstructed the view of the witnesses it is reliable.24 But a man of 70 years even if possessed of full eye sight was held not likely to identify a person in partial moonlight from 100 yards.25

Where visibility was poor due to darkness and witness admitted inability to see what the accused was holding in his hands, identification of accused by the witness was held doubtful.1

Witness step-mother of accused could be expected to recognise accused in dark room at the time when accused gave blows to her and her husband, particularly when she had physically intervened and had the opportunity of feeling presence of accused by touch.2

22. Majkoo v. State, A.I.R. 1961 A.

than, (1976) 1 Raj. Cri. C. 39: 1975 W. L. N. (U.C.) 436 (Raj.).

1. Brahmananda v. State, (1971) 1
Cut. W. R. 351: I. L. R. (1971)

Cut. 466.

 State of Orissa v. Jayadhar alias Raidhar Marijan. (1975) Cut. L. R. (Cri.) 435: I. L. R. (1975) Gat. 1557.

^{21.} State of Punjab v. Hardeo Singh, (1971) 73 Punj. L. R. 280 in appeal, Hardeo Singh v. State of Punjab. A.I.R. 1975 S.C. 179.

^{23.} Chander Singh v. State of U. P., (1972) 2 S. C. W. R. 290; 1973 C. C. (Cri.), 133; (1973) 3 S.C.C. 55; 1973 U. J. (S.C.) 254; 1973 Gri. L. J. 926; A. I. R. 1973 S.C.

Hazari Panda v. State of Orissa, 40 Cut. L. T. 422: (1974) 1 Cut. W. R. 468: 1974 Cri. L. J. 1212
 As Mohammad v. State of Rajas-

(11) What was the condition of the eye-sight of the identifier. Before the Court can rely on the evidence of an identifier, it must satisfy itself as to the condition of his eye-sight. There is no difficulty at all, if it is found to be normal. But complications arise, if it is not so. If his vision is discovered to be dim, his claim to have marked the features of the suspect becomes doubtful; if, at the time of the crime, he saw the suspect from a distance, he must not be short-sighted; if he saw him from close quarters, he must not be long-sighted; if he saw him at night, he must not be night-blind; if he noted some colour, he must not be colour-blind.

Luckily, with the exception of night-blindness these are matters which, if occasion arises, the trial Court can verify for itself by testing the witness in the Court-room. Cataract is a widespread ailment among elderly people in the countryside and must be guarded against, though what the Court should consider is not the state of the cataract at the time the witness appears in the witness-box but at the time of the crime, for cataract usually gets aggravated with the passage of time.

(12) What was the state of his mind. This subject lies more within the province of the psychologist than the Court, hence, in a criminal trial, undue stress cannot be laid on it. Nevertheless, some observations may not be out of place. It cannot be disputed that calm minds view a thing better than emotionally-stirred persons, for excitement or fear or terror may subvert the mind. Yet, a witness's mind may, all the time, be riveted on the subject or the incident that impresses his mind, and thus a close detachment may follow in his observing connected matters even though there happen simultaneously. Witnesses, who stand at convenient places outside the house of the victim of a dacotty and watch the progress of the crime, do, on the whole, view it with a detachment sufficient to lend assurance to their being identifiers.

With regard to the victims themselves, it would, broadly speaking, be true that the features of their tormentors would get photographed in their minds—it is difficult to conceive of a man, who has been tortured or a lady who has been stripped of her jewellery forgetting the faces of the persons who perpetrated such atrocities. All the same, since relevant data will hardly be available, in the case of each witness, the Court will have to judge for itself, whether or not his state of mind was such as to give credence to his identification, and this judgment will have to be based on personal observations in the court-room.

(13) What opportunity did he have of seeing the offender. It is difficult to accede to the argument, sometimes raised, that, as soon as a gang of dacoits raids a house the rest of the villegers scuttle inside their houses or hide in their fields until the coast is clear. The villagers are not so chicken-hearted. Had this not been so, they would never have boldly faced bandits with primitive weapons, suffering and inflicting casualties and sometimes capturing dacoits.⁸ Villagers assemble in groups near the house of the victim as a measure of self-protection and for offering resistance whenever possible, and, for this, watch the miscreants.

Consequently, it is inevitable for many of them to see the criminals. The identification of a miscreant by a witness depends on the opportunity the latter

See the facts in Tabrildar Singh v. State, A.I.R. 1958 A. 255: 1958 Cr.L.J. 424.

has of seeing his face and marking his features. This, in turn, depends on : where the witness was posted, what the distance was from which he saw the accused and what amount of time was available for doing so. These are matters the Court is bound to enquire into. The place, where the witness stationed himself, must be one from where he could, whenever he wished, obtain an unobstructed view of the scene, of the crime. In this behalf, the inmates of the house are always at an advantage, and so are those villagers who participate in an encounter with the dacoits, for, in both events, the parties come face to face.

The distance of the witness must be short enough for features to be marked in the available light. With regard to the time element, it is patent that the longer the time available for the witness to see the face of the miscreant, the greater are the chances of the face being impressed upon his mind. An inmate of the house, or a witness who watches the crime from a vantage point outside, is able to see the criminals for a considerable space of time, and is accordingly in a far more favourable position to see their faces than one who merely views them fleeing with their booty. And the overriding consideration, in all cases, is the state of the prevailing light. Where dacoits were of same district, speaking familiar language and were seen by the witness for half an hour looting the witness and attacking her husband and several torches were focussed on the spot there would be no reason to disbelieve the witness as regards her identifying the dacoits.4

Another objection, which is often advanced, is that the dacoits were putting on dhatas (pieces of clothes tied round the face) -hence the witnesses could not see their faces. It may be conceded that where the dacoits are well-known to the village people, they may wear dhatas-support is lent to this view by the case of Ram Shankar Singh v. State of U. P.5 But this does not happen in the vast majority of cases, for there the dacoits hope to avoid detection by the fact of being total strangers. The simple reason for this is that dacoity is essentially a crime requiring physical activity and agility and a dhata if used may come off within a short time.

- (14) What were the errors committed by him. No question of error would arise, if identification parades are held with only one suspect at a time. It is, therefore, unnecessary to pass any opinion on the practice wholly arbitrary, of evaluating a witness's testimony by the number of right and wrong identifications that he made. Mistakes in identity are usual when large number of persons are being identified. But, this does not vitiate the entire evidence of identification.6
- (15) Was there anything outstanding in the features or conduct of the accused which impressed him. As pointed out in Lachhman v. State,7 if among the criminals there were persons with outstanding features or peculiarities which were noticeable to the witnesses who saw them, the witnesses should be able to mention them. This would lend assurance to their identification. The same applies to any special conduct of any of the miscreants which came to

^{4.} State of Orissa v. Chhaganlal

¹⁹⁷⁷ Cr.L.J. 319.
5. A. I. R. 1956 S.C. 441; 1956 Cr.
L. J. 822; 1956 S. C. G. 307.
6. B. M. Dana v. State of Bombay,

A. I. R. 1960 S. C. 289: 1960 Cr. L. J. 424: 1960 Mad.L.J. (Cr.) 398: 1960 All. W. R. (H. C.) 258: 62 Bom. L. R. 269. 7 1956 All L. J. 718.

the notice of the witnesses, for this enables their mind to retain a clearer picture of the persons concerned. The witnesses should also be able to state what weapon the man they identified was armed with, or what particular part he played in the dacoity. The investigating officer should try to gather from the witnesses the particulars of appearance and part played by the accused seen by them.8 However the failure of a witness to state the particular part played by the accused will not make his evidence inadmissible.⁹

(16) How did the identifier fare at other test identifications held in respect of the same offence. It used to be thought that in appraising the evidence of witnesses who identified a particular accused, the Court should take into account the result of their identification in all other parades held in connection with the same offence. The error of this view has been exposed in State v. Wahid Bux10 and Ram Autar v. State.11 The correct law is that normally the result of identification proceedings, in which a particular accused is put up, must alone be taken into consideration in deciding the value of identification of a particular witness with respect to that accused; other test identifications, provided they were held within a short period of the test under consideration, can be taken into account solely for judging the memory and power of observation of the witness concerned.

A witness correctly identifying two persons but making mistake in identifying third person is reliable.12

(17) Was the quantum of identification evidence .sufficient. Before the Court holds an accused guilty, it must make certain that chance has not been responsible for his identification. If a suspect is mixed with nine innocent persons and is identified by a witness, the mathematical probability of the witness picking him out by chance is one in ten. Hence only one identification cannot eliminate the possibility of the pointing out being purely through chance, and for this reason is insufficient to establish the charge. If the same suspect is identified by two witnesses, the probability of his being pointed out by chance is much less.

The possibility of chance playing a part in identification is therefore slight; and, other conditions being satisfied, two good identifications may be enough to establish his guilt beyond reasonable doubt. If three witnesses identify the same suspect, the probability of this being done by chance becomes very little. In such a case, it may safely be assumed that his identification was perfectly genuine. If the identification is made by even more than three witnesses, the Court may not have a doubt about his being the culprit.

(18) Witness unable to give reasons for identification. Sometimes, defence counsel ask a witness the reasons why he identified a particular accused or article, and when he fails to do so argue that his identification cannot be trusted. In In re Govinda Reddy,13 it has been held that many a witness would not be able to formulate his reasons for the identification of a person or thing,

^{8. 1973} Cut. L. R. (Cri.) 402.
9. State of Andhra Pradesh v. Venkata Reddy, A. I. R. 1976 S.C. 2207: (1976) 3 S.C.C. 454: (1976) S.C.C. (Cri.) 448: 1976 Cri. L. J. 1728 (1976) C. A. R. 298; I. L. R.

A. I. R. 1953 All. 314.
 11. 1958 All L. J. 431.
 12. Nan Chand v. State, 1975 All. Cri. C. 185.

^{13.} A. I. R. 1958 Mys. 150: 1958 Cr. L. J. 1489

since it is based upon general untranslatable impressions on the mind. It would be fatuous to discredit such identification on the ground that reasons were not being formulated for them.

- (19) Non-identification by other witnesses. It may be suggested that, since in the jail parade the accused was identified by only seven out of twelve witnesses, in judging the guilt of the accused the court should counterbalance the identifiers by those who failed to identify them. The decision in Sunder v. State14 shows the argument is ill-founded. Therein, it was stated, that it cannot be said that the number of witnesses who failed to identify an accused should be set-off against those who identified him, so that if an accused was identified by two but not by two others, he should be deemed to have been identified by none; their Lordships emphasised that a witness should be judged on the strength of what he himself has seen and not on the inability of somebody else to see it.
- (20) Identification by single witness. The general rule of practice and prudence in dacoity cases is that identification by a single witness should not be acted upon though it may suffice in exceptional cases.15 Where the evidence of single witness is flawless and corroborated by test identification parade, conviction can be based on it.16 But where there are suspicious features such as parade being he'd after delay, light at occurrence not sufficient17 or similar other doubtful circumstances it would not be safe to convict on single identification.18
- (21) Witness not able to identify an accused in the Sessions Court. It sometimes happens that, owing to the delay in holding the Sessions trial, a witness is unable to identify an accused whom he had pointed out at the jail parade, the lapse of time having resulted in the vision of the witness being affected, or the appearance of the accused having undergone a change. In Auch an event, it is not to be understood that the value of his identification in the jail parade is nil. The question came up for consideration in Abdul Wahab v. Emperor.19 Their Lordships observed:

"If the witness at the trial is no longer able to recognise the accused, there are two ways in which his previous statement can be rendered admissible. The statement made by the witness before the Committing Magistrate may be brought on the record under Section 288, Cr. P. C. This was the course adopted in A. I. R. 1921 All. 215. It is only available where the witness was able to pick out the accused before the Committing Magistrate, though he could not do so before the Judge. The other method is to elicit from the witness at the trial a statement that he identified certain persons at the jail and that the persons whom he identified were persons whom he had seen taking part in the dacoity. If the witness is prepared to swear to this, then it is open to the Court under Section 9 of the Evidence Act to establish by other evidence the identity of the

^{14.} A. I. R. 1957 All, 809: 1957 Cr. L. J. 1378.

Pirthi v. State, 1966 Cr. L. J. 1369; A. J. R. 1966 All 607 613.
 Union Territory of Manipus v.

M. K. Singh, 1971 Cr. L. J. 1759. 17. Pritam Singh v. State, I. L. R.

^{(1970) 20} Raj. 439: 1971 Cri. L. J. 974: 1970 W. L. N. (Part I) 38: A. I. R. 1971 Raj. 184.

18. Phool Chand v. State of Rajasthan, 1977 Cri. L. J. 207.

19. A. I. R. 1925 All. 223: I. L. R. 47 A 30

⁴⁷ A. 39.

accused whom the witness identified at the jail. For this purpose, the best evidence will be that of the Magistrate who conducted the identification, and his evidence will be strictly relevant under the provisions of the Evidence Act."

The jail identification by the witness has a positive value, though the value is reduced by the fact of his non-identification at the trial. Standing by its self, the jail identification cannot form the basis of a conviction, but it can be used for augmenting the force of other evidence.

(22) Examination of identifier in Sessions Court but not in Committing Magistrate's Court. Where, in a dacoity case, the prosecution adduces evidence of identification in the Sessions Court, but does not adduce that evidence in the Committing Magistrate's Court, such evidence should not be disbelieved merely on the ground that the witness was not produced by the prosecution in the committing Magistrate's Court for the purpose of identification. Whether the witness should be believed or not is a question of fact. The fact that he was not examined in the committing Magistrate's Court is not a ground for disbelieving his evidence given in the Sessions Court. The reason is that the right of the prosecuior to refrain from examining such witness in the Magistrate's Court cannot be even indirectly curtailed. The evidence of such a witness must be judged by the Sessions Judge, like that of any other witness, without any prejudice, in the light of all the circumstances, excluding the non-examination of the identifier in the Committing Magistrate's Court, to decide whether it should be believed, and, if believed, what weight should be attached to it. He cannot draw a presumption adverse to the prosecution from the fact of such non-examination, and he cannot assume that the witness was withheld from an oblique or bad motive.20

Identification proceedings are meant for lending assurance to the Court, regarding the credibility of the evidence of the witness at the trial, but it is not the law that without identification proceedings the evidence of a witness at the trial is not worthy of consideration.²¹

(23) Examination of identifier in the Committing Magistrate's Court. The Legislature itself has conferred a power upon the prosecution, which results in the curtailment of the right of the accused, to utilise a witness's statement in the Committing Magistrate's Court for his own benefit. Since this is the outcome of a specific statutory provision, no grievance can be made of the fact that by the non-production of an identifying witness in the Magistrate's Court the accused has been deprived of a possible chance of discrediting him in the event of his failure to identify him in that court.

Besides, it is seriously open to question as to why an identifier's testimony in a Sessions trial must be subjected to a double check, to wit. first, his identification in the Magistrate's Court. Now, if an offence happens to be one cognizable by a Magistrate and yet rests on evidence of identification, only one check on it is permissible, namely, the jail identification parade. Yet all that the law requires is that the charge should be proved beyond reasonable doubt and the standard of proof required is the same whether the offence is triable

^{20.} Jwala Mohan v. The State, I. L. 21. State of Rajasthan v. Shiv Singh, R. (1963) 1 A. 585: A. I. R. 1963 A. 161 (F.B.). 21. State of Rajasthan v. Shiv Singh, I. L. R. (1961) 11 Raj. 299: A I. R. 1962 Raj. 3.

by the Sessions Court, for example, dacoity, or triable by a Magistrate, for example, theft,

Hence, if, in a theft case, the law considers a single check sufficient, there can be no legal jurisdiction for demanding a double check in dacoity. It might also be pointed out that to think that a witness who has identified the accused in the jail parade and in the Court of Session would have failed to do so had he been produced before the Committing Magistrate, is pure speculation-it is extremely rare to find this happening in practice.

Under these circumstances, in Sessions case, resting on identification evidence the Court soluld not insist that every identifying witness be produced in the committing Court, or that, if any such witness is withheld his evidence in the Sessions Court, becomes clothed with suspicion. It should be noted that, by virtue of the second part of clause (4) of Section 207-A, if the Magistrate is of opinion that it is necessary in the interest of justice to take the evidence of any particular prosecution witness, he is empowered to do so, so that injustice can be avoided, where the accused succeeds in persuading the Magistrate to examine the identifiers before himself.

(24) Identification at the instance of the accused. It sometimes happens that witnesses claim to know an accused person, but he contends that they do not know him and applies to the Court for the holding of his test identification to check the veracity of the witnesses. The point came up before P. L. Bhargava, J. in State v. Ghulam Mohiuddin.22 The learned Judge held, that the Court could not order the holding of an identification parade because there was no provision in the Cr. P. C., authorising it to do so, but he observed that it could in its discretion satisfy itself by asking the accused to stand among other persons present in Court and then call upon the witnesses to identify him.

But, in the latest case of Lajja Ram v. State,28 a Division Bench went further and held, that although the accused has no right to claim identification, if the prosecution turns down his request for identification, they run the risk of the veracity of the eye-witnesses being challenged on that ground. The prosecution would be exposing itself to the criticism that the test identification was shirked, because the witnesses would not have been able to stand the test and the accused may be entitled to benefit of doubt,24 It seems that if the Court reasonably comes to the conclusion that there may be force in what the accused contends, it should direct the holding of a regular test identification, in order that the witness's veracity may be tested. The Court has ample power under Section 311 (old Section 540), Cr. P. C., to secure this evidence.

But failure to hold an identification parade does not make inadmissible the evidence of identification in court.25

(25) Presence of Counsel at test identifications. Since justice must not only be done but must seem to be done, the accused must be afforded reasonable opportunity not only to safeguard his interest but to satisfy himself that the

^{22.} A. I. R. 1951 All, 475. 23. A. I. R. 1955 All, 671; 56 Cr. L.

^{24.} Md. Yaqub v. State of U. P., 1973 All. Cr. R. 307.

^{25.} Kanta Parshad v. Delhi Administration, A. I. R. 1958 S.C. 350: 1958 Cr. L. J. 698: (1958) 2 M. L. J. (S.C.) 113: 60 Punj. L. R.

proceedings are conducted fairly and honestly. Hence if he requests for the presence of his counsel at the test identification, his request should never be turned down, though of course the counsel is not entitled to take any part in the actual holding of the test. Similarly, the prosecution too have a right to be represented by counsel if they wish to do so.

(26) Test identification of an accused on bail. As pointed out earlier, there should be reasonable certainty that the accused was not seen by the witness at any time between his arrest and his identification parade. Sometimes an accused person prior to his identification proceedings succeeds in securing bail on giving the undertaking that he would take precautions to keep himself concealed from the prosecution witnesses and that he would not raise the plea that they had seen him before the identification parade. Such an undertaking as pointed out by Roy, J. in Ganga Singh v. State,1 never acts as an estoppel and hence is worthless.

In order to escape punishment a criminal may get himself released on such undertaking and then go and show himself to the witnesses. If he does so he commits no criminal offence whereas any identification of him made subsequently becomes perfectly useless. Consequently, Magistrates and Courts of appeal should be careful not to enlarge arrested persons on bail whose test identification is desired, though it is their duty to see that no undue delay in holding it is permitted. The question of bail should be considered only after the test has been accomplished.

- (27) Identification parade and Article 20(3) of the Constitution of India. A test identification does not violate a fundamental right of the accused. It is not his volitional positive evidentiary act. It is not the accused who is called upon to testify against himself but somebody else on seeing him. The accused does not produce any evidence or perform any evidentiary act.2
- (28) Memo of identification not a record of evidence. A memo of identification, to be regarded as a record of evidence of a witness, must satisfy a double test, namely-
 - (1) that it is a statement made by a witness in a judicial proceeding, or before an officer authorised by law to take such evidence; and
 - (2) that it is a statement which was made on oath or affirmation by

An identification memo, since it does not satisfy the above test, is not a record of evidence of a witness within the meaning of Section 80 of this Act.3 Also see cases under Note 5 (n) (7) ante.

(29) Delay, omission, etc., in identification, effect of. Unexplained delay in holding parade, renders the corroborative evidence worthless, the prosecution should by positive evidence prove that there was no unreasonable delay

C. A. 449: A. I. R. 1954 S.C.

^{300: 56} Punj. L. R: 366: 1954 Mad. W. N. 566: (1954) 1 Mad. L. J. 680: 1954 Cr. L. J. 865. 3. Ram Sanchi v. State. A. I. R. 1963 A. 308: 1963 A. L. J. 61; Gope v. State of Rajasthan, 1974 W. L. N. 78: 1974 Raj. L. W. 192.

in holding the parade.4 An identification parade held eleven days after the arrest of the accused loses its importance unless the inordinate delay is convincingly explained.5 But in an earlier case from the same High Court, delay in identification amounting to some months from the date of commission of the offence (dacoity) was held not by itself justification for the rejection of the identification evidence irrespective of the facts and circumstances of the case.6 It is desirable that identification parades must be held at the earliest opportunity so as to minimise the chance of the memory of the witnesses fading away.7 Recognition of a human face depends on detailed observation and clarity of image. Power to retain and recall the image depends on quality of memory, and efflux of time is certainly a relevant factor, affecting such power, but it is not possible to fix a universal measure of time after which evidence would be disbelieved.8 However the Court must be cautious in examining the evidence of identification in cases of delay.9

When accused was put up for identification after nine months 10 or 15 months11 after the occurrence, according to circumstances of the case, it was not considered safe to act upon such evidence. Delay, however, is immaterial, when prosecution does not rely on test identification evidence.12

When the Magistrate who conducted the parade and the Investigation Officer have not been cross-examined the validity of the test identification parade cannot be challenged on the ground of irregularity or delay.13

If witnesses in a case (of dacoity) omit to give a description of the offenders during investigation and the police officers fail to discharge their duty of ascertaining such description but eventually the offenders were identified both at the identification parade and in court, the value of the identification is not affected.14

Irregularity in not covering the distinctive marks of the accused, on which point there was no cross-examination, is not substantial enough to detract from the value of the identification evidence.15

If the prosecution witnesses, who actually knew the accused before the occurrence, were not cross-examined on the point, and the accused made an

Public Procscutor v. Kandiyan, 1971
 Mad. L. W. (Cri.) 220; 1973 Cut.
 L. R. (Cri.) 413.
 Pritam Singh v. State of Rajasthan.
 I. L. R. (1970) 20 Raj. 439; A. I.
 R. 1971 Raj. 184.
 Prabhati v. State I. L. R. (1966)

- 6. Prabhati v. State, I. L. R. (1966) 16 Raj. 44: 1966 Cr. L. J. 1332: A. I. R. 1966 Raj. 241, 244. 7. Hasib v. State of Bihar, 1971 Cri. Ap. R. 410 (S.C.): (1971) 2 S.C. W.R. 446: 1971 U. J. (S.C.) 830: 1972 Cri. L. J. 233: A. I. R. 1972 S.C. 283.

- 8. State of Rajasthan v. Rama, 1973 W. L. N. 934 (Raj.).
 9. Delhi Administration v. Hukum Singh, A. I. R. 1972 S.C. 3.
 10. Nathu v. State, 1973 All. Cr. R. 388; Smt. Gaujabai v. Bherulal, 1975 W. L. N. 688: 1975 Raj. L. W. 469. W. 469.
- 11. Shitla v. State of U. P., 1972 All.

- W. R. (H. C) 822: 1972 All. Cri. R. 526.
- 12. Raj Kishore Singh v. State of Bihar. 1971 S. C. D. 62: 1971 Cri. L. J. 921: (1971) 2 S.C. Gri, R. 356: (1970) 3 S. C. C. 467; A. I. R. 1971 S.C. 1058.
- 1971 S.C. 1058.

 13. Bharat Singh v. State of U. P., 1972 S. C. D. 1119: (1973) 3 S. C. C. 896: 1978 Mad. L. J. (Cri.) 222: (1973) 1 S. C. J. 533: 1973 S. C. G. (Cci.) 574: 1973 All. W. R. (H.C.) 377: 1973 All Cri. R. 228: 1973 Cri. L. R. (S.C.) 317: 1972 Cri. L. J. 1704: A. 1. R. 1972 S.C. 2478; Mangalia v. State of Rajasthan, 1975 W. L. N. 688: 1975 Raj. L. W. 469.

 14. Parbhati v. State, I.L.R. (1966) 16 Raj. 44: 1966 Cr. L. J. 1332; A. I.
- Raj. 44: 1966 Cr. L. J. 1332; A. I. R. 1965 Raj. 241, 244.
- 15. Ibid.

application for identification proceedings several days after surrendering to the Magistrate, no adverse inference can be drawn from the omission of the prosecution to conduct an identification parade.¹⁶

Where during identification proceedings a witness identified only one of the accused and not the other, no great importance can be attached to the omission especially when no enmity or ill-will of the witness against the accused was shown nor that the witness was favourably inclined towards the complainant.¹⁷

The failure of the prosecution to put up the accused, arrested on the spot, for identification where the accused did not claim it, is not a fatal weakness in the prosecution case.¹⁸

(30) Identification parades with long or short intervals. The rule that the results of test identification parades separated by too long intervals of time should not be considered together, ought to apply only to exclude later test identification parades and not earlier ones when the memory is fresher.¹⁹

Where an accused was not included in the first identification parade and there were several parades, two of which were held on the same day within half an hour at both of which the witness was present, the procedure gives rise to grave suspicions about the investigating agency. At the earlier of the two parades, it was suspected that the witness did not identify the accused. Further, the possibility of the witness having seen the accused in court could not be ruled out. In such a case no value could be attached to the identification evidence.²⁰

- (31) Joint identification parades. The results of test identification parades held jointly in respect of two occurrences on different dates should be discarded as futile.²¹
- (32) Accused not put up for identification, effect of. The absence of test identification in all cases is not fatal. If the accused person is well known by sight it would be waste of time to put him for identification. Though there is no express provision in the Criminal Procedure Code enabling an accused to insist on an identification parade, yet if the accused does make an application and that application is turned down and it transpires that the witness did not know the accused previously, the prosecution will, unless there is some other evidence run the risk of losing the case on this point.²² An identifying witness will not be treated as unreliable nor his evidence discarded merely because the accused in a particular case was not put up for identification. In

 Ram Raj v. State, 1967 A. L. J. 252: 1967 Cr. L. J. 1579: A. I. R. 1967 All. 543, 545.

State of U. P. v. Neel Kanth, 1967
 Cr. L. J. 1250: A. I. R. 1967 All, 447, 449.

19. Pirthi v. State. 1966 Cr. L. J. 1369:

A. I. R. 1966 All. 607, 609.

20. Sheik Habib v. State of Bihar, 1971 Cr. A. R. 410 (judgment of High Court reversed).

21. Harun Tirkey v. State, 34 Cut. L.

T. 215 at pp. 221, 222: 1968 Cr. L. J. 1251.

22. Jadunath Singh v. State of U. P., (1971) 1 S. C. W. R. 151: A. I. R. 1971 S. C. 363, 368 (in this case trial not vitiated by denial of identification to accused); Shri Ram v. State of U. P., 1974 Cri. App. R. (S.C.) 342: 1975 Cri. L. J. 240: 1975 S.C. (Cri.) R. 3: 1975 B. B. C. J. 39: 1975 S.C.C. (Cri.) 87: (1974) 2 S. C. W. R. 619: (1975) 3 S. C. C. 495: 1974 Cri. L. R. (S.C.) 715: A. I. R. 1975 S.C. 175.

Sheoraj Singh v. State, 1967 A. W.
 R. (H.C.) 153: 1967 Cr. L. J.
 1465: A.I.R. 1967 All, 528 at pp. 529, 530.

such a case corroboration of the evidence given in court will not be available and the court will, therefore, examine the evidence a little more carefully.23 Failure to put up the accused for identification, where the accused themselves do not claim identification, is not fatal to the prosecution case.24 Similarly where accused refuses to be put up for identification, evidence in court can be safely relied upon.25 From the refusal of accused to appear in a test identification parade a presumption arises against him under Section 114 of this Act, but it is not such a presumption which can be conclusively relied upon to infer guilt of the accused.1

- (33) Identification evidence doubtful or worthless. Test identification parade is hardly of any use when there was a countercharge of some of the witnesses having been won over and the accused were also apparently known to the identifying witnesses. The other identifying witness died a natural death before he could appear as a witness in the case. His test identification, which was not a substantive but only corroborative evidence, could not be of much evidentiary valu. In these circumstances the identification parades were of little value and there was no question of the accused having been prejudiced by the late identification parades.2 If a case hinges on identification and the witnesses who identified the accused on the first occasion failed to do so on the second occasion, it is a doubtful case of identification on which a conviction cannot be based.8 If the witness states that in all probability or according to his guess the accused was the person who participated in the occurrence, he cannot be said to have identified the accused as culprit.4
- (34) Evidence based on personal impressions. The evidence of identification based on personal impressions requires careful scrutiny because it is apt to be deceptive and may lead to miscarriage of justice. 5-8
- 6. Facts fixing time or place. It is sometimes of the highest importance to fix accurately the exact time of the occurrence of an event, and a difference of even a few minutes may be of vital moment. This frequently happens in cases where the defence is that of an alibi. On a charge of murder, where the defence was of that nature, and it was essential to fix the precise times at which the prisoner had been seen by the several witnesses, soon after the fatal event which was the subject of investigation, the object was satisfactorily effected by a comparison made by an intelligent witness on the same day, of the various timepieces referred to by the several witnesses, with a public clock, thus affording the means of reducing the times as spoken to by them to a common standard,

Post-office marks are often of great importance in fixing disputed dates; but the defective manner, in which they are impressed, frequently renders

Budhoo v. State, 1968 All Cr. R. 489: 1963 A. W. R. (H.C.) 788,

State of U. P. v. Ramji 1.al, 1968
 All Cr. R. 224: 1968 A. W. R. (H.C.) 344; State of U. P. v. Neel

Kanth, A. I. R. 1967 All, 147.

25. I. L. R. (1970) 2 Delhi 854.

1. State v. Lavinder Singh, (1972) 2 Sim, L. J. 349: 1973 Cr. L. J. 1023 (H.P.).

Bharvad Bhikha Valu v. State of Gujarat, 1971 S. C. D. 62; A. I. R. 1971 S. C. 1058, 1064.
 Beni Sabni v. State of Bihar, 1970 B. L. J. R. 436, at pp. 438, 439.
 Jiwanprakash v. State of Maha-

Jiwanprakash v. State of Maharashtra, 1973 Mah. L. J. 855: I. L. R. 1975 Bom. 337.
 Prithi v. State, 1966 Cr. L. J. 1369: A. I. R. 1966 All. 607, 611.
 Rex v. Thornton, 1 Lew, 49.

them useless and this has been, from time to time, the subject of judicial animadversion.8

Scientific testimony grounded on the state of wounds and injuries to the human body, or on its condition of decay, is frequently employed indirectly in the solution of questions of time, but cases of this nature belong to the department of medical jurisprudence.9 Where the medical officer is not crossexamined as to decomposition, the fact that he could give opinion as to cause of death would indicate that decomposition was not advanced.10

On the question, whether a deed, purporting to have been made in the reign of Philip and Mary, and enumerating King Philip's titles was forged, the fact that, at the alleged date of the deed, Acts of State and other records were drawn with a different set of titles is relevant.11

A plaintiff, who claims under the Hindu Succession Act, 1956, a share in the self-acquired property of her father (he was last seen in December, 1955). must prove that her father died after the said Act came into force.12

- 7. Facts showing relation of parties. Where A's will was alleged to have been made under undue influence, his way of life, and relation with the persons alleged to have unduly influenced him, are relevant.18 Where, in a case, one of the questions in issue, as to the pedigree of a certain family, being, whether one GS was son of BS, or of one MS, belonging to a totally different family from that of BS, an attested copy of rubkar (or order-sheet), in some proceedings long anterior to the suit was tendered in evidence, in which rubkar GS was described as the son of BS; it was held that the rubkar was admissible in evidence under this section.14
- 10. Things said or done by conspirator in reference to common design. Where there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, anything said, done or written by any one of such persons in reference to their common intention, after the time when such intention was first entertained by any one of them, is a relevant fact as against each of the persons believed to be so conspiring as well as for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it.

Illustration

Reasonable ground exists for believing that A has joined in a conspiracy to wage war against the [Government of India].15

- 8. By Lord Campbell, L. C. J. in Reg. v. Palmer and by the Lord Justice Clerk in Reg. v. Madeleine Smith, See Wills Circumstantial
- Evidence, 6th Ed., p. 248. Wills Circumstantial Evidence, 6th
- Ed. pp. 247, 248.

 10. Hardyal v. State of U. P., A. I. R. 1976 S. C. 2055; 1976 Cr. L. J. 1578; 1976 S.C.C. (Cr.) 317; (1976) 2 S.C.C. 812.

 11. Lady Ivy's Case, 10 St. Tr. 617;

- Steph. Dig. 7th Ed., p. 14. 12. Tadepalli Ram Rathnam v. Kantteti Vardarajulu, A Andh. Pra. 246, 253. A. I. R. 1970
- Boyse v. Roosbarough, (1857) 6 H.
 L. C. 42. Steph. Dig. 7th Ed., p.
- 14. Radhan Singh v. Kuarji Dichhit. 1, L. R. 18 All. 98: (1895) A. W. N. 236.
- 15. Subs. by the A. O. 1950 for "Queen".

The facts that B procured arms in Europe for the purpose of the conspiracy, C collected money in Calcutta for a like object, D persuaded persons to join the conspiracy in Bombay, E published writings advocating the object in view at Agra, and F transmitted from Delhi to G at Kabul the money which C had collected at Calcutta, and the contents of a letter written by H giving an account of the conspiracy, are each relevant, both to prove the existence of the conspiracy, and to prove A's complicity in it although he may have been ignorant of all of them, and although the persons by whom they were done were strangers to him, and although they may have taken place before he joined the conspiracy or after he left it.

- s. 3 ("Relevant").
- s. 3 ("Fact.")

s. 136 (Fact proposed to be proved only admissible on proof of some other fact).

Steph. Dig. Art. 4, and Note III; Taylor. Ev., Sections 590-597; Best, Ev., Section 508; Russell on Crime, 12th Ed., Vol. II, pages 1469-1494; Norton, Ev., 120; Roscoe, Cr. Ev., 15th Ed., 477-492; Mayne's Penal Code, Sections 107, 121-A; Wills' Ev. 3rd Ed., 171-172; Wigmore, Ev., Section 1079.

SYNOPSIS

General.

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- 5. English and Indian Law. ence between.
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- That two or more persons have conspired together.
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- 21. Illustration,

1. General. Where-

- (1) there is reasonable ground to believe,
- (2) that two or more persons have conspired together,
- (3) to commit—
 - (a) an oftence, or
 - (b) an actionable wrong,

then-

- (i) anything said, done or written,
- (ii) by any one of such persons,
- (iii) in reference to their common intention,
- (iv) after the time when such intention was first entertained by any one of them,

is a relevant fact-

- (1) as against each of the persons believed to be so conspiring, and
- (2) for the purpose
 - (a) of proving the existence of the conspiracy, and
 - (b) of showing that any such person was a party to it.

There is no difference between the mode of proof of the offence of conspiracy and that of any other offence. It can be established by-

- (a) direct evidence, or
- (b) by circumstantial evidence.

But this section introduces the doctrine of agency and if the conditions laid down in it are satisfied, the act done by one is admissible against the co-conspirators.¹⁶

This section, as the opening words indicate, comes into play only when the Court is satisfied that there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong. This means that there should be prima facie evidence that a person was a party to the conspiracy before his acts can be used against his co-conspirators. Once such a reasonable ground exists, anything said, done or written by one of the conspirators in reference to their common intention, after the said intention was entertained, is relevant against the others, not only for the purpose of proving the existence of the conspiracy but also for proving that the other person was a party to it.¹⁷

The evidentiary value of the said acts is limited by two circumstances, namely—

- (1) That the act shall be in reference to their common intention, and
- (2) in respect of a period after such intention was first entertained by any one of them.¹⁸

The expression "in reference to their common intention" is very comprehensive and appears to give it a wider scope than the words "in furtherance of" in the English law with the result that anything said, done or written by a co-conspirator, after the conspiracy was formed, will be evidence against the others before they entered the field of conspiracy or after they left it. 16

Another important limitation implicit in the language is indicated by the expressed scope of its relevancy. Anything so said, done or written is a relevant fact only, "as against each of the persons believed to be so conspiring, as well for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it.²⁰

Bhagwan Swarup v. State of Maharashtra, (1964) 2 S. C. R. 378: (1964) 2 S. C. R. 1965
 S. C. 682: 1965 (1) Cr. L.J. 608.

Ibid.
 Ibid.

Bhagwan Swarup v. State of Maharashtra, (1964) 2 S.C.R. 378;
 (1964) 2 S.C.J. 771; A.I.R.
 1965 S.C. 682; 1965, (1) Cr. L.J.
 608.

^{20.} Ibid.

Anything said, done or written can only be used for the purpose of proving the existence of the conspiracy, or for the purpose of showing that the other person was a party to it. It cannot be used in favour of the other party, or for the purpose of showing that such a person was not a party to the conspiracy.21

The section may be analysed as follows:

- (1) there must be prima facie evidence affording a reasonable ground for a Court to believe that two or more persons are members of a conspiracy to commit an offence or an actionable wrong;
- (2) anything said, done or written by any one of them should have been said, done or written by him after the intention was formed by any
- (3) if the said conditions are fulfilled anything said, done or written, by any one of them in reference to their common intention will be evidence against the others;
- (4) it would be relevant for the purposes mentioned in the section against the others, whether it was said, done or written before he entered into the conspiracy or after he left it; but
- (5) it can only be read against the co-conspirator and not in his favour.22

Initially, a question arises as to the effect of this section where a charge of conspiracy has been laid. The illustration attached to the section shows that once a reasonable ground, to believe that several persons have conspired to commit an offence, exists, the acts and declarations of a particular person, in reference to their common intention, after the time when such intention was first entertained by any one of them, are relevant facts although that person may not have known of the existence of many others engaged in the conspiracy. This reasonable ground for belief will depend upon the proof of facts. Such belief may be initially entertained and may later be discarded.23 A trial Judge may admit evidence under this section, if he has a reasonable ground to believe as is postulated, yet he may reject it, at a later stage of the trial, if that ground of belief is displaced by further evidence.24 The evidence properly admitted, in this case, will be evidence touching not only the person directly affected by it but also his co-conspirators.25

2. Principle. The rule which says that a man shall be chargeable with the acts and declarations of his agent or fellow-conspirator is not a rule of evidence.1 A conspiracy makes each conspirator liable under the Criminal Law for the acts of every other conspirator done in pursuance of the conspiracy. Consequently, the admissions of a co-conspirator may be used to affect the proof against the others, on the same conditions, as his acts when used to create their legal liability. The inclusion of tortfeasors enacts the same rule,

Bhagwan Swarup v. State of Maharashtra. (1964) 2 S.C.R. 378: (1964) 2 S.C.J. 771: A.I.R. 1965 S.C.

² S.C. J. 771: A.I.R. 1965 S.C. 682: (1965) 1 Cr.L.J. 608.
22. Ibid: I. L. R. (1974) 1 Cal. 599.
23. Samunder Singh v. State, A.I.R. 1965 C. 598, reiving on Gill v. King, A.I.R. 1948 P.C. 128.

^{24.} Ibid. 25. Ibid.

Prof. Thayer in American Law Review, XV, 80. As to procedure, see Abdul v. R., (1921) 35 C.L.J. 279: 69 I.C. 145: A.I.R. 1922 C.

in its application to civil liability for torts.2-3 The tests, therefore, are the same, whether that which is offered is the act or the admission of a co-conspirator or that of a joint tortfeasor; in other words, the question is one of substantive law, and its solution is not to be sought in any principle of evidence.4

The section lays down not only the rule applicable in this country, so far as leading evidence in cases of conspiracy is concerned, but has to be treated as a part of the statute law, in the matter of proof of evistence of a conspiracy and of the furtherance of its objects.5 The principle is substantially the same, as that, which regulates the relation of agent and principal. When various persons conspire to commit an offence or actionable wrong (e.g., co-trespassers or other tortfeasors) each makes the rest his agents to carry the plan into execution.6 The acts done by anyone in reference to the common intention (v. post) is considered to be the acts of all. These acts are, themselves, evidence of the corpus delicti, the conspiracy to be established; they are relevant "for the purpose of proving the conspiracy," as well as the part which each conspirator took in it. Section 10 based on the principle of agency can well be treated as laying down an exception to the general rule that a person cannot be made responsible for the acts done by others unless he is an abettor.8

3. Scope and object. This section is comprehensive enough, and renders admissible, in cases of conspiracy, evidence which is not, ordinarily, admissible under the English law, or under the Indian law.9

Before the provisions of this section can be invoked, it has to be established, from independent evidence, that there is reasonable ground to believe that two or more persons conspired together to commit an offence or an actionable wrong.

When this is shown, anything said, anything done and anything written by any one of such persons would be a relevant fact as against each of the other conspirators, provided that it is in reference to their common intention. Such things said, done or written would be relevant, (1) for the purpose of proving the existence of the conspiracy, and also, (2) for showing that any such person was a party to it.10 The object of the section is merely to ensure, that one person shall not be made responsible for the acts or deeds of another, until (1) some bond, in the nature of agency, has been established between

^{2-3.} See R. v. Hardwick, (1809) 11 East.

Wigmore, Ev., s. 1079.
 Jitendra Nath Gupta v. King-Emperor 1937 Cal. 99: 169 I.C. 977: 38 Cr.L.J. 818 (S.B.).

See Indra Chandra v. Emperor, 1929 Pat. 145: 116 I.C. 756 (F.B.); 1929 Pat. 145: 116 I.C. 756 (F.B.);
Emperor v. Shafi Ahmad, (1929) 31
Bom. I.R. 515; Emperor v. G.V.
Vaishampayan. 1932 Bom. 56: I.L.R.
55 Bom. 839: 134 I.C. 1238;
Vishindas Lachmandas v. Emperor,
1944 Sind 1: I.L.R. 1943 Kar.
449: 212 I C. 56 (F.B.).
7. Steph. Dig. Note III, p. 160: Nor
ton, Fr., 121: Taylor; Ev., s. 590;
3 Russ. Cr. 143, 144: Best. Ev.,
Sec. 508: R. v. Amir Khan (1871)

Sec. 508; R. v. Amir Khan (1871)

⁹ B. L. R. 36: 17 W. R. Cr. 15; R. v. Ameeroddin, (1871) 7 B. L. R. 63: 15 W. R. Cr. 25. and cases there and in the text-books

⁽supra) cited.

8. Mohd. Yunus v. The State of Bihar, 1977 Cr. L.J. 1243 (Pat.).

9. Bhola Nath v. Emperor, 1939 All. 367 at 574; I. L. R. 1939 All. 786:

¹⁸⁴ I.C. 191; Ram Prasad v. Emperor, 1927 Oudh 369 (2); I.L. R. 2 Luck. 631; 106 I.C. 721. S. H. Jhabwala v. Emperor, 1933 All. 690; 145 I.C. 481; 1933 A.L. J. 799; Badri Rai v. State, A.I.R. 1958 S.C. 953: 1958 Cr. L.J. 1434: 1958 A.L.J. 909: 1959 B.L.J.R. 50: 1959 Mad. L.J. Cri. 25: 1958 All. W. R. (H.C.) 861.

them, and (2) the acts, words or writing, which it is proposed to attribute vicariously to the person charged are in furtherance of the common design, and (3) done, spoken or written after such design was entertained.11 The rule excluding hearsay evidence is not applicable to statements admissible under this section. Thus, a document written by a woman, since deceased, in which she described her conversations with a third person and said that he had told her that among his revolutionary friends was the accused, is admissible under this section, as the statement by the writer, if proved, is itself a relevant fact by virtue of this section. But having regard to the fact that it is the report of a conversation of a third person much evidentiary value cannot be attached to it.12

Wherever evidence is attempted to be made admissible under this section, the defence is entitled to insist on strict compliance with its provisions, namely, upon proof of reasonable ground for belief that the persons named have conspired together.13

4. English law of criminal conspiracy. Conspiracy in common law started its career primarily as a civil injury (28 Edward 1, c. 10) but was later made punishable on an indictment (33 Edward I c. 2). In its earliest meaning, conspiracy was the agreement of persons, who combined to carry on illegal proceedings in a vexatious or improper way. The Star Chamber developed the criminal aspect of agreements of this nature into a substantive offence and widened its scope; being thus established the new offence eventually penetrated into the courts of criminal law, but in its gradual evolution into a crime at common law of general application there can be discerned a close association with the law of principal and accessory.14

In English law, if two or more persons agree together to do something contrary to the law, or wrongful and harmful towards another person, or to use unlawful means in the carrying out of an object not otherwise unlawful, the persons, who so agree, commit the crime of conspiracy.15

In R. v. Parnell¹⁶ Fitzgerald, J. stated: "Conspiracy has been aptly described" as divisible under three heads: where the end to be attained is in itself a crime; where the object is lawful but the means to be resorted to are unlawful; and where the object is to do injury to a third party or to a class, though, if the wrong were effected by a single individual, it would be a wrong but not a crime." The House of Lords in Moghul S. S. Company v. McGregor1' has explained that an agreement which is immoral or against public policy, or in restraint of trade, or otherwise of such a character that the courts will not enforce it, is not necessarily a conspiracy. An agreement to constitute a conspiracy must be to do that which is contrary to or forbidden by law, as for instance, to violate a legal right or to make use of fraud or violence, or to do what is criminal.

Indra Chandra v. Emperor, 1929
 Pat. 145; 116 I.C., 756 (F.B.).
 Emperor v. Surjya Kumar Sen, 1934 Cal. 221; 147 I.C. 32 (S.B.).
 See also Shiom Kumar Singh v. Emperor, 1941 O. 130: 191 I.C.

^{13.} Amritlal Hazra v. Emperor, 1916 Cal. 188; I.L.R. 42 Cal. 957: 29

I.C. 513. 14. Russell on Crime, 12th Ed., Vol.

^{1,} p. 201. 15. Halsbury's Laws of England, 3rd

Ed., Vol. 10, page 310. 16. (1881) 14 Cox C.C. 508 at page

^{17, (1892)} A.C. 25,

The term "conspiracy" includes all combinations involving violation of private rights which, if done by a single person, would give a civil, though not a criminal, remedy against the wrong-doer.18

- 5. English and Indian law. Difference between. The provisions of the section are wider than those of the English law, according to which the act or declaration must have been done or made in the execution or furtherance of the common purpose.19 Thus, mere narratives and admissions of past events have been held to be inadmissible, as such, as against co-conspirators, except those by whom, or in whose presence, such statements were made.20 Under this section, anything said or done, in reference to the common intention, is admissible; thus, the contents of a letter written by a co-conspirator, giving an account of the conspiracy, is relevant against the others, even though not written in support of or in furtherance of it.21
- 6. "Where there is reasonable ground to believe". The operation of this section is strictly conditional upon there being reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong.22 It is only in cases of existence of a conspiracy that Section 10 applies. The application of the section follows and does not precede the finding that there is reasonable ground to believe that a conspiracy exists and certain persons are conspirators.²³ There must be (1) an issue to the existence of the conspiracy, and (2) "reasonable ground".²⁴ for belief in the existence of the conspiracy must be shown, before evidence can be given of the acts, statements or writings of persons who, but for such conspiracy, would be strangers to one another.

The words "reasonable ground to believe" are not equivalent to proof. It is enough, if the prosecution have produced prima facie proof of a conspiracy.27 But although, in the preliminary stage, there need not be definite proof, there must be reasonable ground to show the connection of each of the persons implicated. It is not enough to find simply that there must have been a conspiracy, without coming to a prima facie conclusion as to who were the members of it.1 "Sometimes, for the sake of convenience, the acts or declarations of one

cited ante.

21. See Illustration to Section 10 and Cunningham, Ev., 100; Whitley Stokes, 527; Balmokand v. Emperor, 1915 Lah. 16: 28 I.C. 738, 742, 774; Bhola Nath v. Emperor, 1939 All. 567 at 574; I.I., R. 1939 All, 736;

184 I.C. 191.

titendra Nath Gupta v. King, Emperor, 1937 Cal. 99: 169 I.C.

977; 38 Cr. L. J. 818 (S.B.); S. H. Jhabwala v. Emperor, 1933 All. 690; 145 I.C. 481; I.L.R. (1972) 1 Delhi 536,

 Seth Chandrattan Moondra v. Ent-peror, 1945 S. 188: I.L.R. 1945 Kar. 129; Emperor v. Shafi Ahmad Nabi Ahmad, 31 Bom. L.R. 515:

Nabi Ahmad, 31 Bom. L.R. 515:

24. Kadambini v. Kumudini, (1903)
30 C. 983 s.c.: 7 C.W.N. 808;
Shahebar v. R. (1913) 18 C.L.J.
590; 21 I. C. 378; Mahomed Ismail
v. Emperor, 1936 Nag. 97: I.L.R.
1936 Nag. 152: 38 Cr. L. J. 106;
Bhola Nath v. Emperor, I.L.R.
1939 All. 786: 1939 A. L. J. 785:
1939 All. 567: Seth Chandrattan
Moondra v. Emperor, I.L.R. 1945
Kar. 129: 1945 Sind 188.

25. Balmokand v. Emperor, 1915 Lah.

Balmokand v. Emperor, 1915 Lah.
 16: 28 I.C. 738.
 Mahomed Ismail v. Emperor, 1936

Nag. 97: 1.L.R. 1936 Nag. 152: 165 I.C. 913.

^{18.} K. v. Farnell, (1759), 2 Burr. 806, 19. Steph. Dig., Art. 4, and text-book

R. v. Hardy, (1794) 24 How. St.
 Tr. 451-453. Where an account given by one of the conspirators in a letter to a friend of his own pro-ceedings in the matter not intended to further the common object and not brought to A's notice was held not to be relevant as against A; see also R. v. Blake, (1844) 6 Q.B. 126: Steph. Dig. Art. 4, illus-trations, (a). (b); Taylor Ev., ss.

are admitted in evidence before proof of the conspiracy has been given; the prosecutor undertaking to furnish such proof in a subsequent stage of the cause. But this mode of proceeding rests in the discretion of the Judge, and in seditious or other general conspiracies is seldom permitted, except under particular and urgent circumstances." Section 136, post, also allows a similar course to be followed in appropriate cases.

7. That two or more persons have conspired together. For the existence of a conspiracy two or more persons must have conspired together to commit an offence or actionable wrong. There must have been some preconcert. A conspiracy within the terms of this section contemplates something more than the joint action of two or more persons to commit an offence. If that were not so, the section would be applicable to any offence committed by two or more persons jointly with deliberation and this would import, into a trial, a mass of hearsay evidence, which the accused persons would find it impossible to meet.8

The conspiracy may be to commit an offence, in which case, it would be a criminal conspiracy, or to commit an actionable wrong in which case the conspiracy would be a tort.

Under this section, when there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, anything said, done or written by any one of such persons in reference to their common intention after the time when such intention is first entertained by any one of them, is relevant against each person believed to be compring for the purpose of both proving the existence of the conspiracy and showing that such person was a party to it.4 Once the section is applied, then whatever is said or done by parties to the conspiracy becomes relevant evidence as against the co-conspirators even for the purpose of proving the conspiracy itself.5

8. Conspiracy to commit an offence. Criminal conspiracy is an offence under the Indian Penal Code, and is defined as follows:

"When two or more persons agree to do, or cause to be done-

- (1) an illegal act, or
- (2) an act which is not illegal by illegal means,

such an agreement is designated a criminal conspiracy:

Provided that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof.

Taylor, Ev., S. 591.

I. C. 145.

5. Baburao Bajirao Patil v. State of

Maharashtra, Ibid.

Nogendrabala v. R., (1900) 4 C. W.N. 528, 530. As to evidence of conspiracy, see Kalil v. R. (1901) 28 G. 797; Templeton v. Lauric (1901) 25 B. 230 (conspiracy to obtain conviction of accused person and as to what amounts to evidence of conspiracy): See Abdul v. R., 1922 Cal. 107: I.L.R. 49 Cal. 573: 69

Baburao Bajirao Patil v. State of Maharashtra, (1971) 2 S.C. Cr. R. 162, 165: 1971 S.C.C. (C.R.) 680; Noor Mohammad v. State of Maharashtra, 1971 Mah.I., J. 792, 795 (S.C.).

Explanation. It is immaterial whether the illegal act is the ultimate object of such agreement, or is merely incidental to that object."6

The constituent elements of the offence are (1) an agreement between two or more persons, (2) to do an illegal act, or (3) to do a legal act by illegal means, and (4) an overt act done in pursuance of the conspiracy.7 The first three ingredients suffice for the definition of criminal conspiracy under the English common law, but in the case of a conspiracy other than a conspiracy to commit an offence, Section 120-A further requires the doing of an overt act in furtherance of the conspiracy. An overt act is necessary under both laws, but the English law considers the mutual consultation and agreement as a sufficient overt act,8 whereas the Indian Penal Code, in the case of a conspiracy other than a conspiracy to commit an offence, goes a step further and requires some act independent of the agreement. In the case of conspiracy to commit an offence, however there is no difference between the English and the Indian law and the first three ingredients are sufficient to constitute the offence of criminal conspiracy.9 As observed by Wills, J., in Mulcahy v. R. (supra) "a conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act by unlawful means. So long as such a design rests in intention only, it is not indictable, when two agree to carry it into effect, the very plot is an act in itself, and the act of each of the parties, promise against promise, actus contractum, capable of being enforced, if lawful, punishable, if for a criminal object and for the use of criminal means." The criminality of the conspiracy is independent of the overt act.10

- 9. "Two or more persons". Under the English law, husband and wife, being regarded as one person, cannot be charged with, or convicted of, conspiracy together, unless charged with conspiring with a third person.11 But Section 120-A of the Indian Penal Code makes no such exception in the case of husband and wife.
- (a) Agreement. It will be observed that there can be no conspiracy without an agreement, which is an advancement of the intention which each has conceived in his mind, which then passes from a secret intention to the stage of mutual consultation and concert, proof of which may be available in the evidence of an accomplice which must, however, be definitive as to the agreement "to do or cause to be done" the act charged, which, again, must be shown to be illegal within the meaning ascribed to that term in Section 43 of the Penal Code which generally follows English law.12 It is immaterial whether the illegal act is the ultimate object of such agreement, or is merely incidental to the object.13 It is, similarly, immaterial that the offence agreed on is one,

6. Sec. 120A. Indian Penal Code (Act XLV of 1860).

8. Mulcahy v. R. (1868) 3 H.L. 306:

peror. Supra.

11. Director of P.P. v. Blady, (1912) 2 K.B. 89, 92,

R. v. Rowlands, (1851) 17 Q.B. 671; R. v. Parnell, (1881) 14 Cox. 508; O'Connell v. R (1844) 11 Cl. & Fin. 155; Gulab Singh v. Emperor. 14 A.L.J. 688: 35 I.G. 991: A. I.R. 1919 A. 141; Billinghurst v. King Emperor. 1924 C. 18; Mohammad Ismail v, Emperor, 1936 Nag. 97: 38 Cr. L.J. 106; Parsram v. R., 1937 Sind 58: 38 Cr. L.J. 651; Rash Behari v, Emperor, 1936 Cal.

Rash Behari v Emperor, 1936 Cal

State v. Jai Govind, 1951 Raj. 89: 52 Cr. L. J. 646: See also Rash Bihari v. Emperor, 1936 Cal. 753.

¹ C. I. 13.
9. Nirmal Chandra De v. King-Emperor, 1927 Cal. 265 at 266-7; 100 I.C. 113: 31 C.W.N. 239; S.H. Iliahwala v. Emperor. 1933 All. 690; 145 I.C. 481: 34 Cr. L.J. 967; Jitendra Nath Gupta v. King-Emperor, 1937 Cal. 99: 169 I.C. 977. 10. Jitendra Nath Gupta v. King-Emperor. Supra

which one of the conspirators could not singly commit. So, in an English case, where a woman who erroneously believed herself with child conspired with another to procure abortion, she was held liable to be convicted of conspiracy to procure abortion, although, if she had merely done the act to herself with like intent, she could not have been convicted.14

- (b) Act illegal. To amount to the offence of criminal conspiracy, an agreement must be to do that which is contrary to, or forbidden by law. Being a highly technical offence, this ingredient of the crime is essential and must be strictly proved.15 An agreement, which is immoral or against public policy or in restraint of trade or otherwise of such a character that the Courts will not enforce it, is not necessarily illegal.¹⁶ But, since an act may be illegal without being criminal, it follows that an agreement to do an illegal act may amount to criminal conspiracy, though it may not be punishable as such.17 It may be an offence to conspire with another to do an act which, if done alone, would not be criminal, e.g., procuring a woman to become a prostitute,18 or to have illicit connection with a man.19
- (c) Means illegal. The end does not justify the means in criminal law. If, therefore, one conspires with another to employ illegal means to achieve a legal purpose, one may be convicted of conspiracy. It is not difficult to conceive of such cases, for instance, it is not illegal to under-sell a rival trader, but it would be illegal for the latter to combine to ruin the seller of cheap goods by inducing to give credit to a bankrupt purchaser and thereby cause him loss.20
- 10. Conspiracy to commit an actionable wrong. A combination of persons to do some act, the object of which is to injure some third person is wrongful and actionable; so too, is a combination of persons to do some act by unlawful means which will have the effect of injuring some third person.21 Every person has a right to a free course of trade and to conduct his business upon his own lines, even though it results in an interference with the business of another person to his detriment. If a person, or a combination of persons, unlawfully procures a breach of contract, the matter is actionable, provided that damage accrues therefrom. Malice in the sense of spite or ill-feeling is not the gist of the action. An act that is legal in itself does not become illegal because it is prompted by an indirect or sinister motive. Even though the dominating motive in a certain course of action may be the furtherance of one's business or one's interect, one is not entitled to interfere with another man's methods of earning his living by illegal means. Illegal means may either be means that are illegal in themselves, or that may become illegal because of conspiracy, where they would not have been illegal if done by a single individual. An unlawful interference with the business of another person, with in-

^{14.} R. v. Whitechurch, (1734) 94 E. R.

Amritlal Hazra v. Emperor, 42 C. 957: 29 I.C. 513: A.I.R. 1916 C.

^{16.} O'Connel v. R. (1844) 11 Cl. & Fin. 155.

R. v. Whitechurch, (1734) 94 E, R. 610. R. v. Howell. (1864) 4 F. & F. 160. 17.

^{19.} Deleval. (1763) 3 Bur. 1131; Grey

⁽Lord), 9 St. Tr. 127; R. v. Mears and Chack, (1851) 2 Den. 79. Esdaile (1682) 1 F. & F. 213; s.c.

^{20.} sub, nom, Brown. (1858) 7 Cox. 442.

^{21.} Ware & De Frewille Ltd. v. Motor Trade Association, (1921) 3 K.B. Trade Association, 40; See also Crofter Handwoven Harris Tweed Co., Ltd. v. Veitch 1942 A.C. 435.

tent to hurt that person, is actionable, provided that damage results from such interference. A lawful interference by unlawful methods, with the same object and producing similar results, is equally actionable.²² A mere conspiracy to injure a man, without an overt act resulting in injury, does not furnish any cause of action. A conspiracy is not illegal unless it results in an act done, which, by itself, would give a cause of action.²³

- 11. General principles of evidence in conspiracy. To sum up, the following general principles of evidence in conspiracy cases may be usefully borne in mind:
- (1) The existence of the fact of conspiracy must be proved. For that, there should be at least two persons. One person alone cannot conspire.24 There should be prima facie evidence of the existence of the conspiracy.
- (2) A prima facie case cannot be made out by mere proof of intention of two or more persons to do an unlawful act or a lawful act by unlawful means. An agreement as distinguished from intention has to be proved. Joint evil intent is necessary to constitute the offence. Culpability arises, not at the stage of design but only when it ripens into intention. This agreement to act in concert must be based upon joint acts which are the result of concert and agreement. The evidence adduced may be direct or circumstantial.
- (3) After the existence of the conspiracy has been established, the particular accused against whom evidence is sought to be let in under this section must be proved to have been a party to the conspiracy. This must be done by proving that each of the accused connected with the conspiracy was actuated by the unity of will and purpose for which the conspiracy has been hatched.
- (4) After the existence of a conspiracy among several persons has been established, and it has been further established that the person against whom evidence is led under Section 30 was one of the conspirators, then, and then only, should evidence be given against any accused of the acts and declarations and writings of any one of them in reference to their common intention.25 Hearsay is not excluded. The acts, declarations and writings by any one of such persons need not necessarily be in furtherance of their common intention. They must be in reference to their common intention. This section is intended to admit in evidence all communications between the different conspirators, while the conspiracy was going on with reference to the carrying out of the conspiracy. The statements made or acts done by others, before the accused joined the conspiracy, are equally relevant and admissible, and any statement made by one conspirator to another, indicating in any way the complicity of a third conspirator, is a relevant fact and such statement can be admitted. Whether it should be believed or not is another question. Similarly, documents in the possession of a conspirator are admissible against co-conspirators in the following circumstances, viz., if after the arrest of a conspirator, papers are found on the person or at the lodgings of a co-conspirator, they will be admissible against the former, if there is evidence that they existed previously to the arrest of the former. The existence of a secret code is, in itself, evidence for supposing that the persons named therein have conspired to commit an

A.L.J. 161, 25. Shamsher v. State of Bihar, A.I.R., 1956 Pat. 404.

Bhola Nath v. Lachmi Narain, I. L. R. 53 All 316: 1931 All. 83 at 89: 1931 A.L.J. 84.

T mpleton v. Lauric. (1900) L.L.
 R. 25 B. 230

^{24.} Topandas v. State of Bombay, A.I.

R. 1956 S.C. 33: 58 Punj. L.R. 178: 1956 B.L.J.R. 139: 1956 Cr. L.J. 138: 1956 Nag. L.J. 204: 1956 A.J. J. 161

offence. The evidentiary value of the facts which are admissible under this section are well illustrated by the illustrations given under this section.1 In regard to the period, within which limits such evidence can be adduced, it may be taken that anything said, done or written by any one of such persons must be after the time when such intention was first entertained by any one of them and before the common intention ceased to exist.2

- (5) This section is subject to the restrictions imposed in this Act or the Criminal Procedure Code, regarding statements made to the police.
- (6) The evidence of accomplices or approvers in conspiracy cases is subject to the general rule of evidence laid down in Section 30, that where more persons than one are tried jointly for the same offence and a confession made by one of them affecting himself and others jointly tried with him is proved, the court may take into consideration such confessions both against the person making it as also against those who are implicated by it. The restriction is significant and its effect is that the court can only treat a confession as lending assurance to other evidence against the co-accused. So also, even in conspiracy cases, a court cannot, as a rule of ordinary prudence, act solely on the evidence of an accomplice, unless it is corroborated. On this, the necessary corollary follows, namely, that a statement by one of the two accused, jointly tried, if it was made self-exculpatory, is not admissible against the other accused under Section 30 of this Act. Similarly, non-confessional statements, made by a coconspirator before trial but after arrest, are admissible as against himself but not against the other co-conspirators. So also, a written statement of one conspirator, handed in at the trial, unless it is a full confession, cannot be taken into evidence against a co-conspirator under Section 30 of this Act.
- (7) Evidence of similar acts can be tendered but they must be of the same specific kind as that in question and must also have been proximate in time to that in question. Sections 14 and 15 of the Act appear to be the only sections dealing with this question in relation to conspiracy cases.
- (8) Offences, alleged to have been proved in pursuance of a conspiracy, may be proved to support the charge of conspiracy, even if the accused were not charged with them.
- (9) Criminality of conspiracy is distinct from and independent of the criminality of the overt acts.8
- (10) For establishment of conspiracy, two or more conspirators are required and evidence once admitted is liable to rejection, if belief in conspiracy is subsequently displaced. Evidence under this section is admissible only upon footing of a reasonable belief, that two or more persons have conspired to commit an offence, being entertained by the court. It is not correct that, in a conspiracy charge, evidence once admitted remains admissible evidence whatever new aspects the case may bear, whether in the original or appellate court.

^{1.} Rangarajulu Naidu and others v. State of Madras, Cr. Appeal Nos. 495 to 497, 510, etc. dated 10-9-57 (Ramaswami, J.): A, I. R, 1958 Mad. 368: 1958 Cr.L.1. 906.

2. Sardul Singh v. State of Bombay, A. J. R, 1957 S, C, 747: 1957 Cr.

<sup>I. J. 1325; (1957) 1 Mad. L. J. (Cr.) 739; 1958 All W. R. (Sup)
I; State v. Shankar, A. I. R. 1957
Bom. 226; 1957 Cr. L. J. 1107.
Russell on Crime (12th Ed.) Vol. I. p. 200; Halsbury, 3rd Ed. Vol. 10, pp. 310-311.</sup>

- (11) Where more than two persons are charged of conspiracy, it does not follow, that all of them must be convicted, or all must be acquitted. But, if all are tried jointly, one cannot be convicted if the other or all the others are acquitted. In Bimbadhar Pradhan v. State of Bombay,4 one person was convicted of conspiracy, while the other enjoyed immunity on his turning approver.5
- (12) The section applies to criminal offences as well as to actionable wrongs, etc. The acts and declarations of co-trespassers in civil actions, and indeed of all persons combined and having a common object, whether civil or criminal, are governed by the same rules. The admissions of one joint tortfeasor are receivable against others on the same principle, and with the same limitations, as those of conspirators.6 In short, although, in criminal cases, it is the agreement which is the essential element, and in civil ones, the resultant damages, the admissions are all receivable on the same principle and with the same limitations as those of conspirators.7
- (13) If no charge of conspiracy is made, and all the evidence is that the accused wrote some invoices and took them to the complainant without making any representation that induced the complainant to part with money, the evidence is not relevant under this section.8

The wide range of evidence, in conspiracy cases, has led judges to insist upon careful scrutiny of the evidence. Fitzgerald, J. in the Irish State Trials of 1867 said: "The law of conspiracy is a branch of our jurisprudence to be narrowly watched, to be jealously guarded and never to be pressed beyond its true limits. Because, as Dr. Kenny points out, owing to the two peculiarities in the circumstances to which those principles of admission of evidence, which are just the same for conspiracy as for other crimes, are applied in conspirac cases, it often seems, as if there were an unusual laxity in the modes of giving proof of an accusation of conspiracy. For, it rarely happens that the actual fact of the conspiring can be proved by direct evidence, since such agreements are usually entered into both swiftly and secretly. Hence, they ordinarily can be proved only by an inference from the subsequent conduct of the parties, in committing some overt acts which tend so obviously towards the alleged unlawful result as to suggest that they must have arisen from an agreement to bring it about. Upon each several isolated doings, a conjectural interpretation is put; and, from the aggregate of these interpretations, an inference is drawn. circumstantial evidence, thus rendered necessary, will often embrace a wide range of acts, committed at widely different times and in widely different places. The range of admissible evidence is still further widened by the fact, that each of the parties has, by entering into the agreements, adopted all his confederates as his agents to assist him in carrying it out. Consequently, by the general doctrine as to principal and agent, any act done, subsequently for that purpose, by any of them, will be admissible as evidence against him; before it was done, he had given them notice that he withdrew from the

A. I. R. 1956 S.C. 469: 1956 All W. R. (Sup.) 89: 1956 Gr. L. J. 831: 22 Cut. L. T. 276: (1956) 2 Mad. L. J. S.C. 13.
 See contra in English Law, Duguid 75 L.J.K.B. 470, R. v. Sharpe, (1938) 1 All. Eng. Rep. 48.

Wigmore s. 1079.

Quinn v. Leatham, 1901 A. C. 495 at 542.

^{8.} Madanlal Ramchandra Daga v. State of Maharashtra, (1968) 2 S. C. W. R. 598; 1968 Cr. L. J. 1469; A. I. R. 1968 S. C. 1267, 1269.

conspiracy. Just the same doctrine is applicable to any crime where a plurality of offenders are concerned, and so is not peculiar to trials for conspiracy. But, in them, it assumes unusual prominence, because in cases of conspiracy an unusually long interval often elapses-with consequently an unusually long series of acts-between the time, when the common criminal purpose is formed, and the time, when it is carried out or is frustrated by arrest.9

To conclude, the crime of conspiracy affords support for the proposition that criminal law is an instrument of the Government.10 The opportunity, which the vagueness of this crime can offer to governmental oppression, has been recognised by an independent judiciary. It creates a genuine fear in all minds. So Prof. Sayre writes: "A doctrine vague in its outlines and uncertain in its fundamental nature as criminal conspiracy lends no strength or glory to law; it is a veritable quicksand of shifting opinion and ill-considered thought.' He further emphasises that it would seem, therefore, of transcendent importance that judges and legal scholars should go to the heart of this matter, and, with eyes resolutely fixed upon justice, should reach some common and definite understanding of the true nature and precise limits of the elusive law of criminal conspiracy.11 These remarks apply with equal emphasis to the law of criminal conspiracy in India. There is a close affinity between the Indian and English law of conspiracy.

12. Proof. The existence of the fact of conspiracy must be proved before evidence can be given of the acts of any person not in the presence of the prisoner. This must, generally speaking, be done by evidence of the party's own acts.12 But, owing to the difficulties in the way of such proof, a deviation has, in many cases, been made from the general rule, and evidence of the acts and conduct of others have been admitted to prove the existence of a conspiracy previous to the proof of the defendant's privity.12 But, in respect of such conduct a distinction has been made between declarations accompanying acts14 (which are admissible) and mere detached declarations and confessions of persons not defendants, not made in the prosecution of the object of the conspiracy, and which, being mere "hearsay", are not evidence, even to prove the existence of a conspiracy.

There cannot be, strictly speaking, direct evidence of the inception of a conspiracy, if any of the conspirators themselves do not choose to speak to the same.15 The agreement to conspire may be inferred from circumstances which raise a presumption of a concerted plan to carry out an unlawful design.16

After the existence of a conspiracy has been established, the particular defendants must be proved to have been parties to it.17 The words "such persons" in the section refer to "two or more persons" in the previous clause,

^{9.} Outlines of Criminal Law, 17th Ed., PP. 395-396.

^{10.} Russell on Crime. 12th Ed., Vol. 1,

Criminal Conspiracy, 35 Harvard

L. R., p. 393. 12. East P. C. 96 cited in argument in R. v. Amir Khan, 17 W. R. 15; Roscoe, Cr. Ev., 16th Ed., 486. 13. Roscoe, Cr. Ev., 16th Ed., 486: 2 Starkie, 2nd Ed., 234. 14. v. S. 8 ante.

^{15.} Jitendra Nath Gupta v. King Em-

peror, 1937 Cal. 99 (S.B.): 169 I.C. 977: 38 Cr. L. J. 818.

16. Barindra v. R., I. L. R. 37 Cal. 467: Bholanath v. Emperor, 1939 A. 567: 1939 All. 736: 184 I.C. 191; Mahendra Singh v. Manipur State, 1952 Manipur 4.

Roscoe, Cr. Ev., 16th Ed., 486; Amritlal Hazara v. Emperor, 1916 Cal. 188; I. L. R. 42 Cal. 957; 29 Roscoe, I. C. 513.

and it follows that reasonable ground must be shown to believe that the persons whose statements or actions are to be used had conspired together.18

"It is necessary to prove the existence of a conspiracy and to connect the prisoner with it in the first instance, when you seek to give in evidence against him the declaration of a conspirator; and having done so, you are then at liberty to give in evidence against the prisoner acts done by any of the parties, whom you have connected with the conspiracy; but when a party's own declarations are to be given in evidence such preliminary proof is not requisite, and you may, as in any other offence, prove the whole case against him by his own admission."19 A conspiracy need not be established by proof which actually brings the parties together but may be shown, like any other fact, by circumstantial evidence.20

- 13. Rejection of evidence when ground of belief is displaced. As the trial Judge may admit evidence under this section, when he has such a reasonable ground of belief as is postulated, he must reject it if, at a later stage of trial, the reasonable ground of belief is displaced by further evidence. So also, the appellate Court, which has from the outset refused that belief, must refuse to admit evidence which was admissible only upon the footing of the belief being entertained. It is not the true view that, in a conspiracy charge, evidence once admitted remains admissible evidence, whatever new aspect the case may bear, whether in the original or in the appellate court.21
- 14. "Anything said, done or written, by any one of such persons." When it is shown that there is reasonable ground to believe that two or more persons have conspired to commit an offence or an actionable wrong, anything said, done or written by any one of such persons in reference to their common intention becomes a relevant fact. "Anything said" would include the statements made, speeches delivered, or declarations made. "Anything done" must be some act done, and not merely the intention or knowledge of the persons. "Anything written" would include (i) a manuscript, whether signed or ansigned, written by the person, and (ii) matter transcribed by him on a typewriter. But the document of which the writer is not known, found in the possession of a conspirator, would not by itself be admissible for the purpose of proving the truth of its contents, as against the other accused. The fact of possession would be evidence to show that the conspirator, in whose possession it is found, had received and preserved it.22 The possession of a document creates an inference that the possessor was aware of its contents.28 Evi-

19. Per Pennefather, C. J. in R. v. Mekenna, (1842) I. Circ. Rep. 416 cited in 9th Ed., Taylor, Ev., 382.
20. Taylor, Ev., S. 591; 3 Russ. Cr.

fectly true that the dark overtness of crime cannot often be laid open, that conspiracies like other crimes that conspiracies like other crimes must be generally supported by circumstantial proof," per Sir Lawrence Peel, C. J. in R. v. Hedger, (1853) P. 131.

21. H. H. B. Gill v. The King, 1948 P. C. 128; 75 I. A. 41: (1948) 2 M.L.J. 6 (P.C.).

22. S. H. Jhabwala v. Emperor, 1933 All. 690: 145 I. C. 481; Jitendra Nath Gupta v. King Emperor, 1937 Cal. 99: 169 I.C. 977 (S.B.).

23. Mahendra Singh v. Manipur State, 1952 Manipur 4; Jitendra Nath Gupta v. Emperor supra

pta v. Emperor supra.

^{18.} Mohammad Ismail v. Emperor, 1936
Nag. 97: I. L. R. 1936 Nag. 152:
165 I. C. 913; Amritlal Hazara v.
Emperor, 1916 Cal. 188; see also
Pulin Bihari Das v. Emperor, 16 I.
C. 257: 13 Cr. L. J. 609: 16 C.
W. N. 1105.

^{148:} the evidence may be entirely circumstantial and the existence of the conspiracy collected from collateral circumstances; R. v. Parsons, (1763) 1 W. N. B. I. 392; Roscoe Cr. Ev., 16th Ed., 486. 'It is per-

dence of acts and statements of co-conspirators in pursuance of conspiracy can be relied upon because in cases of conspiracy better evidence is hardly ever available.24

In a case of criminal conspiracy, the original letters written by the conspirators were suppressed by them but the photostats only of these letters were available at the trial. These photostats were proved to be genuine photographs of the letters. If the court is satisfied that there is no trick photography and the photograph of the document is above suspicion, it can be received in evidence. It is always admissible to prove the contents of the document but subject to the safeguards indicated to prove the authorship. This is all the more so in India under this section to prove participation in a conspiracy. But evidence of photographs to prove writing or handwriting can only be received if the original cannot be obtained and the photographic reproduction is faithful and not faked.

In the instant case before the Supreme Court no such suggestion existed and the originals having been suppressed by the accused, it was held that the evidence of photographs as to the contents and as to handwriting was receivable.25

Any statement made by one conspirator to another, indicating in any way the complicity of a third conspirator, is a relevant fact, and as such may be admitted. Whether it should be believed or not is another question.1 If an accused has given evidence for the defence, it would be relevant evidence in respect of communications between the conspirators during the conspiracy, the implementation of conspiracy and participation by the other accused in the conspiracy. It is quite another thing whether he can be believed or not.2

A Cipher Code cannot be treated as "the act, words, or deed" of a particular person. But, the fact that it exists and that the names and addresses of a number of persons, who are alleged to be parties to a conspiracy as charged, are mentioned in it, the fact that it is in a peculiar form, such as is not likely to be found in any Code intended to be used for lawful purposes, taken along with other matters brought out in evidence may give rise to a legitimate inference that the Ciphers were prepared in connection with some unlawful purpose requiring secrecy; and, in the absence of evidence that the matters appearing from the secret document were associated with some legitimate or lawful purpose, the Cipher Code is in itself a good ground for supposing that the persons named in it had conspired to commit an offence and any other

Bhagwan Das Keshwani v. State of Rajasthan, 1974 Cri. L.J. 751: 1974 U.J. (S.C.) 356: 1974 S.C.D. 759: (1974) 4 S.G.C. 611: (1974) Punj. L.J. (Cri.) 266: 1974 Cri. L. R. (S.C.) 402: (1974) S.C. Cri. R. 186: 1974 Serv. L. C. 449: 1974 W. L. N. 532: 1974 S.C.G. (Cri.) 647: 1974 Cri. App. R. (S.C.) 188: A. J. R. 1974 S.C. 898.
 Laxmipat Choraria v. State of Maharashtra, (1968) 2 S. C. R. 621: (1968) 1 S. C. A. 682: 1968 Cr. L. J. 1124: 1968 M. L. J. 743: (1968) 2 S.C.J. 589: 70 Boin, L. R. 595: 16 Law Rep. 473: 1968 Mad. L.J. (Cr.) 614: A.

I. R. 1968 S.C. 938, 946 (Conflict between Phipson, 10th 7d., Para-graphs 316/317 and Wigmore 3rd Ed., Vol. III, para. 797 noticed).

^{1.} Kr. Sham Kumar Singh v.

Kr. Sham Kumar Singh v, Emperor, 1941 O, 130; 191 I.C. 466; Emperor v, Surjya Kumar Sen, 1934 Gal. 221; 147 I. C. 32 (S.B.), Tribubhan Nath v. State of Maharashtra, 1972 Cri. L. J. 1277; 1972 S. C. D. 571; 1972 Cri. App. R. 257 (S.C.): 1972 U. J. (S.C.) 826; 1972 S. C. Cri. R. 458; (1972) 3 S.C. C. 511; A.I.R. 1973 S.C. 450.

acts or writings of individual conspirator in furtherance of the common design become admissible under this section.3

It is not necessary that the co-conspirator, whose act or declaration it is sought to prove, should be tried or indicted.4 The act or declaration of the co-conspirator may have been done or made by a stranger to, and in the absence of, the party against whom it is offered; or without his knowledge, or before he joined the combination,5 or even after he left it.6 This last mentioned provision is contrary to the English rule, according to which acts and declarations of others are not admissible against a conspirator, if done or made after his connection with the conspiracy has ceased.7

The section does not cease to apply to "anything said, done, or written" by a conspirator simply because that conspirator gives evidence as an approver. The evidence of a conspirator becoming approver must be read subject to the rules of prudence and corroboration which apply to the evidence of approvers generally, but once the Court is satisfied that the approver is speaking the truth, his evidence can be accepted as to anything he has "said, done or written" as in the case of any other conspirator.8

Where, in order to prove a conspiracy, the prosecution produces the statement of an approver before the trying magistrate as to the existence of a conspiracy, and a number of letters written by the conspirators to each other using code words, the statements and the letters are admissible under this section.9

In this connection the decisions of the Supreme Court in Sardul Singh v. State of Bombay, 10 and Badri Rai v. State of Bihar 11 may be referred to.

In the former case, where the charge was one of conspiracy entered into between December 1, 1948 and January 31, 1949, to commit criminal breach of trust in respect of the funds of a company by utilising the same to purchase the controlling block of shares of the company itself, and the modus operandi was to screen the utilisation of the funds by showing them as having been advanced for legitimate purposes and invested on proper security, but in fact utilising the same for payment to the owners of the controlling block of shares. It was held that all evidence which would go to show that the transactions during the period of conspiracy were bogus would be admissible, notwithstanding that such evidence, may necessitate reference to and narration of acts of the conspirators beyond the period of conspiracy, but within reasonable limits. The conduct in general of each individual conspirator, irrespective of the time to which it relates, can be relied upon by the prosecution to show the criminality of the intention of the individual accused with reference to his proved

Indra Chandra Narang v. Emperor, 1929 Pat. 145: 116 I. C. 756 (F.B.); Jitendra Nath Gupta v. King Emperor, 1937 Cal. 99: 169 I.C. 977 (S.B.); see also Mahendra Singh v. Manipur State, 1952 Mani-

^{4.} Roscoe, Cr. Ev., 16th Ed., 486.

^{5.} See Illustration ante., R. v. Brandreth. 32 How. St. Tr. 857, 858; R. v. Murphy, 9 C. & P. 311; Taylor, Ev. s. 592.

^{6.} See Illustration ante.

R. v. Hardy, (1794). 24 How. St. Tr. 718, 731; Taylor Ev., s. 595.

Vishindas Lachmandas v. Emperor, 1944 Sind 1: I.L.R. 1943 K. 449. 212 I.C. 56 (F.B.).

^{9.} Bholanath v. Emperor, 1939 All. 567: I. L. R. 1939 All. 736: 184

^{567:} I. L. R. 1939 All. 750: 164
I. C. 191.
A. I. R. 1957 S.C. 747: 1957 S.
C. J. 780: 1957 Cr. L. J. 1325:
(1957) 1 Mad. L. J. (Cr.) 739:
1958 All. W. R. (Sup.) 1.
A. I. R. 1958 S. C. 953: 1959 S.
C. J. 117: 1958 Cr. L. J. 1434:
(1959) Mad. L. J. (Cr.) 25: 1958
All L. J. 909: 1959 B. L. J. R. 50:
1958 All W. R. (H.C.) 861.

participation in the alleged conspiracy, that is, to rebut a probable defence that the participation though proved was innocent. It is well settled that the evidence in rebuttal of a very likely and probable defence on the question of intention can be led by the prosecution as part of its case. To anticipate a likely defence in such a case and to give evidence in rebuttal of such defence is in substance nothing more than the letting in of evidence by the presecution of the requisite criminal intention beyond reasonable doubt. That the reference to the acts and conduct of a co-conspirator beyond the period of conspiracy may conceivably be capable of being wrongly relied on by the jury in respect of issues on which they are not admissible by itself, without showing that serious prejudice would in all likelihood have occurred in the particular case would not be enough to vitiate the conviction. The court cannot normally compel the prosecution to examine a witness where it does not choose to and the duty of a fair prosecutor extends only to examine such of the witnesses who are necessary for the purpose of unfolding the prosecution story in its essentials. All that can be said normally in a case of non-examination of any witness, is that the defence is entitled to comment upon it and to ask the jury to draw an adverse inference in respect of that portion of the case to which the evidence of the witness relates. It is open to the prosecution to rely both on direct evidence and on circumstantial evidence and to maintain that even if the direct evidence is not acceptable; the circumstantial evidence is enough for the proof of its version. The alternatives which arise on the reliance of the prosecution both on the direct evidence and on the circumstantial evidence are not in any sense the presentation of any inconsistent cases. The prosecution cannot be permitted to lead evidence relating to inconsistent cases. Evidence of the conduct of a deceased conspirator would not be admissible under Section 8, Evidence Act, as the evidence of conduct admissible under Section 8 is of conduct of a person who is a party to the action.

This section must be construed in accordance with the principle that the thing done, written, or spoken, was something done in carrying out the conspiracy and was receivable as a step in the proof of the conspiracy. In criminal trials, on a charge of conspiracy evidence not admissible under this section as proof of the two issues to which it relates, viz., of the existence of conspiracy and of the fact of any particular person being a party to that conspiracy, is not admissible at all. In civil cases, it is well settled that a principal is bound by the acts of his agent, if the latter has an express or implied authority from the former and the acts are within the scope of his authority. Therefore, acts of an agent are admissible in evidence as against the principal. An analogous principle is recognised in criminal matters in so far as it can be brought in under this section. The principle underlying the reception of evidence under this section of the statements, acts and writings of one co-conspirator as against the other is on the theory of agency. The rule in this section confines that principle of agency in criminal matters to the acts of the co-conspirators within the period during which it can be said that the acts were "in reference to their common intention", that is to say, "things said, done or written, while the conspiracy was on foot" and "in carrying out the conspiracy." The act or deed sought to be admitted in evidence against his co-conspirator must be something said, done or written by him when he continues to be a conspirator and still retains the character of a conspirator. It must have some relation to the common intention of the conspiracy which is the binding force not only between

the conspirators inter se but also between them and the conspiracy.12 Where, the charge specified the period of conspiracy, evidence of acts of co-conspirators outside the period is not receivable in evidence. But, in a conspiracy to commit criminal breach of trust, all evidence which would go to show that certain transactions are bogus, is certainly admissible. The conduct in general of each individual co-conspirator including his acts, writings and statements is evidence against himself. There can be no doubt that such conduct irrespective of the time to which it relates can be relied on by the prosecution to show the criminality of the intention of the individual accused with reference to his proved participation in the alleged conspiracy, that is, to rebut a probable defence which may normally arise in such a case, viz., that the participation, though proved, was innocent. Such evidence would come under Section 14 of the Act. Though the very reference to acts and conduct of a conspirator during the year which is beyond the period of conspiracy, may conceivably be capable of being wrongly relied on by the jury in respect of issues on which they are not admissible and might be capable of producing some prejudice, this is a possibility inherent in such cases. A weighty caution has always to be kept in mind when judges and juries have to deal with such complicated cases. But, that, by itself, without showing that serious prejudice would in all likelihood, have occurred in the particular case, would not be enough to vitiate the conviction.18

In the undernoted case14 the Judicial Committee observed that the words, written or spoken, may be a declaration accompanying an act, and indicating the quality of the act, as being an act in the course of conspiracy; or the words, written or spoken, may, in themselves, be acts done in the course of the conspiracy. This being the principle, the words of this section must be construed in accordance with it, and are not capable of being widely construed, so as to include a statement made by one conspirator, in the absence of the other, with reference to past acts done in the actual course of carrying out the conspiracy, after it has been completed. The common intention is in the past. The words 'common intention' signify common intention existing at the time when the thing was said, done or written by one of them. Things said, done or written while the conspiracy was on foot are relevant as evidence of the common intention, once reasonable ground has been shown to believe in its existence. But, it would be a very different matter to hold that any narrative, or statement or confession made to a third party after the common intention or conspiracy was no longer operating, and has ceased to exist, is admissible against the other party. There is, then, no common intention of the conspirators to which the statement can have reference. The section embodies this principle.

The undermentioned¹⁵ was a case where Blake was an officer, employed in the Customs House, and Tye an agent of the importers. Tye made false entries in his day-book, to have some goods passed without paying full duty. These entries, and the counterfoil of his cheque book showing that money was

Sanchaveerappa Awadhya, In re, 8 Law Rep. 110, 123; 1967 M. L. J. (Cr.) 72 (Mysore).

⁽Cr.) 72 (Mysore).

13. Mirza Akbar v. King-Emperor, A. I. R. 1940 F.C. 176; 190 I. C. 233; (1940) 2 M. L. J. 811 and (1894) A. C. 57 and A. I. R. 1949 P.C. 103, relied on in Sardul Singh v. State of Bombay, A. I. R. 1957 S.G. 747; 1957 Cr. L. J. 1325; 1958 A. W. R. (Sup.) 1; (1957) 1 Mad. L. J. (Cr.) 739; 1957 S. C.

J. 780: 1958 M.W.N.S.C. Cr. 73; Badri Rai v. State of Bihar, 1958 S.C. 953: (1958) M.W.N.S.C. Cr. 105: (1959) S.C.J. 117: 1958 Cr. L. J. 1434: (1959) Mad. L. J. (Cr.) 25: 1958 All. L. J. 909: 1959 B. L. J. R. 50: 1958 All. W. R. (H.C.) 861.

Mirza Akbar v. King-Emperor, 67
 I. A. 336; A. I. R. 1940 P. C. 176
 R. v. Blake, (1844) 6 Q.B. 126.

paid to Blake were tendered in evidence by the prosecution, in a trial of the two accused for the offence of conspiracy to pass the goods without paying full duty. It was held, that the entries in the day-book were admissible against Blake, for they were necessary to execute their common object; but the counterfoil was irrelevant, being a mere statement to show that the plunder had been shared, after the object of the conspiracy had been achieved.

- 15. Statement made to police. The section does not apply to incriminating statements made by accused to the police in the course of the investigation, whether they incriminate themselves or others, unless the special provisions of Section 27 let in part of a confession to a police officer. The present section is not intended to remove those restrictions which the Act (Section 25) and the Criminal Procedure Code (Section 162 new) place upon the admissibility of statements made to the police.16
- 16. Confession made to Magistrate. (a) General. A confession by a conspirator made to a Magistrate after arrest disclosing the existence of a conspiracy, its object and the names of its members, is not admissible under this section against the co-conspirators, jointly tried with him, but only under Sectio 1 30, post. This section is intended to make, as evidence, communications between different conspirators while the conspiracy is going on with reference to the carrying out of the conspiracy. The confession of a co-accused was not intended to be put on the same footing as a communication passing between conspirators or between conspirators and other persons with reference to the conspiracy.17 A retracted confession has always been considered to be a weak evidence and where it was not relied upon by the prosecution against its maker, it has no value against his co-accused.18
- (b) Intercepted correspondence in divorce cases. Any intercepted correspondence between the respondents in divorce cases cannot be considered as evidence against the persons to whom it is addressed for any purpose whatever.10 Bit a letter written by a respondent to a co-respondent is evidence against the respondent.20
- (c) Other cases. In other cases, copies of letters from the accused his coconspirators which were intercepted and re-posted are admissible in evidence.21
- 17. "By any one of such persons." The words "such persons" refer to the "two or more persons" in the previous clause22 and, what is admissible is only "anything said, done or written" by any one of those against whom

 Pritam Hariomal v. Emperor, 1939
 Sind 185: I. L. R. 1939 Kar. 449: 184 I. C. 145.

17. Emperor v. Abani Bhushan, .I L. R. 38 Cal. 169; 8 I. C. 770; 15 C. W. N. 25; see also Emperor v. Vaishampayan, 1932 B. 56; I.L.R. 55 B. 839; 134 I.C. 1238; Pritam Hariomal v. Emperor. supra; see Also Bali Ram Singh v. Emperor, 1939 Nag. 295: 184 I.C. 274: 1939 N.L.J. 442. But see Kunjalal Ghosh v. Emperor, 1935 Cal. 26: 155 I.C. 261: 38 C.W.N. 1015. Babu Rao Bajirao Patil v. State of Maharashtra, 1971 S.G.C. (Cr.) 155: (1971) 2 S.C. Cri. R. 162:

- 1971 Cri. L. J. 4. Varsapillai Gabriel v. A. S. Elliatamby, 1925 P.C. 229: 52 I.A. 372. Frederick Dugan Slade v. Mrs. Doris Slade, 1946 O. 78: 1945 O.W. N. 384, [relying on Robinson v. Robinson, (1860) 29 L.J.P. Mat. & A. 178]: 32 L.T. (O.S.) 96: 164 E. R. 767; Williams v. Williams, (1865) L. R. 1 P. & D. 29: 35 L. J.P. 8: 13 L.T. 610.
- 21. Manaven ira Nath Roy v. Emperor, 1933 All. 498.
- 22. Mohammad Ismail v. Emperor, 1936 N. 97: I.L. R. 1936 Nag. 152: 165 I. C 913.

there is reasonable ground to believe that they conspired together to commit an offence or actionable wrong.23

A document written by a woman, sinc deceased, in which, describing her conversations with a person, she said that he told her that among his revolutionary friends was the accused to whom he was accustomed to turn for guidance was held to be admissible under this section as evidence against all the conspirators including the accused.24

18. "In reference to their common intention." The word "intention" implies that the act intended is in the future, and the section makes relevant statements made by a conspirator with reference to the future. The word; "in reference to their common intention" mean in reference to what, at the time of statement, was intended in the future. Narratives coming from the conspirators as to their past acts cannot be said to have a reference to their common intention.25

As already noticed under the heading "English and Indian Law", difference between "anything said, done or written" by any of the conspirators is admissible under this section, if it is in reference to their common intention, even though it is not in furtherance of their common design.1 Accordingly anything said, done or written by a conspirator after the conspiracy was formed will be evidence against other conspirators whether it was said, done, or written before, during or after the other conspirators participated in the conspiracy.2 When specific acts done by each of the accused have been established, showing their connection with their common intention, they are also admissible against the other accused.3

19. After the time when such intention was first entertained. The words of this section must be construed in accordance with it and are not capable of being widely construed so as to include a statement, made by one conspirator, in the absence of the others, with reference to past acts done in the actual course of carrying out the conspiracy, after it has been completed. The common intention is in the past. The words "common intention" signify a common intention existing at the time when the thing was said, done or written by any one of them. Things said, done or written while the conspiracy was on foot are relevant as evidence of the common intention, once reasonable ground has been shown to believe in its existence. But, it would be a very different matter to hold that any narrative or statement or confession made to a third party, after the common intention or conspiracy was no longer operating and had ceased to exist, is admissible against the other party. There is then no common intention of the conspirators to which the statement can have reference.4 Where the object of the conspiracy had been carried out and the

24. Emperor

L.J. 334 (S.B.). 25. Emperor v. G. V. Vaishampayan, 1932 Bom. 56; I.L.R. 55 Bom. 839; 134 I.C. 1238: See also Emperor v. Abani Bhushan Chuckerbutty, I. L. R. 38 Cal. 169: 8 I.C. 770: 11 Cr. L.J. 710; Sital Singh v. Emperor. I.L.R. 46 Cal. 700: 54 I.C. 53:

21 Gr.L.J. 5: A. I. R. 1920 C. 300.

1. Bholanath v. Emperor, 1939 All. 567 at 574; see also Balmokand v. Emperor, 1915 Lah. 16: 28 I.C. 738.

 I. L. R. (1974) 2 Delhi 706.
 Kunwar Sen v. Emperor, 1933 Oudh 86; I.L.R. 8 Luck, 286; 141 I.C. 192: 34 Cr. L.J. 124: 9 O.W. N. 1136.

Mirza Akbar v. King-Emperor, 1940
 P.C. 176; 67 I.A. 336; I.L.R. 1940
 Lah. 612; 190 I.C. 233; State v. Sankar, A.I.R. 1957 Bom. 226; 59
 Bom. L.R. 244.

^{23.} See Mohammad Ismail v. Emperor, supra; Amrit Lal Hazara v. Emperor, 1916 Cal. 188; I.L.R. 42 Cal. 957; 29 I.C. 513; Pullin Bihari Das v. Emperor, 16 I.C. 257; 13 Cr. L.J. 609; 16 C.W.N. 1105. Emperor v. Surjya Kumar Sen, 1934 Cal. 221; 147 I.C. 32; 35 Cr.

conspiracy had come to an end in subsequent statement,⁵ or confession, made to a Magistrate by the accused after arrest cannot be said to have reference to the common intention of the conspirators. The confession may, however, be taken into consideration against co-accused under Section 30.⁶ Any statement, made by an accused person during the trial, can hardly be regarded as a statement made by him as a conspirator in reference to the common intention of the persons who were members of the conspiracy. The statements of co-accused, made under Section 342, Cr. P. C., in the course of the trial, are not admissible against the other.⁷

The statement of an accused made after arrest and not amounting to a confession is not admissible in evidence against a co-accused either under this section or Section 30 of the Evidence Act, but only against himself. The admission does not however affect the conviction when no stress was laid on such statement by the Trial and Appellate Courts.8

Evidence that some of the accused ran cocaine and gambling dens long before the existence of the conspiracy which was the subject of the charge, was held admissible, the prosecution case being that some of the accused were first thrown together by frequenting or running such dens, and that they continued to meet at such places for the purposes of conspiracy charged. The evidence of the excise inspector of raids on the dens was held admissible as leading up to the admission made to him.⁹

If, after his apprehension, papers be found on the person or at the lodgings of a co-conspirator, they will be admissible or not against other alleged co-conspirators, according as there is or is not evidence that they existed previously to the arrest of the prisoner who is on his trial. If there be no such evidence, they will be rejected as a prisoner cannot be responsible for acts or writings which possibly may not have existed until after the common enterprise was, so far as he was concerned, at an end, but if their previous existence be established, either by direct proof, or by strong presumptive evidence, no objection to their admissibility can prevail.¹⁰

Entries in books, made in furtherance of a conspiracy, are admissible, but memoranda of payments made after the fraud by one conspirator to another are not.¹¹

The possession of seditious literature and some essays by one member of an association is evidence against the other members for the purpose of ascertaining the objects of the association, even if the literature was obtained and the essays had been written by the member before the association was formed, or before some of the other members joined the association.¹²

20. Relevancy of statements and acts. If prima facie evidence of the existence of a conspiracy is given and accepted, anything said, done or written

In rc N. Ramratnam, 1944 Mad. 302; (1944) 1 M.L.J. 91: 1944 M.W. N. 57; Balabhadra Misra v. Smt. Nirmala Sundra Devi, 1954. Orissa 23

Bali Ram Singh v. Emperor, 1939
 Nag. 295; 184 I.C. 274; 1939 N. L.
 J. 442; set also cases cited therein.

Kunwar Sen v. Emperor, 1933 Oudh 86; I.L.R. 8 Luck. 286; 141 I. C. 192.

^{8.} Sital v. R., 1920 Cal. 300; I.L.R.

⁴⁶ Cal. 700: 54 I.C. 532.

[.] Ibid.

^{10.} Taylor, Ev., s. 595.

^{11.} Taylor, Ev., s. 594. See also Superintendent and Remembrancer of Legal Affairs, Bengal v. Mon Mohan Roy, 35 I.C. 999: 17 Cr. L.J. 439: A.I.R. 1916 C. 912.

Monindra Mohan Sanyal v. Emperor, 1919 Cal. 702; I. L. R. 46 Cal. 215; 46 1.C. 152.

by any one of the conspirators in reference to their common intention is admissible in evidence against all of them, not only for the purpose of proving the existence of the conspiracy but also for the purpose of showing that any such person was a party to the conspiracy.¹²

As the wide provisions of this section apply to acts done in connection with a conspiracy, an act done by third person may possibly, under certain circumstances, be treated as evidence of the existence of the conspiracy. Mere statements of third parties, however, made in the absence of the person implicated, form a class by themselves of no probative value whatever standing alone. The mere statements of this kind made in absence of the accused, and the independent evidence required as corroboration of such a statement must be something very much more than the evidence which may ordinarily be regarded as corroborating the evidence of an accomplice. It may be circumstantial evidence or direct evidence. It must be evidence which, standing alone, would be properly treated as evidence for a jury, of proved intention, so that there would be evidence for the jury, apart from the statement of the alleged fellow conspirator, incriminating the person charged. The evidence must be proof of intention, and not merely proof of a possible motive for the intention.¹⁴

21. Illustration. In Balmokand v. Emperor. 15 Johnston, J., referring to the illustration to this section observed as follows:

"The way that the words 'and to prove A's complicity in it' come into the illustration is not quite in accordance with commonsense or with the section as I read it. I am unable to see how what B did in Europe and C in Calcutta and so forth can per se possibly touch the question of A's complicity. A's complicity can, from the nature of things, only be shown by A's acts, or, A, being otherwise shown to be a member of the conspiracy, by acts of B, C and so forth implicating him. Other acts of B, C, and rest seem to me capable as regards A only of adding proof of the existence and nature of the conspiracy. At the risk of being tedious I must give an illustration to explain my view. In the case given in the illustration, if B, in ordering arms in Europe tells the manufacturers to send the bill to A, or to consign the arms to him, this, if A is otherwise prima facie shown to be a member of the conspiracy, would be relevant both as to the nature of the conspiracy and as to A's complicity; but if B does not mention A and A's name in no way comes into the business of ordering arms in Europe, how can it be said that B's ordering of arms there can produce in the mind of the Judge any added conviction that A was a member of the conspiracy? Of course, in framing a law the Legislature can lay it down that any given thing is 'relevant' for the purpose of proving such as such; but I think I am justified in rejecting the idea that the Legislature intended by a provision of the law of evidence, to create a barren, useless and merely nominal relevancy. Anyhow one sees, after an analysis of this kind, that the question is not very important, it seems not to matter much whether a thing is technically 'relevant' against A or not, if, as a matter of fact, from the nature of things, it cannot of its own force help towards the conviction of A."

11. When facts not otherwise relevant become relevant. Facts not otherwise relevant are relevant,—

Balmokand v. Emperor, 1915 Lah.
 16; 28 I.C. 738; Lal Chand v.
 State, 1972 Raj. L. W. 675.

Mahant Jagdish Das v. Emperor, 1938 Pat. 497; 178 I.C. 324.

^{15.} A.I.R. 1915 Lah, 16 at 20: 28 I.C. 738.

- (1) if they are inconsistent with any fact in issue or relevant fact:
- (2) if by themselves or in connection with other facts they make the existence or non-existence of any fact in issue or relevant fact highly probable or improbable.

Illustrations

(a) The question is, whether A committed a crime at Calcutta on a certain day.

The fact that, on that day, A was at Lahore is relevant.

The fact that near the time when the crime was committed, A was at a distance from the place where it was committed, which would render it highly improbable, though not impossible, that he committed it, is relevant.

(b) The question is, whether A committed a crime.

The circumstances are such that the crime must have been committed either by A, B, C or D. Every fact which shows that the crime could have been committed by no one else and that it was not committed by either B, C, or D, is relevant.

s. 3 ("Fact") s. 3 ("Relevant") s. 13 (Transaction inconsistent with existence of right or custom)
s. 3 ("Fact in issue")

Steph. Dig., Art. 3; Steph. Introd., 160, 161; Norton, Ev., 124; Whitley Stokes, 11, 8, 9; Cunningham, Ev., 102; Taylor, Ev., Sections 322, 325,; Wills' Circ. Ev., Passim, Roscoe, N.P. Ev., 85, 86, 931, 934; Wigmore, Ev., Sections 135 - 144.

SYNOPSIS

1. Principle.

2. Scope.

3. Facts not otherwise relevant".

Clause (1).

(a) Consistency.

(b) Alibi.

(c) General features of alibi evidence.

 (d) Facts not truly inconsistent.
 (e) Non-existence of Entry in Account Books may be relevant under this section, if inconsistent with the receipt of the amount.

5. Clause (2).

(a) Probability.

(b) Recitals in Documents not inter partes".

(i) General.

(ii) Documents between party to the suit and a stranger. (iii) Judgments.

(c) Gases.

- (d) Admissions. (e) Judgments.
- Recitals in documents. (f)

(g) Maps.

(h) Title, question of.

6. Illustrations.

- 1. Principle. The object of a trial being the establishment or disproof by evidence of a particular claim of charge, it is obvious that any fact which either disproves or tends to disprove, or tends to prove that claim or charge is relevant.
- 2. Scope. This section attempts to state in popular language the general theory of relevancy and may, therefore, be described as the residuary section dealing with the relevancy of facts.17 While the seventh section defines the meaning of the term 'relevancy' in quasi-scientific language, the present

^{17.} Rangayyan v. Innasimuthu, A. I. R. 1956 Mad. 226, 230; (1955) 2 M.

L. J. 687.

section contains a statement in popular language of what in the former section is attempted to be stated in scientific language. The practical effect of those two sections is to make every relevant fact admissible as evidence.18

The section applies when the question is whether a fact is relevant and not when the question is whether a particular method of proof is admissible under any provisions of the Evidence Act.19 The sort of facts which the section was intended to include are facts which either exclude or imply, more or less distinctly, the existence of the facts sought to be proved.20 "The words 'highly probable' point out that the connection between the facts in issue and the collateral facts sought to be proved must be so immediate as to render the coexistence of the two highly probable."21

In the words of West, J., this section "is, no doubt, expressed in terms so extensive that any fact which can, by a chain of ratiocination, be brought into connection with another, so as to have a bearing upon a point in issue, may possibly be held to be relevant within its meaning. But the connections of human affairs are so infinitely various, and so far-reaching, that thus to take the section in its widest admissible sense would be to complicate every trial with a mass of collateral inquiries limited only by the patience and the means of the parties. One of the objects of a Law of Evidence, is to restrict the investigations made by Court within the bounds prescribed by general convenience, and this object would be completely frustrated by the admission on all occasions, of every circumstance on either side, having some remote and conjectural probative force, the precise amount of which might itself be ascertainable only by a long trial and a determination of fresh collateral issues, growing up in endless succession, as the enquiry proceeded. That such an extensive meaning was not in the mind of the Legislature, seems to be shown by several indications in the Act itself. The illustrations to the eleventh section do not go beyond familiar cases in the English Law of Evidence."22 All evidence which would be held to be admissible by English Law would be properly admitted under this section.²³ The only two limitations are:

(1) The Court must exercise a sound discretion and see that the connection between the fact to be proved and the fact sought to be given under this Section to prove it must be so immediate as to render the co-existence of the two highly probable. The section makes admissible only those facts which are of great weight in bringing the Court to a conclusion one way or the other as regards the existence or the non-existence of the fact in question. The admissibility under this section must, in each case, depend on how near is the connection of the facts sought to be proved with facts in issue and to what degree do they render facts in issue probable or improbable when taken with the other facts in the case. There must always be room for the exercise of discretion when the relevancy of testimony rests upon its effect towards making the affirmative or negative of a proposition

Markby, Ev., 17, 18.
 Soney Lall v. Darbdeo, 1935 Pat. 167; L.L.R. 14 Pat. 461; 16 P.L.T. 199 (F.B.).

^{20.} Ibid. Per Mitter, J., R. (1881) 6 C. 655, 662.

R. v. Parbhudas, (1874) 11 B. H. C. R. 90. 91: R. v. Vajiram, (1892) 16 B. 414, 425; see notes to s. 14,

R. v. Vajiram, supra at p 430, per Telang, J.

S. 11-N. 2] WHEN FACTS NOT OTHERWISE RELEVANT BECOME RELEVANT

"highly probable," and, with any reasonable use of the discretion, the Court ought not to interfere.24

(2) This section is also controlled by some more specific provisions of the Act, viz. Sections 17 to 39.25 As to the admissibility of depositions made by a person since deceased, it has been held, that unless they are admissible under Sections 32 and 33, the present section will not avail to make them evidence.1

In Sheikh Ketab-Uddin v. Nagarchand Pattok,2 it was held, that where the executants of a document containing recitals of boundaries of land are alive and do not give their evidence, such documents are not admissible under this section.

In Ambikacharan v. Kumud Mohan,3 Cumming and Mukherji, JJ., heid, that, as a general rule, Section 11 is controlled by Section 32 when the evidence consists of statements of persons who are dead and the test whether such a statement is relevant under Section 11, though not relevant and admissible under Section 32, is that it is admissible under Section 11 when it is altogether immaterial whether what was said was true or false but highly material that it was said.

In order that a collateral fact may be admissible as relevant under this section, the requirements of the law are:

- (a) that the collateral fact must itself be established by normally conclusive evidence, and
- (b) that it must, when established, afford a reasonable presumption or inference as to the matter in dispute.4

Any fact material to the issue which has been proved by the one side may be disproved by the other, whether the contradiction is complete, i.e., inconsistent with a relevant fact under the first clause of this section, or such as only to render the existence of the alleged fact highly improbable under the second clause.5

The court cannot, merely because there was evidence of previous similar actions on the part of the accused infer that the offence under inquiry must have been committed by the accused and to that extent may with advantage restrict the operation of this section. Facts which are merely of probative force cannot be offered in evidence under Section 11.6

24. R. v. Parbhudas, (1874) 11 B.H.C. R. 90 at 94. per West, J.

Rangayyan v. Innasimuthu, 1956 Mad. 226; (1955) 2 M. L. J. 687; see also the cases cited therein.

2. A. I. R. 1927 Cal. 230; 99 I. C. 907: 44 C.L.J. 582.

A. I. R. 1928 Cal. 893; 110 I. C. 521; referring to Sethna v. Maho-med Shirazi. (1907) 9 Bom. L. R. 1047; see also Thakurji v. Para-meshwar Dayal, A.I.R. 1960 All.

4. Bibi Khaver v. Bibi Rukha, (1904) 6 B.L.R. 983.

Sec. 9 is very similar to the pre-sent section as to rebutting an in-

ference: Norton, Ev., 115, v. ante, 6. State v. Lakshmandas, 69 Bom, L. R. 808, 828; 1968 Cr. L. J. 1581 A. I. R. 1968 Bom. 400, 422.

Bela Rani v. Mahabir. (1912) 34
 A. 341: 14 I.C 116: 9 A.L.J. 361;
 Latafat Husain v. Onkarmal, 1935 Oudh 41: I.L.R. 10 Luck, 423: 152 I.C. 1042: 11 O.W.N. 1589; Munna Lal v. Kameshwari Dat, 1929 Oudh 113; Mst. Naima Khatun v. Basant Singh, 1934 All. 406 at 409; I. L. R. 56 All. 766; 149 I.C. 781; 1934 A.L.J. 318 (F.B.); Sevugan v. Raghunatha, 1940 Mad. 273; 1939 M. W. N. 841.

3. "Facts not otherwise relevant". The section says "facts not otherwise relevant" (i.e., under Sections 6-10, 12 and subsequent sections) are relevant, if they fall within Clause (1) or (2). It may possibly be argued that the effect of the second paragraph of this section would be to admit proof of facts of the irrelevant character mentioned in the Introduction, ante. "It may, for instance, be said: A not called as a witness was heard to declare that he had seen B commit a crime. This makes it highly probable that B did commit that crime. Therefore, A's declaration is a relevant fact under Section 11, clause (2). This was not the intention of the section, as is shown by the elaborate provisions contained in the following part of Chapter II (Sections 12-39) as to particular classes of statements, which are regarded as relevant facts, either because the circumstances under which they are made invest them with importance, or because no better evidence can be got." "Some degree of latitude was designedly left in the wording of the section in compliance with a suggestion from the Madras Government, on account of the variety of matters to which it might apply."

The meaning of the section would have been more fully expressed, if words to the following effect had been added to it: "No statement shall be regarded as rendering the matter stated highly probable within the meaning of this section unless it is declared to be a relevant fact under some other section of this Act.7

"If an improperly wide scope be given to the section, the latter might seem to contain in itself and to supersede all the other provisions of the Act as to relevancy."8

Recitals in a document are not facts within the meaning of this Section and are, therefore, not admissible under it.9 A statement made in a document can be used as admission against the maker whether or not it was communicated to any other person.10

The section applies only when the question is whether a fact is relevant and not when it is whether a method of proof is admissible under any provision of the Act.11 "Fact" includes a statement.12 Obviously there is a difference between the existence of a fact and a statement as to its existence. Section 11 makes the existence of facts admissible, and not statements as to such existence, unless of course the fact of making that statement is itself a matter in issue.13 A letter written by tenant to the landlord which makes probable the existence or non existence of the fact of landlord having sent a notice to him is relevant and admissible under this section.14

4. Clause (1). (a) Consistency. The usual logic of the argument from essential inconsistency is that a certain fact cannot co-exist with the doing of the act in question, and, therefore, that if that fact is true of a person of whom

^{7.} Steph. Introd. 160, 161.

^{8.} Cunningham, Ev., 103.

^{9.} Kalappa v. Bhima, A. I. R. 1961

Mys. 160, Veerabasa Varadhya v. Devotees of Lungadagndi Mutt. A. I. R. 1973 Mys. 280 (A. I. R. 1959 S.G. 356 relied on).

Soney Lall v. Darbdeo, 1935 Pat, 167; I.L.R. 14 Pat. 461; 165 I.G. 470 (F.B.).

^{12.} Ram Bharose v. Rameshwar Prasad Singh, 1938 Oudh 26, 29: I. L. R. 13 Luck, 697: 171 I.C. 481.

^{13.} Mst. Naima Khatun v. Basant Singh, 1934 All. 406 at 409; I.L.R. 56 All. 766: 149 I.C. 781: 1934 A. L. J. 318. 14. M/s. B. Ram Narayan v. Smt Raina Bibi, (1972) 76 Cal. W. N. 996 I. L. R. (1973) 1 Cal. 469.

the act is alleged, it is impossible that he should have done the act. According to Professor Wigmore there are five common cases of this form of argument:

- (1) the absence of the person charged in another place (alibi);
- (2) the absence of the husband (non-access), a variety of the preceding;
- (3) the survival of an alleged deceased person after supposed time of death;
- (4) the doing of a crime by a third person;
- (5) the self-infliction of the harm alleged. 15

More cases are conceivable. Thus, to disprove a rape, evidence is admissible that the prisoner had for many years been afflicted with a rupture which rendered sexual intercourse impossible.16

(b) Alibi. Of all kinds of exculpation, the defence of an alibi, if clearly established by unsuspected testimony, is the most satisfactory and conclusive. "It must be admitted", says Sir Michael Foster, "that mere alibi evidence lieth under a great and general prejudice, and ought to be heard with uncommon caution; but, if it appeareth to be founded on truth, it is the best negative evidence that can be offered; it is really positive evidence which in the nature of things necessarily implieth a negative; and in many cases it is the only evidence an innocent man can offer."17

The theory of an alibi is that the fact of presence elsewhere is essentially inconsistent with presence at the place and time alleged, and therefore with personal participation in the act.18

It is obviously essential to the proof of an alibi that it should cover and account for the whole of the time of the transaction in question, or at least for so much of it as to render it impossible that the prisoner could have committed the imputed act; it is not enough that it renders his guilt improbable merely, and if the time is not exactly fixed and the place at which the accused is alleged by the defence to have been is not far off, the question then becomes one of opposing probabilities.19

The credibility of an alibi is greatly strengthened, if it be set up at the moment when the accusation is first made, and be consistently maintained throughout the subsequent proceedings. On the other hand, it is a material circumstance to lessen the weight of this defence, if it be not resorted to until some time after charge has been made.20 An alibi, not set up at the very earliest stage, is, in most cases, unconvincing, but that is no reason why the courts should fail to give due weight to public documents filed before them, and afford reasonable facilities for the accused to call his evidence. Usually,

^{15.} Wigmore, s. 135.
16. 1 Hale, P.G. 835; Best Ev., s. 450.
17. Foster's Disclosures on the Crown Law, p. 368; and see the observa-tions of George B, in Rex v. Brennan, 30 State Trials, 58, 79; Hadibandhu v. State, I. L. R. (1972) Cut. 1181; 1972 Cut. L. R. (Cri.) 526; (1972) 38 Cut. L. T. 1044 (A fool proof alibi is the

most effective answer to a charge). Wigmore, s. 136.

^{18.} 19. Wills' Circumstantial Evidence, 279-280; see also Jahangir Lal v. Emperor, 1935 L. 280; 150 I.C. 1056; 35 Cr. L. J. 1180.

^{20.} Wills' Circumstantial Evidence, 281. See also Dilwar v. Emperor, 1936 Lah. 233: 168 I.C. 143.

a request to call an alibi witness at the very end is vexatious and dilatory, unless the alibi has been indicated at the earlier stare 21

Witnesses to establish anything in the nat or of an alibi ought to be called by the accused person who takes that line of deence. Unless evidence of that character is tested by cross-examination on brhalf of the Crown, it is very difficult for anyone to say what value should b attached to it.22 Whenever a defence of alibi is set up and that defence utterly breaks down, it is a strong inference that if the prisoner was not in fact v ere he says he was, then, in all probability, he was where the prosecution sa,s he was.23 But, though the onus of establishing the plea of alibi set up by the accused is upon them, no presumption of their complicity in the crime arises from their failure to establish the plea. To tell the jury that such a presumption arises amounts to misdirection.24 Where, although the accused fails to establish his plea of alibi he has taken the plea at an early stage of the investigation and from the evidence his presence at the occurrence is doubtful, he is entitled to the benefit of doubt.25 But where the accused sets up a plea of alibi that he was on duty at another town on the date of occurrence, the burden of proof lies on him under Sect on 103 to establish the plea. It is not for the prosecution to prove the fact.1

The weakness or falsity of an alibi is not a sufficient ground for holding that the case for the prosecution is thereby improved.2 It is of course easy to give evidence of alibi, but where the case for the pro-ecution depends entirely on the identification in somewhat doubtful circumstances of the accused, the evidence of alibi cannot be lightly brushed aside.3 But, where there is satisfactory evidence that a man committed a crime at a certain place and at a certain time, a Court will never find any difficulty in rejecting an alibi he may seek to establish, even if that alibi is supported by what, on the surface, would appear to be satisfactory evidence.4

(c) General features of alibi evidence. Alibi, Latin for 'elsewhere', is the desence resorted to in criminal prosecutions, where the person charged alleges that he was so far distant at the time from the place where the crime was committed that he could not have been guilty.

The presence of the accused at the scene of the crime, at the time it was comm tted, is an essential factor in the proof of his guilt. The burden is upon the prosecution to prove such an act. If the defendant raises an alibi, he, in effect, is denying the claim of the prosecution that he was at the scene of the crime at the time the crime was committed. Therefore, while it is the burden of the prosecution to prove beyond reasonable doubt that the accused was present at the scene of the crime at the time of its commission, the burden of

^{21.} Sahdeo v. State of Vindhya Pra-desh, 1954 V., P. 6.

^{22.} Emperor v. Nirmal Jiban Ghose, 1935 Cal. 513 at 520; I.L.R. 62 Cal.

^{238: 157} I.C. 387. (S.B.). 23. Sarat Chandra Dhupi w. Emperor, 1934 Cal. 719 at 720: 151 I.C. 478: 35 Gr. L. J. 1335 (S.B.): Mahinder Singh v. State of Punjab, 1971 Cr. L. J. 1764; Hadibandhu v. State, 1972 Cut. L. R. (Cr.) 526: I. L. R. (1972) Cut. 118!.

^{24.} King-Emperor v. Taribullah, 1921 Cal. 252; 66 I.C. 180: 25 C.W.N.

^{25.} Pindi Das v. Emperor, 1936 Lah. 473: 163 I.C. 135: See also Nga Tin Han v. Emperor, 1933 Rang. 423: 147 I.C. 440.

^{1.} Satva Vir v. State, A:I.R. 1958 All.

^{746: 1958} Cr. L.J. 1266. 2. Nga Zaw Gyi Aung v. Emperor, 1937 Rang. 10: 166 I.C. 605; 38 Cr. L.J. 279. 3. Nga Ye Gyan v. Emperor, 1937

Rang. 267: 170 I.C. 273: 38 Cr. L. J. 890. Suraj Baksh

v. Emperor, Oudh 369; 145 I.C. 817.

going forward with the evidence in regard to a fact which is specially within his knowledge, the accused has to show that he was elsewhere at the moment of the crime and that he remained there for such a period of time as will reasonably exclude the probability that he was in the place of the crime when it was committed. The prosecution cannot be legitimately saddled with the burden of proving this negative.

It is now well settled law that, in regard to this burden of going forward with the evidence to be discharged by the accused, if he raises a reasonable doubt of his presence at the scene of the crime at the time that it was committed, it is not incumbent upon the accused to prove his alibi beyond a reasonable doubt or by a preponderance of evidence. An accused is entitled to an acquittal, if the judge has a reasonable doubt upon consideration of the evidence, viz., that offered by the prosecution to show the accused's presence and participation in the alleged crime and that offered by the accused to prove his presence elsewhere. Both aspects should be considered together. The judge must not weigh merely that relating to the alibi and determine from that alone whether he has reasonable doubt of guilt. On the other hand, he must acquit, even though the evidence to prove alibi be insufficient of itself to establish the same affirmatively, as a separate factor, if, when considered with all the other evidence, it raises a reasonable doubt. Conversely, the judge cannot also acquit the accused on the ground that the alibi evidence, considered by itself, raises a doubt. The defence of alibi is a legitimate defence, and, in fact, is often the only evidence of an innocent man. Plea of self defence may be taken in alternative to the plea of alibi s

In Bhuboni Sahu v. The King,6 their Lordships pointed out:

"An Indias villager, if he is charged with having taken part in a crime on a particular night when he was in fact asleep in his hut or guarding his crops, can only rely as a rule on the evidence of his wife, members of his family or friends to support his story. He is seldom in a position to produce more cogent and disinterested evidence of alibi. But unfortunately, on account of defence of alibi being put up as the first line of defence in most criminal cases, it has fallen into disrepute and is often characterised as a well-worn defence. Courts have generally not considered evidence of an alibi as convincing because of the case with which persons may be mistaken ir dates long after the occurrence of a particular event, the case with which an alibi may be constructed and the difficulty of proving the contrary."

In fact a learned English lawyer with 40 years' experience at the Criminal Bar, M. Purcell, writes in his book "Forty Years in the Criminal Bar":

"The defence of an alibi may endanger an innocent man; it often convicts the guilty. It always raises suspicion that it is a fraud. An innocent man can rarely prove conclusively where he was on a particular day at a particular time; most men are constantly at the same place about the same time and often with the same people. These people have to admit it was not the only occasion they saw an accused; they even have no reason, or some reason which appears unsatisfactory, for fixing the particular day. If the witnesses are relations their very relationship throws doubt on their testimony. If they are cross-examined as to incidental details they may from defective memory or from inattention or from excessive zeal in perfect good faith, flatly

^{5.} Karnail Singh v. State of Rajasthan, 6. A.I.R. 1940 P.C. 257: 50 Cr. L.J. 1977 Cr. L.J. 1729 (Raj).

contradict each other. Above all, the weakness of the alibi withdraws attention from the weakness of the prosecution. The alibis that are usually successful are those that are false and constructed by acute and intelligent men."

One form of this is where the whole story is true but events did not happen on the date of the commission of the offence. The maker of the alibi simply shifts the events to another date and therefore cross-examination will make little dent upon the alibi. This alibi is known as the Kerry alibi where the story is true in every respect except the date. This is one of the types of alibi prevalent in Ireland where the defence of alibi is as extensive as in India. (See for description of the various types of alibis in Ireland in Maurice Healy. The Old Munster Circuit, p. 168 and Edward Marjoribanks, Life of Lord Carson, Vol. I).

The requisites of a satisfactory alibi are:

- (1) that it should be pleaded at the earliest opportunity, and
- (2) that it should cover the time of the alleged offence.

The first requisite is laid down in the following decisions.7

It is interesting to note that a number of States in the United States of America, as well as Scotland, have adopted statutes and practices requiring the accused to give notice or written notice to the prosecution of his intention to present alibi evidence at the trial. Such statutes have been incidentally held to be constitutional in the United States, as they merely make a procedural regulation which is reasonable in the interests of unfair surprise.

In regard to the second requisite, in proving his aiibi, the accused should not be required to prove the exact time or every moment of time involved in order to sustain his defence. On the other hand, it is sufficient for him to raise a reasonable doubt of his presence at the scene of the crime at the time that it was committed. But, it must cover the time, when the offence is shown to have been committed, so as to preclude the possibility of the prisoner's presence at the place of the crime at the relevant time. For, if it be possible that he could have been at both places, the proof of the alibi is absolutely valueless. The failure to establish a plea of alibi does not give rise to a presumption as to his complicity in the crime. But, when all is said against an adverse inference, Judges and Juries being after all human, it is difficult to ignore the subtle effect of a plea of alibi which has utterly broken down and deliberate fabrication of evidence which is always a circumstance pointing, though never conclusively, to the guilt of the accused.8

The onus of proving a plea of alibi is on the accused.9 A statement by

Chhoga v. Rex, A.I.R. 1950 Ajmer

18: 51 Cr. L.J. 877.

8. Sarat Chandra v. Emperor, A. I. R. 1934 Cal 719: 35 Cr. L.J. 1335: 151 I.C. 473.

Gurcharan Singh v. State of Punjab, 1956 Cr. L.J. 827: A.I.R. 1956 S. C. 460, 462.

^{7.} Thiagaraja Bhagavathar v. Emperor, A.I.R. 1946 Mad. 271: 47 Cr. L.J. 785; 225 I.C. 598; Emperor v. Sheo Janak Parde, A.I.R. 1934 All, 27; 35 Cr. L.J. 364; 147 I. C. 238; Dilwar v. En:peror, A.I.R.
 1936 Lah. 283: 37 Cr. L.J. 751;
 163 I.C. 143; Ramadhin v. Emperor, A.I.R.
 1929 Nag. 36

the accused that he was away from his place for a period of nine days attending a cattle fair is not sufficient to sustain a plea of alibi.10

- (d) Facts not truly inconsistent. Facts not truly inconsistent with any fact in issue or relevant fact are not relevant. In considering only the sole question whether a deed has been executed within the meaning of Section 35 of the Indian Registration Act, questions like valuation, absence of necessity for sale, etc., cannot be relevant under this clause as they cannot be said to be truly inconsistent with the fact in issue, within the scope of Sections 35 and 37 of the Registration Act.11
- (e) Non-existence of Entry in Account Books may be relevant under this section, if inconsistent with the receipt of the amount. The section provides that facts not otherwise relevant are relevant, if they are inconsistent with any fact in issue or relevant fact. Where, therefore, a fact in issue is whether payment of a certain sum of money was made to a particular person, the absence of entries in the account books of the person, to whom the payment is alleged to have been made, would be inconsistent with the receipt of the amount, and would thus be a relevant fact which can be proved under this section.12

Absence of an entry of mutation in the revenue records may be relevant under this section, but the value of such absence would depend on other evidence, because it may be due to the fact that public servant was not required to make entry in respect of every land or that he deliberately or negligently failed to make some entries.18

Pukar register and documents relating to prosecution of truck drivers are admissible in evidence to show corrupt practice.14

5. Clause (2): (a) Probability. Facts which, as a matter of ordinary logic or experience, tend to render the existence or non-existence of the main fact highly probable or improbable, are relevant and admissible under this clause. By "probability" is meant likelihood of anything to be true, deduced from its conformity to our knowledge, observation and experience. When a supposed fact is so repugnant to the Laws of Nature, assumed for this purpose to be fixed and immutable,15 that no amount of evidence could induce us to believe it, such supposed fact is said to be impossible, or physically impossible. There is likewise moral impossibility, which however, is nothing more than a high degree of improbability. As the knowledge, observation and experience of men vary in every imaginable degree, their notions of possibility and probability might naturally be expected to differ.16 The clause does not make all facts, which make the existence or non-existence of a relevant fact probable or improbable relevant. The expression "highly probable or improbable" in it

^{10,} Dinker Bandhu Deshmukh v. State, 72 Bom. L.R. 405; 1970 Mah. L. J. 634: 1970 Cr. L.J. 1622: A.I.R. 1970 Bom. 438, 447.

Rajendra Singh v. Ramganit Singh, 1954 Pat. 556.

Andhra Pradesh v. Gan-State + of eswara Rao, A.I.R. 1963 S.C. 1850; (1963) 2 Cr. L. J. 671. 13. Hetram v. Bhader Ram, 1973 W.L.

N. 981 (Raj). 14. Pratap Singh v. Rajender Singh, A. I.R. 1975 S.C. 1045.

^{15.} The judicial proceedings of mo-dern times are conducted on the assumption that the Laws of Nature are fixed and immutable; not from disbelief in miraculous interposition, but because such interposition is unquestionably rare, and it would be dangerous in the highest degree if tribunals were allowed to adopt its supposed occurrence. as a principle of decision.

^{16.} Best, Ev., 8s. 24-25

is significant. It indicates that the connection between the facts in issue and the collateral facts sought to be proved must be so immediate as to render the co-existence of the two highly probable or improbable.¹⁷ The facts sought to be proved must be so closely connected with the fact in issue or the relevant fact that a Court will not be in a position to determine it without taking them into consideration.¹⁸

Salient omission of very important facts from the F. I. R. which constitute an important link of the prosecution story would go to affect the probabilities of the case and are relevant under this section.¹⁹

One particular instance of bad faith and mala fides in a transaction cannot render the issue of bad faith and mala fides in a totally different transaction highly probable. The words "highly probable" indicate a state of more than normal standard of probability.²⁰

A Court is not precluded from allowing its decision to be affected by a consideration of probabilities, even where there is positive evidence to the contrary,²¹ but, in order to prevail against such evidence, the improbability must be clear and cogent it must approach very nearly to, if it does not altogether constitute, an impossibility.²²

Where the parties to a suit are at issue on a vital question and the evidence is conflicting, the safest principle for the Court is to consider which story fits best with the admitted circumstances and the resulting probabilities.²³

If the statement in a document executed before the controversy in the suit had raised its head renders a fact in issue (the issue of being joint) improbable, the statement is admissible under section 11 (2).24

(b) Recitals in documents not inter partes: (i) General. Recitals in documents, not inter partes, are not "facts" within the meaning of the section unless the existence of those recitals is itself a matter in issue.²⁵ If a statement does not fall within section 32, it cannot be admitted under this section.¹ There is

17. S.H. Jhabwalla v. Emperor, 1933 All 690 at 705; 145 I.C. 481: 1933 A.L.J. 799; Bhuriya v. Ram Kali, A.J.R. 1971 Punj. 9 at pp. 11, 12; see also R. v. Vyapoory, 6 Cal.

18. Rajendra Singh v. Ramgenit Singh,

1954 Pat. 556 at 559 per Banerji, J.

19. R. K. Pande v. State of M.P., 1975
Cr. L.J. 870 :A.I.R. 1975 S.C.
1026; Pyare Mian and others v. The
State of Rajasthan, 1976 Raj. Cri. C.
243.

 Babulal v. Western India Theatres, A.I.R. 1957 Cal. 709.

21. Surendra Krishna Mandal v. Ranee Dassec. 1921 Cal. 677; 59 I.C. 814;

33 C.L.J. 34. 22. Chottey Narain v. Ratan Koer, (1894) I.L.R. 22 Cal. 419, 431: 22 I.A. 12 (P.C.) per Lord Watson.

23. Davis v. Maung Shwe Goh, (1911) 38 L.A. 155; L.E.R. 38 Cal, 805.

 Jaigobind Singh, v. Brij Bahadur Singh, A.I.R. 1966 Pat. 168, distinguishing Soneylai Jha v. Dayahdeo Narain Singh, A.I.R. 1935 Pat. 167 (F.B.) and Nihar Bewa v. Kadar Bakas Mohamed, A.I.R. 1923 Cal. 290.

25. Raviappa v. Nilakanta Rao. A. I. R. 1962 Mys. 53: see also Radha Krishna v. Sarbeswar. 86 I.G. 674: A. I. R. 1925 C. 684 (2); Soneylali v. Darabdeo Narain Singh, I. L. R. 14 Pat. 461; A. I. R. 1935 Pat. 167 (F.B.); Mst. Naima Khatun v. Basant Singh, I. L. R. 56 A. 766; A. I. R. 1934 A. 406; Lal Chand v. State, 1972 Raj. L. W. 675; V. A. A. Mainar v. A. Chettiar, A. I. R. 1972 Mad. 154; Pachhakhan v. Gopalakrishna, (1975) I. Kant. L. J. 105; A. I. R. 1975 Kant. 179 (unless they amount to admission against interest of such party).

 Mst, Naima Khatun v. Basant Singh supra; R. G. R. Institute v. State, A.I.R. 1976 Kant. 75; Lal Chand v. State, 1972 Raj J. W. 675.

a difference between the existence of a fact and a statement as to its existence. This section makes the existence of facts admissible, and not statements as to such existence, unless the fact of making that statement is itself a matter in issue. In other words recitals in a document are not "facts" as mentioned in this section, unless the existence of those recitals is itself a matter in issue.2 The clause does not cover a recital by a third party relating to the ownership of a house in which he has admittedly no interest.3 The clause does not apply to recitals of such a type whether made by persons living at the time of the controversy or dead; if the person making the recital is dead, it does not fall under section 32 (3).4

- (ii) Documents between party to the suit and a stranger. In a suit in which the plaintiff claims a certain title to property, the recitals in a document between him and a third party, which lend support to his title are not admissible in evidence under sub section (2) of the section,4-1 unless it amounts to admission against the interest of such party.4-2 A fact to become admissible under this section should be such as to make the existence of a fact in issue or relevant fact highly probable or improbable and not merely probable or improbable,5
- (iii) Judgments. A judgment not inter partes, as for instance, in a land acquisition reference and relating to land situate near the land in question, is not admissible in evidence, either as an instance or one from which the market value of the land in question can be inferred or deduced. Such a judgment cannot fall under sections 40 to 43 or under this section. Although this section is expressed in wide terms, yet it is not open to any wide construction. The ort of facts, the section is intended to include, are those which either exclude or imply more or less distinctly the existence of facts sought to be proved. As already stated, there is a distinction between the existence of a fact and a statement as to its existence. It is the former only that is relevant under this section. The words "highly probable" in this section point out that the connection between the fact in issue and the collateral fact sought to be proved must be so immediate as to render the co-existence of the two highly probable. The admissibility of a particular piece of evidence offered must be so closely connected with and in fact must depend on the weight to be attached to that piece of evidence, if it is taken into consideration.6

2. Mst. Naima Khatun v. Basant Singh, I.L.R. 56 A 766: A.I.R. 1934 A. 406 : Lal Chand v. State, 1972 Raj. L.W. 675.

Bhuriya v. Ram Kali, supra,

Mys. 160.

6. Special Land Acquisition Officer v. Lakhamsi, A.I.R. 1960 B, 78; 61 Bom, L. R 1032.

^{3.} Bhuriya v. Ram Kali, A. I. R. 1971 Punj. 9 at pp. 11. 12; Abdulla v. Kunj Behary Lal. (1913) 14 C. L. J. 467 (decision of Mookerjee and Cunliffee, JJ.) followed in Seroj Kumar Acharji Chowdhuri v. Umed Ali Hawaldar, 25 C. W. N. 1022: A.I.R. 1922 Cal. 251; Choni Lal Kesarwani v. Nil Madhub Barik, A. I. R. 1925 Cal. 1034; Lajpati Rai v. Faiz Ahmad, A. I. R. 1927 Lah. 448 followed in Ghulam Mr hammad v. Kalim Ullah, A. I. R.

¹⁹²⁸ Lah. 428; Prem Nath Choudhuri v. Chandra Bhattacharjee, 28 C. W. N. 1092: A. I. R. 1924 Cal. 1067.

V. A. A. Mannar v. A. Chettiar. A. I. R. 1972 Mad. 154.
 Pachakhan v. H. D. Gopal Krishna Rao. (1975) 1 Kant. L. J. 105; A. I. R. 1975 Kant. 179; I. I. R. 1975 Kant. 25.
 Kalappa v. Bhima, A. I. R. 1961 Mys. 160

This section speaks about collateral facts only as being relevant. A judgment, not inter partes, not being a fact, cannot be relevant under this section, which has no reference to judgments which are opinions in regard to the existence or non-existence of certain facts.7

Judgments, not inter partes, can be admitted in evidence under certain circumstances and for certain limited purposes under the provisions of Section 43 read with this section and Section 13. They can be treated as pieces of evidence and taken into consideration along with the other cyidence.8

Where a previous judgment or an award makes the existence of certain facts highly probable, it becomes relevant under sub-section (2) of this section.9

(c) Cases. Where the accused was charged under the Arms Act for being in possession of a revolver on a particular date, it was held that the fact, that three weeks previously the accused was displaying a revolver similar in size and appearance to that with the possession of which he was charged, made the fact in issue-the possession of revolver-highly probable and was therefore relevant under this section.¹⁰ But the mere physical presence of the accused in close proximity to the object cannot be an incriminating circumstance. Possession of a hidden firearm alone without knowledge will not amount to an offence under the Arms Act.11 In a case of conspiracy close association of the accused with the approver was held to be relevant, under this section, as making the existence of the conspiracy highly probable,12 Where one of the main questions for determination, in a case, was whether a document, then impugned, was or was not presented before the Registrar by one NS, a comparison of the thumb impression of the person who presented the document with that of NS was held to be admissible under the second clause of this section, since dissimilarity of the impressions made the identity of that person with NS highly improbable.13

When the question was whether a deed was forged or not, it was held admiss ble to prove that the titles recited in the deed as those of the then reigning Sovereign were not in fact then used by that Sovereign.14 And when the question was whether A lent money to B, evidence of the poverty of A, about the time of the alleged loan, was held admissible as tending to disprove it.15

Under sub-section (2) of the section, facts may be put in evidence in corroboration of other relevant facts, if they render them highly probable.16 Where two or more persons perish by a common calamity, such as a shipwreck, and the question arises whether A survived B, then although the law of England raises no presumption either of survivorship or contemporaneous death, yet, if any circumstances connected with the death of either party can be proved,

8. Collector, Bilaspur v. Lachhman, A. I. R. 1965 H.P. 18.

Hrishikesh v. Khantamani, R. 1959 C. 257.

10. Saroj Kumar Ghakravarty v. Fm-

peror. 1932 Cal. 474; I.L.R. 59 Cal. 1361; 139 I.C. 873. II. In re K. Thimma Reddi, A. I. R. 1957 Andh, Pra. 758; 1957 Cr. L. J. 1091.

- Emperor v. Wahiduddin, 1930; Bom, 157; I. L. R. 54 Bom, 524; 127 I. C. 189; R. v. Fakir, (1896) 1 G. W. N. 12. Wahiduddin, 1930-
- 33, pp. 33, 34.
- 11. Lady Ivy's case, (1684) 10 St. Tr. 555, 627; Steph. Dig., Art. 9, Illus-
- tration (d). 15. Dowling v. Dowling, (1860) 10 Ir. C.L.R. 236 cited in Phipson, Ev. 11th Ed., 126.

Norton, Ev., 124.

Special Land Acquisition Officer v. Lakhamsi, A.1 R. 1960 B. 78: 61

the whole question of survivorship may be dealt with as one of fact, and the comparative strength, or skill, or energy of two sufferers may be taken into account in estimating the probabilities of the case.17

Where the question is whether A is the child of B, evidence of the resemblance, or want of resemblance, of A to B is admissible.18 So also, circumstances may be proved which render the fact of payment of a debt probable, as for instance, the settlement of accounts subsequent to the accruing of the debt, in which no mention is made of it,19 as also that the party claiming to have paid the debt was afterwards in possession of the document creating it.20 Evidence to show a particular line of action the accused would probably take has been held to be admissible.21

A schedule annexed to an award in a partition suit setting out the deposits or investments made by strangers with the parties therein was held admissible in the suit filed by the depositors for recovery of the amount deposited. The award was not an admission but the schedule made the claim of the plaintiff highly probable and as such relevant under sub-section (2) of this section. As the award contained a recital that the amounts had been claimed by the deposifors, it was a relevant circumstance under Section 13 of this Act.22

Batwara papers can be treated as evidence against strangers only under this section, but they are not binding on them.23 Chitta extracts, as regards lands held by tenants, are admissible against third parties.24 Where defendants Nos. 2 and 4 sold a jote to defendant No. 1, which they obtained under a partition, and subsequently colluded with the plaintiff and denied the said partition, as well as the sale, the statements previously made by them, which went to show that there had been a partition and they had changed their attitude, were held to be admissible as against them under the third sub-section of twenty-first section and the second sub-section of this section.25 In the undernoted rase, in whilh the question was as to the permanency of certain leases in suit, instonces of alleged recognition of the successors of the grantees were adduced, relating to other leases. It was argued that, as all the leases were granted at or about the same time under similar circumstances, and on similar terms, acts and conduct of the parties indicative of an intention that any of these leases was perpetual should be evidence of a similar intention with regard to all the other leases. The Court, however, held, that it was unable to accept this argument as correct in its broad generality. It pointed out that if it had been shown that in the case of a fairly large number of these leases, there was recognition of the successors of the original grantees, and such recognition was not explained by the other side as being the result of anything peculiar to the leases to which the recognition related, the fact that the intention indicated by the acts and

Taylor, Ev., s. 203: Best, Ev., S. 410: Underwood v. Wing, (1854) 4 D. M. and G. 633; Wing v. Angrare. (1860) 8 H. L. C. 183.

18. Burnaby v. Baillie, (1889) 42 Ch.
D. 282, 290.

^{19.} Colsell v. Budd, (1807) 1 Camp.

^{20.} Brenbridge v. Osborne, (1816) 1 Starkie, 374 see for similar cases, Taylor, Ev., s. 178, Best Ev., s. 406; and other cases dealt with by these authors under the head of Pre-

sumptive Evidence.

^{21.} Satindra v. R., (1928) 47 C. L. J. 444; 111 I.C. 369; A. I, R. 1928 C. 438.

Hrishikesh v. Khantamani Dasi, A.

I. R. 1959 Cal. 257. Rahimuddin v. Umesh Chandra, 1926 Cal. 115: 87 I.G. 694.

Abdul Khalique v. Susil Chandra, 39 C. W. N. 330. Gyannessa v. Mobarakunnessa, 25

Cal. 210; (1897) 2 C. W. N. 91.

conduct of the parties was to make these leases perpetual would make it highly probable that the same was the intention with regard to the leases in disputes, and the facts relating to these leases would, therefore, have been relevant facts under the second sub-section of this section. But such a fairly large number of instances were not proved and the instances so far as they were proved had been explained as being either insufficient or as being the result of peculiarities in the circumstances of the leases to which they belonged.1 Where an oral lease was denied and the sale-deed in favour of the person suing as landlord was alleged to be bogus, evidence as to the nature of the sale-deed was held to be relevant on the question of existence or non-existence of the oral lease.2 When the question was whether a deceased person had married a lady and a draft of a will, not written by the testator himself, and containing no mention of the lady, was tendered in evidence under this section, it was held to be inadmissible inasmuch as it was not a written statement made by the deceased testator.8

A statement in an application for probate as to the date of the death of the last holder of the property is admissible.4 In a suit for rent of land from defendant, plaintiff alleged that he bought the land from the defendant and thereafter leased it to him year by year, and the defendant totally denied the sale and the lease; it was held that the fact in issue was the lease alone, but that evidence might be given for the fact of the sale also, as a relevant fact, corroborative of the fact of the lease.5 When the question is, whether the accused is an habitual cheat, the fact, that he was a member of an organization formed for the purpose of habitual cheating, is relevant under this section, and the facts of such membership and such cheating may be proved against each of the members of the organization.6 An intercepted letter, written by the accused referring to a telegram signed with a different name but sent from his address, is relevant against him under this section as prima facie evidence that he had sent the telegram.7 In the undernoted case, A and B were charged with theft committed in 1914 in the house of a prostitute and evidence was brought forward to show that C and D committed a theft in the house of another prostitute in 1918 in somewhat similar circumstances. It was held (Chaudhuri, J. dissenting) that the evidence was not admissible either under Section 9 or under this section to prove that A and B were the same persons as C. and D.8 Where the question was whether a fire at a factory in 1940 was intentional and evidence was tendered of another fire in 1932 in another mill owned by the same proprietor, it was held inadmissible under this section.9

An entry made in a register of indoor patients in a hospital is admissible in evidence to prove that the person mentioned in the entry was in the hospital on a certain date.10 In the undernoted case, the accused was charged with having caused grievous hurt to one of his wives and killed another. The wounded woman on the day of occurrence, on her arrival in hospital, made a statement to a Magistrate to the effect that it was accused who had attacked

Ram Narain, 30 C. Narsingh

Narsingh v. Ram Narain, 30 C. 883, 896, 897.
 Sh. Rashid v. Hussain Bakash, 1943 Nag. 265; I.L.R. 1943 Nag. 340: 207 I. C. 472; 1943 N. L. J. 318.
 Haji Saboo v. Ayeshhabai, (1903) 7 C. W. N. 665: 27 B. 485 (P.C.).
 Lachuman Lal v. Kamakshya Narayan, 1931 Pat. 224; 12 Pat. L. T. 891; 131 I.C. 788.
 Kaung v. San, 3 L.B.R. 90.

Kalu v. R., (1909) 37 C. 91.
 Booth v. Emperor, (1914) 41 C. 545: A. I. R. 1914 C. 649,
 R. v. Panchu Das, 1920 Cal. 500: I. L. R. 47 C. 671: 58 I.C. 929: 21 Cr. L. J. 849: 24 C.W.N. 501: 31 C. L. J. 402 (F.B.).
 A. H. Gandhi v. The King, 4941 Rang. 324: 1941 Rang. L. R. 566.
 Amolak v. R., 19 Cr. L. J. 141.

herself and co-wife. This statement was admitted and placed before the jury. It was held that the mere fact that the woman made a statement had no bearing on the main fact in issue and this section does not justify the admission of the contents of the statement.11

When the market value of land for acquisition is determined on the basis of sales of similar property at or about the same time, what is relevant under Section 9 or this section is not whether there was a valid transfer of title but the price actually paid for the property.12

- (d) Admissions. Admissions are relevant and may be proved as against the person who makes them, but they cannot be proved by or on behalf of the person who makes them except in the three cases mentioned in Section 21, post. But even self-serving statements are admissible under this section where they make relevant facts highly probable or improbable or where they are res gestae.13.
- (e) Judgments. This section only refers to certain facts and not to opinions of certain persons, in regard to those facts. It does not make such opinions to be relevant, and judgments after all of whatever authority are nothing but opinions as to the existence or non-existence of certain facts. These opinions cannot be regarded to be such facts as would fall within the meaning of Section 11 of the Act unless the existence of these opinions is a fact in issue or a relevant fact which is of course a different matter.14 Previous judgments not inter partes are not therefore admissible, except in certain circumstances for limited purposes. 15 The provisions of this section and Section 13 read with Section 43 do not make the judgment of the Sessions Court, acquitting two of the accused who were absconding and whose case was separated, admissible in evidence in a revision by the other accused convicted for offences relating to the same transaction.16 For further discussion as to the admissibility of judgments, see notes under sub-head (b), sub-sub-head (iii) supra, and section 13, post.
- (f) Recitals in documents. Recitals of boundaries in documents not inter bartes are relevant and admissible under Sections 157, 32 (2), 13 and 11 of his Act, the particular circumstances of the case determining the particular

54 I.C. 887; 21 Gr. L. J. 183; A. I. R. 1920 G. 90.

12. State of Kerala v. Mariamma Abraham, I. L. R. (1969) 1 Ker. 455; A. I. R. 1969 Ker. 265, 269.

13. Harihar Prasad Singh v. Maharaja Kesho Prasad Singh, 1925 Pat. 68; 5 P. L. T. Sup. 1, per Dawson Miller, C. J. and Foster, J. See also Sayeruddin Akonda v. Samiruddin Akonda, 1923 Cal. 378; 72 I.C. 985; Inderdeo Rai v. Deo Karan Rai, 1955 Pat. 292; Ram Bharosc v. Diwan Rameshwar Pra-Bharosc v. Diwan Rameshwar Prasad; 1938 Oudh 26; I. L. R. 13 Luck. 697: 171 I. C. 481: 1937 O. W. N. 1058; Jwala Singh v. Prem Singh, A. I. R. 1972 Delhi

221. 14. B. N. Kashyap v. Emperor, 1945 Lah, 23 at 26; I. L. R. 1944 Lah.

408; 217 I.C. 284 (F.B.); In re

408: 217 I.C. 284 (F.B.); In re Antonius Raab, 1950 Bom, 101: I. L. R. 1949 Bom, 537: 51 Cr. L. J. 558: 51 Bom, L. R. 852. Hem Chandra v. Puran Chandra, 1934 Cal. 788: 153 I.C. 134: 59 C. L. J. 320; Gopal Rao v. Sita Ram, 1927 Nag. 19: 97 I.C. 694: 9 N. L. J. 215; Vednath Singh v. Mahomed, 1934 Rang, 212: 154 I.C. 123; Dhanjishaw Rattanji Karani v. Bombay Municipality, 1945 Bom. Bombay Municipality, 1945 Bom. 520; I. L. R. 1945 Bom. 547; 47 Bom. L. R. 804; see also Kalicharan v. Emperor, 1927 All. 654 (2); 104 I.C. 225; M. Misbahuddin v. Vidya Sagar, 1935 Lah. 64: 156 I.C. 268: 36 P. L. R. 106.

Bhojjagani Moogadu, In re, (1971)
 Andh. W. R. 316; 1971 M. L.
 J. (Gr.) 361, 364.

^{11.} R. v. Abdul, 23 C. W. N. 933: 54 I.C. 887; 21 Gr. L. J. 183; A.

section applicable to the facts of that case. The probative value to be attached will also equally depend upon the circumstances of each case and may vary all the way from zero to almost clinching evidence.¹⁷

Copies of printed newspapers containing an account of some proceedings, found in possession of one accused (a) are evidence of the fact of the publication of such an account in that paper; but (b) are not by themselves evidence of the truth of the fact stated therein, unless in connection with other facts they make the existence or non-existence of the facts mentioned "highly probable or improbable." For further discussion, see notes under sub-head (b), sub-sub-heads (i) and (ii), supra.

- (g) Maps. The mere proof of a map by itself is only proof of the fact that the map was prepared by the maker thereof. The fact that a particular person prepared a map or, in other words, made certain statements by lines cannot, without or apart from and independent of the proof of the correctness of its contents, have any bearing on the matters in issue in the case.¹⁹
- (h) Title, question of. On questions of title, repeated acts of ownership with respect to the same property are, under the thirteenth section, post, receivable, and even acts done with respect to other places connected with the locus in quo by "such a common character of locality as to give rise to the inference that the owner of one is likely to be the owner of the other"²⁰ are sometimes under the present section receivable. In Jones v. Williams,²¹ Parke, B., said that "evidence of acts in another part of one continuous hedge adjoining the plaintiff's land was admissible in evidence on the ground that they are such acts as might reasonably lead to the inference that the entire hedge belonged to the plaintiff." In other words, they are facts which, by this section are relevant, because they make the existence of a fact in issue highly probable.²² When a question as to the ownership of land depends on the application to it of a particular presumption, capable of being rebutted, the fact that it does not apply to other neighbouring pieces of land similarly situated is deemed to be relevant.²³ So when the question is, whether A, the owner of

S. H. Jhabawalla v. Emperor, 1933
 All. 690; see also Pratap Singh v.
 Ved. 1955 Sau. 68.

Dwijesh Chandra Roy v. Naresh Chandra Gupta, 1945 Cal. 492: 49
 C. W. N. 791; see also Gokul Prasad v. Mahant Harisaran Das, 1947
 Oudh 98: I. L. R. 22 Luck. 270: 229 I.C. 112: 1947 O. W. N. 30.

20. Jones v. Williams, (1837) 2 M. & W. 326; Bristow v. Cormican, (1878) 3 App. Cas. 641, 670; Neill v. Devonshire, (1877) 8 App. Cas. 135, Lord Advocate v. Lord Blantyre, (1879) 4 App. Cas. 770; Sabran v. Odoy Mahto, 1922 Pat. 488: 1 Pat. 375; 70 I.C. 18; Taylor, Ev., ss. 322—325; Roscoe, N. P. Ev., 85, 86, 931, 934; Steph. Dig., Art. 3; see notes to s. 13, post. The rule in Jones v. Williams, (1837) 2 M. & W., 326 and Lord Advocate v. Lord Blantyre, (1879) 4 App. Cas. 791 was observed upon in Mohini v. Promoda, (1896) 24 C. 256.

(1887) 2 M. & W. 326 at p. 331.
 Naro Vinayak v. Narhari, (1891) 16
 B. 125, 128; per Sargent, C.J. referred to in Gyannessa v. Mobarkunnessa, (1897) 25 Gal. 210. 2 C. W. N. 91.

23. Steph, Dig. Art. 3.

^{17.} Rangayyan v. Innasimuthu Mudali, 1956 Mad. 226: (1955) 2 M. L. J. 687; see also Raghunath v. Bindeshwari, 1924 All. 526: 82 I. C. 582; Mst. Katori v. Om Prakash, 1935 All. 351; 150 I.C. 868: 1934 A. L. J. 597; Thakur v. Lalji, 1934 Pat. 81; 150 I. C. 884; Inderdeo Rai v. Deokaran Rai, 1955 Pat. 292, but see Pramatha Nath v. Krishna Chandra, 1924 Cal. 1067; 84 I.C. 420: 28 C. W. N. 1092; Acharji Chowdhury v. Umed, 1922 Cal. 251; 25 C. W. N. 1022: 63 I.C. 954.

one side of a river, owns the entire bed of it, or only haif the bed at a particular spot, the fact that he owns the entire bed little lower down than the spot in question is deemed to be relevant.24 In like manner, when the question is, whether a piece of land by the roadside belongs to the lord of the manor, or the owner of the adjacent land, the fact that the lord of the manor owned other parts of the slip of land by the side of the same road is relevant.25 And, in a suit brought by the plaintiff against several defendants to prevent encroachments by the defendants, the admission of one of the defendants in a previous suit to which the other defendants were not parties, as to the common character of the portion of the land between his house and the plaintiff's and also a similar statement in a deed put in by another of the defendants to prove his title to his own house, are admissible in evidence to establish the common character of the entire lane as alleged by the plaintiff. The fact of common ownership of other parts of the lane should be treated as relevant to the issue as to the common character of the entire lane on the principle laid down in this section.1

6. Illustrations. Illustration (a) is an example of a fact rendering the hypothetical fact on the other side not positively impossible, but highly improbable, as often happens when the question is, whether there was time for the accused to have gone from the place where he says he was to the scene of the crime and returned again.

Illustration (b) is a disjunctive hypothetical syllogism-X is either A or B or C, but it is not B or C; therefore it is A.2

12. In suits for damages, facts tending to enable Court to determine amount are relevant. In suits in which damages are claimed, any fact which will enable the Court to determine the amount of damages which ought to be awarded, is relevant.

s. 3 ("Facts") s. v. ("Relevant") s. 55 ("Character as affecting damages").

Roscoe, N.P. Ev. passim, sub voc. "Damages"; Norton, Ev., 124; Mayne on Damages, Law of Torts, 3rd Ed. by Anand and Sastri; Pollock on Torts; Act IX of 1872 (Contract Act), Sections 73-75, 125, 150-152, 154, 180, 181, 205, 206, 211, 212, 225, 235; Sale of Goods Act (III of 1930), Sections 56-61; J. P. Singhal and E. S. Subrahmanyan, Indian Contract Act (1967).

SYNOPSIS

1. Principle.

Suits for damages. Evidence in mitigation or aggravation of damages.

- (a) Libel.
- (b) Seduction, etc.

(c) Adultery,

Injury to feelings, relevancy of

5. Character, evidence of.

6. Statements made "without prejudice".

1. Principle. In suits in which damages are claimed, the amount of the damages is a fact in issue. See notes, post.

ss. 320-325.

1. Naro Vinayak v. Narhari,

16 B. 125, 128.
2. See Whitley Stokes, 861. note (3):
Cunningham, Ev., 103; Norton, Ev., 124.

Steph, Dig, Art. 3; Jones v. Williams, (1837)
 M. & W., 326 (see note to s. 13, post); followed in Naro Vina-yak v. Nathari, (1891) 16 B. 125. 25. ib., Doe v. Kemp., (1835) 7 Bing 332; 2 Bing. N. C. 102; Taylor, Ev.,

2. Suits for damages. Damages, which are the pecuniary satisfaction which a plaintiff may obtain by success in an action, are, unless expressly admitted, deemed to be a fact in issue.8 Damages may be claimed either in an action on contract4 or tort.5 The question, as to when damages may be recovered, and the amount of damages recoverable in particular suits as well as the defence pleadable in such suits, is a portion of the particular branch of the substantive law under the provisions of which these suits are brought,6 and, therefore, the present section does not specify how the facts made relevant by it are to be related with the injured property, person or reputation, but lays down generally that evidence tending to determine, i.e., to increase or diminish the damages, is admissible.7

In determining the amount payable as compensation for the acquisition of land, if a person, who had made an offer for the purchase of that land, himself gives evidence, such evidence is relevant in that it is his opinion that the land was of a certain value.8

3. Evidence in mitigation or aggravation of damages. (a) Libel. In an action for libel, other libellous expressions by the delendant, whether used before or after the commencement of the suit, are sometimes admissible, for the plaintiff to show the malevolence of the defendant, and so to enhance damages. On the other hand, evidence of circumstances, which, according to the law of libel, have the effect of mitigating damages, is admissible in evidence for the defendant,9

Where the defamatory statement, complained of, is an imputation of bad conduct towards a woman and truth is pleaded in defence, evidence that the woman herself made statements to that effect to a number of persons is relevant under this section in order to assist the court in assessing the damages to be awarded.10 Where the complainant prosecutes the defendant for defamation in a criminal Court where his reputation is vindicated by the conviction of the defendant, his subsequent action in launching an action for damages cannot be regarded as, in any sense, other than vindictive, and this circumstance can be properly taken into account in deciding the amount of damages to be awarded.11

(b) Seduction, etc. Evidence in mitigation or aggravation of damages may be further illustrated by the cases on actions for seduction, assault, false imprisonment, trespass, trover, etc. Thus, where the defendant had given the plaintiff in charge of a constable for felony, he was allowed to show reasonable ground of suspicion in mitigation of damages.12 So also, in actions for assault,

See Roscoe, N. P. Ev., 864, 878.
 See Contract Act (IX of 1872), Ss. 73-75, 125, 150-152, 154, 180, 181, 205, 206, 211, 212, 225, 235 and Sale of Goods Act (III of 1933), Ss., 56-61.

See Alexander's "Indian Case Law on Torts": Pollock on Torts, Draft Indian Civil Wrongs Bill, ib., p.

^{6.} Singhal on Damages and Compensation, 1970; Roscoe, N. P. Ev., sub. voc "Damages".

Norton, Ev., 124; Roscoe, N. P. Ev., 86.

^{8.} Raghubans Narain Singh v. The U. P. Government, (1967) 1 S. C. R. 489: (1967) 2 S. C. J. 214: (1967) 1 S. C. W. R. 1005: I. L. R. (1967) 1 All. 204: A. I. R.

¹⁹⁶⁷ S.C. 465, 467.

9. Roscoe, N. P. Ev., 864, 878.

10. Ma Sein Tin v. U. Kayaw Maung, 1936 Rang, 332; 164 I.G. 385. 10.

^{11.} ibid.

Chinn v. Morris, (1826) Rv. & M. 424: Roscoe, N. P. Ev., passium sub voc, "damages", Norton, Ev.

the provocation offered by the plaintiff would be relevant under this section and in action against Railway Companies for injuries received, the position, circumstances and earning of the plaintiff, the precautions taken by the Company, and the contributory negligence, if any, of the plaintiff13 would be similarly relevant.

In an action for breach of promise of marriage, the plaintiff may give evidence of the defendant's fortune, for it obviously tends to prove the loss sustained by the plaintiff; but not in an action for adultery,14 nor for seduction,15 nor for the malicious prosecution, for it is nothing to the purpose in an action on tort "whether the damages come out of a deep pocket or not."16

- (c) Adultery. In an action for adultery, the conduct of the husband must be looked to. The facts that the husband and wife had been leading an unhappy life before they parted, that he knew she had no means of living and made no earnest inquiry after her and that in the ordinary course of things she yielded to the temptation of securing support of some other man have to be taken into consideration in assessing the damages.17
- 4. Injury to feelings, relevancy of. Injury to the feelings is irrelevant in an action on contract as an element of damage; but, in actions on tort, heavy damages may be given on this score. In Hamlin v. Great Northern Railway Company,18 it was said:

"The case of a contract to marry has always been considered as a sort of exception in which not merely the loss of an establishment in life, but, to a certain extent, the injury to a person's feelings in respect to that particular species of contract, may be taken into account; but, generally speaking, the rule is this, in the case of a wrong, the damages are entirely with the jury, and they are at liberty to take into consideration the injury to the party's feelings and the pain he has experienced, as, for instance, the extent of violence in an action of assault, and many topics, and many elements of damage, find place in an action for tort, or wrong of any kind, which certainly have no place whatever in an ordinary action of contract."19

This principle is well illustrated in actions for libel where the injury to the feeling is always an element of consideration.20 The circumstances of time and place, when and where the insult was given, require different damages; thus, it is a greater insult to be beaten upon the Royal Exchange than in a private room,21 and, in trespass, the jury may consider not only the pecuniary

17. Keyse v. Keyse, (1886) L. R. 11

19. See Williams v. Currie, (1845) 1 C. B. 841; Sears v. Lyons, Starkie 317.

20.

 Norton, Ev., 126.
 Per Bathurst, J., Tullidge v. Wade, (1769) 3 Wills, 18: Roscoe, N. P Ev., 913.

^{13.} See Cunningham, Ev., 105.

^{14.} James v. Biddington, (1834) 6 C. & P. 589; Keyse v. Keyse and Maxwell, (1886) L. R. 11 P. D. 100, followed in Thomas v. Mrs. Thomas, 1925 Cal. 585: I. L. R. 52 Cal. 379: 86 I. C. 1018: 29 C.

W. N. 350 (F.B.). Hodsoll v. Taylor, L. R. 9 Q.B. 79; Roscoe, N. P. Ev., (1873) 86 and p. 911 as to evidence in aggra-

Per Blackburn, J., in Hodsoll v. Taylor, supra, quoting Lord Mansfield.

L. E. 61

P. D. 100. (1856) 26 L. J. Ex. 20: 1 H. and N. 408; per Pollock. C.B. (this was an action for damages for breach of contract). See Williams (1845) 1 C.B. 841. v. Currie,

damage sustained but also the intention with which the act has been done, whether for insult or injury.²² The leading case on the subject of damages in the case of breach of contract-Hadley v. Baxendale28-is the foundation of the rule contained in Section 73 of the Indian Contract Act; according to which rule, the damages which the plaintiff ought to receive should be such as naturally arose in the usual course of things from the breach,24 or such as the parties knew, when they made the contract, to be likely to result from the breach of it. All facts showing the amount of such damages are relevant under this section; but no damages can be, ordinarily, recovered by an action of contract that are not capable of being specifically stated and appreciated.25 Neither in actions on contract nor on tort must the damage be too remote,1 and evidence of damage of such a character will not be admissible, nor, in general, will evidence of facts tending to show damage, or of facts in aggravation or mitigation of damages, be relevant under this section, unless the damage or aggravating or mitigating facts are of the kind and character which the substantive law recognizes.

- 5. Character. Evidence of. The question when, and under what circumstances, evidence of character may be given in civil actions with a view to damages, is dealt with by Section 55 post, and in the notes thereto. But good faith, honesty of purpose and absence of malice are relevant in mitigation of damages.2 The rule as regards the duty of plaintiff to mitigate damages was stated in Finlay v. Kwik.3 It will be an aggravating circumstance that a seduction was effected under the cloak of honourable overtures.4 The high rank of the parties may be an aggravation of the wrong for which damages are claimed.5 In actions for malicious arrest the injury suffered or expenses incurred by plaintiff may be taken into account.6
- 6. Statements made "without prejudice". The section lays down that in suits in which damages are claimed, any fact which will enable the Court to determine the amount of damages which ought to be awarded is relevant. But the section does not enable the Court to admit in evidence documents marked "without prejudice," since, the rule which excludes documents marked "without prejudice" is a wholesome rule, adopted to enable the disputants to engage in discussion for the purpose of arriving at terms of peace. Without this protective rule, it would often be difficult to take steps towards amicable

22. Per Abbott, J., Sears v. Lyons, (1818) 2 Starkie, 318: Roscoe, N. P.

887; Dominion of India v. All-India Reporter Ltd., 1952 Nag. 32. Per Pollock C.B. in Hamlin v. G. N. Ry. Co. (1856) 26 L.J. Ex. 20 at p 23,

Pearson v. Lemaitre, (1843) M. & G.

700.

(1769) 3 Wills

5. Andrews v. Askey, (1837) 8 C. &

Jenings v. Florence, (1857) 26 L.J.
 C. P. 277; Churchil v. Siggers, (1854) 3 E. & B. 929.

^{(1854) 23} L. J. Ex. 179, 182; 9 Ex. 341; see Act IX of 1872 (Contract) S. 73; Cunningham and Shephard's Indian Contract Act, (1915),

Jayaraghavan v. The Leo Films Co., 1948 Mad. 442: I.L.R. 1948 Mad. 851: (1948) 1 M.L.J. 209; Bhabani Prosonna Lahiri v. Sarojini Debya, 1944 Cal. 106; I.L.R. (1943) 1 Cal. 578: 212 I.C. 483; Pratap v. Raghunath, 1937 Nag. 243: 169 I.C.

Act IX of 1872, S. 73: Alexander op. cit. 9: M/S B.R. Herman v. Asiatic Steam Navigation Co., Ltd., 1941 Sind 146; 196 I.C. 529.

^{(1929) 1} K. B 400; see also Jamal v. Moola Dawood, 1915 P.C. 48: I.L.R. 43 Cal. 493: 43 I.A. 6; Hari-chand v. Gosho Kabushiki Kaisha Ltd., 1925 Bom. 28: I.L.R. 49 Bom. 25: 86 I.C. 521. Tullidge v. Wade, (1769) 3 Wills

settlement. Every facility should be given to persons who are in litigation or anticipate litigation, to come together fully and frankly with a view to come to some arrangement. Statements made "without prejudice" should not be treated as admissions against the maker or as binding between the parties They are merely tentative statements, the object of which is to put an end to litigation. Offers and propositions between the litigating parties are generally excluded on the principle of public policy.7

Thus, statements made without prejudice cannot justify a decree straightaway, without proof of actual loss and quantum of damages, as the same cannot be treated as an admission of liability. It might be that the loss sustained is incapable of proof with the certainty of mathematical demonstration; but where absolute certainty is impossible though damages are not uncertain, the amount of damages should be ascertained by rules of evidence to a reasonable degree of certainty.8

- 13. Facts relevant when right or custom is in question. Where the question is as to the existence of any right or custom, the following facts are relevant:
 - (a) any transaction by which the right or custom in question was created, claimed, modified, recognized, asserted, or denied, or which was inconsistent with its existence then;
 - (b) particular instances in which the right or custom was claimed, recognized, or exercised, or in which its exercise was disputed, asserted or departed from.

Illustration

The question is whether A has a right to a fishery. A deed conferring the fishery on A's ancestors, a mortgage of the fishery by A's father, a subsequent grant of the fishery by A's father, irreconcilable with the mortgage, particular instances in which A's father exercised the right, or in which the exercise of the right was stopped by A's neighbours, are relevant facts.

- s. 3. ("Relevant.")
- s. 32, cl. (4) (Public right or custom: opinion of person not called as wit-
- s, 32. Illust, (i). (Illustration of "Public right").
 s. 32, cl. (7), (Statement in Document relating to "transaction.")
 s. 42 and Illust. (Judgments relating to
- matters of a public nature).
- s. 48, and Illust. (General right, opinion of witnesses on).
- s. 48. Explanation (Meaning of "general custom or right".)
- s. 49. Illust. (Illustration of "general custom or right.")
 s. 49. (Opinions as to usage, etc.)
 s. 51. (Grounds of opinion.)
 s. 52. Prov. 5 (Usage and custom im-
- ported into contract).

The following Acts refer to custom; Acts XXI of 1950, Section 1 (Nonforfeiture of right by loss of caste); XV of 1856 (Re-marriage of Hindu Widows); IV of 1872, Sections 5 (a), 7 (Punjab Laws); IX of 1872, Section 1 (Contract); III of 1873. Section 16 (b) (Civil Courts, Madras); XX of 1875, Section 5, Central Provinces Laws, XVIII of 1876, Sections 3 (b) (1), 4, 8 (Oudh

Kurtz & Company v. Spence & Sons,
 L.J. Ch. 238, (241) cited in Union of India v. Sheo Bux, A.I.R.

¹⁹⁶⁵ C. 636, 638; See Phipson (11th Edn.,) para. 679, page 307.

^{8.} Union of India v. Sheo Bux, supra,

Laws) ;IX of 1908, Art. 10 (Limitation) (see now XXXVI of 1963, Art. 97); II of 1882, Section 1 (Indian Trust); III of 1930 (Sale of Goods), Section 62. See also Act XIV of 1920 (Religious Trust); V of 1882, Sections 18, 20 (Easement); Steph. Dig., Article 5; Taylor, Ev., Sections 1683, 609, 320; Starkie, Ev., Sections 123-139; Roscoe, N. P. Ev., 24, 25, 53, 54, 934; Phipson, Ev., 11th Ed., 51; Best, Ev., Sections 366-399, 499; Wills Ev., 3rd Ed., 62, 63.

SYNOPSIS

1. Principle.

Scope and object.
 Right.
 Custom;

(a) Essentials,

(b) Private custom.

(c) Usage.

(d) General custom.

(e) Public custom.

(f) Custom in Hindu law.

5. Facts.

6. Clause (a):
(a) "Transaction,"

(i) Meaning of term.

(ii) Proceedings distinguished. (iii) Qualifying characteristics of

transaction. (b) "By which".(c) "Claimed".

(d) "Asserted"

(e) 'Recital' and 'assertion', distinction between.

(f) "Recognised".

7. Admissibility of statements made in prior proceedings.

Clause (b):

(a) "Instances".
(b) Illustrative cases.

(i) Road-cess papers

(ii) Sale-deeds and mortgagedeeds.

(iii) Sale certificates,

(iv) Documents showing recognition of rights by Govern-

(v) Maps and plans.

(vi) Documents not inter partes.

(vii) Recitals in documents,

(viii) Recitals of boundaries.

(ix) Previous judgments and decrees.

(x) Award in Partition Suit.

(xi) Malicious Prosecution, Admissibility of judgment of Criminal Court.

(xii) Compromise decrees,

(xiii) Chittas.

(xiv) Batwara papers.

(XV) Leases.

9. Miscellaneous cases. 10. Pleadings.

11. Admissibility of judgments decrees as transactions or instances.

Privy Council decisions.

Supreme Court and other decisions, Decisions of Indian and other High

Calcutta.

Bombay.

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Conclusion.

11-A. Judgment of criminal Court.
12. Ex parte judgments.
13. Subsequent judgments.
14. Judgments shifting onus of proof.
15. Judgments relating to matters of. public nature.

16. Proof of custom and right.

17. Local usage.

18. Caste custom.

19. Family custom

20. Proof of customs.21. Proof of custom of Primogeniture.

22. Usage of trade.

1. Principle. The general rule as to relevancy is that a party may prove all facts that are relevant to the facts in issue and no others.9 The rule is well illustrated by cases of possession, and especially by the possession of real rights, whether incorporeal, as an ancient watercourse, or corporeal, as a field or road strip. In such cases, every act of enjoyment or possession is a relevant fact, since the right claimed is constituted by an indefinite number of acts of user exercised animo domini.10 Ownership may be proved by proof of possession; and that can be shown by particular acts of enjoyment,11 these

10. Wills. Ev., 3rd Ed. 62.

^{9.} Wright v. Doe, (1837) 7 A. & E. 313, 384.

Jones v. Williams, (1837) 2 M. & W. 326, followed in Sabran v. Odoy, 1922 Pat. 488; I. L. R. 1 Pat. 375; 70 I.C. 18.

acts being fractions of that sum total of enjoyment which characterises dominium.12 This also is the best evidence, with the exception of that afforded by judicial recognition, which is only admissible in proof of matters of a public nature that is public or general rights and customs.13 Opinion also is admissible in proof of such rights and customs.14 But the most cogent evidence of rights and customs is not that which is afforded by the expression of opinion as to their existence, but by the examination of actual instances and transactions in which the alleged custom or right has been acted upon, or not acted upon, or of acts done or not done, involving a recognition or denial of their existence.15 "In the absence of direct title-deeds, acts of ownership are the best proofs of title."16 Acts of ownership, when submitted to, are analogous to admissions or declarations by the party submitting to them that the party exercising them has a right to do so, and that he is, therefore, the owner of the property upon which they are exercised. But such acts are also admissible of themselves proprio vigore, for they tend to prove that he who does them is the owner of the soil,17

- 2. Scope and object. The purpose of this section is to enable a right, which may be constituted by a number of acts, by the exercise of the right itself animo lomini, on numerous occasions, to be proved by transactions or particular instances in which the right or custom in question was asserted or denied but by evidence otherwise admissible.18 The section consists of two parts. The first part deals with transactions and the second part with instances, so that facts constituting instances may be relevant under this section, even if they do not constitute a transaction.19 The section does not contemplate evidence of any incident or right in the sense of evidence of any grant creating these incidents or rights. It contemplates only certain transactions and instances as evidence of facts relevant to the facts in issue in any particular case, and it makes these transactions and instances relevant for the purpose of establishing any right or incident, thus making such transactions or instances evidence of the fact in issue.20 The section only makes certain facts relevant. It does not say how these relevant facts are to be proved; for that one has to look to other provisions of the Act, e.g., Sections 64 and 65.21
 - 3. Right. This section applies to all kinds of rights, whether

12. Wills, Ev., 3rd Ed. 63.

(1895) 18 M. 1.

16. Per Jackson, J., in Collector v. Doorga, (1865) 2 W. R. 210.

17. Starkie, Ev., 470, note F: Jones v. Williams, (1837) 2 M. & W. 326 v.

18. Tahil Ram Tackchand v. Mst. Miral, 1938 Sind 132; I.L.R. 1939 Kar. 18: 176 I.C. 549.

19. Secretary of State v. District Board, Rangpur, 1939 Cal. 758; 185 I. C.

454: 70 C. L. J. 126. 20. Maharaja Srish Chandra Nandi v. Kala Ghand Roy, 1942 Cal. 445: I. L. R. (1942) 1 Cal. 510; 202 I.C.

21. U. P. Government v. C. M. T. Association, 1948 Oudh 54: I. L. R. 22 Luck, 93: 229 I.C. 421.

Wills, Ev., 3rd Ed. 63.
 v. S. 42, post: see remarks of Edge, C.J. and Tyrrell, J. in Gurdayal v. Jhandu, (1888) 10 A. 585 (586): 8 A. W. N. 242.
 v. S. 32, cl. (48).
 See remarks of Turner, J., in Luchman v. Akbar, (1877) 1 A. 440 and Gopalayyan v. Raghupatiayyan, 7 Mad. H. C. Rep. 250, 254 and remarks of Westrop, C.J. in Bhagwandas v. Rajmal, (1873) 10 Bom. H. C. R. 241, 261; Steph. Dig. H. C. R. 241, 261; Steph. Dig. Arts. 5 and 6 and case there cited; Taylor Ev., s. 1683; Ranchhoddas v. Bapu, 10 B. 439, v. Commentary, post and note to Ss. 32, cls. (4), (7) and 42, 48. As to long usage being the best exponent of right, see Nilakandhen v. Padmarahha see Nilakandhen v. Padmanabha,

rights of full ownership or falling short of ownership, e.g., rights of easements,

The right mentioned in this section is not a public right only; the illustration shows this is not so, the right there mentioned being a private one.23 Three kinds of rights are thus included in the Act: (a) private e.g., a private right of way, (b) general, which is defined to include rights common to any considerable class of persons e.g., the right of the villagers of a particular village to use the water of a particular well,²⁴ and (c) public.²⁵ The latter class of right is nowhere defined in the Act. Every public right, in the sense of the previous definition, is a general one, though (if the distinction made in English law between the terms "general" and "public" be accepted) every general right is not a public one.

There was at one time a conflict of decisions as to whether the term is to be understood as comprehending all legal rights (including a right of ownership) or only incorporeal rights. In the leading case, Gujju Lall v. Fatteh Lall, Jackson J. and Garth, C. J. were of opinion that the rights referred to in the section were incorporeal rights. "What is referred to in the section cited is evidently a right which attaches either to some property or to status; in short, incorporeal rights, which though transmissible, are not tangible or objects of the bodily senses." "It may be difficult perhaps to define precisely the scope of the word 'right', but I think it was here intended to include those properties only of an incorporeal nature, which in legal phraseology are generally called 'rights' more especially as it is used in conjunction with the word 'custom'. It is certainly used in that sense in subsequent parts of the Act (v. the fortyeighth section, and the fourth sub-section of the thirty-third section) which deal with matters of public or general 'right' or custom."2 On the contrary, it has been held by Mitter, J., that the contention that the section in question refers only to incorporeal rights, whether of a public or private nature, is not warranted by any general principle, it being difficult to suggest a reason which would justify the existence of a distinction between the rules applicable to the proof of corporeal and incorporeal rights, respectively, whether of a public or private nature.8 Also Banerjee, J., observed as follows:4 '-It has been said

^{22.} Rangayyan v. Innasimuthu, 1956
Mad. 226; (1955) 2 M. L. J. 687.
23. Soorjo Narain v. Bissambhar,
(1875) 23 W. R. 311; see Gujju
Lall v. Fatteh Lall. (1880) 6 C,
171 (F. B.) per Garth, C. J.;
Rangayyan v. Innasimuthu, 1956
Mad. 226: (1955) 2 M. L. J. 687;
Mahabir v. Sonmati, A. I. R. 1964
Pat. 66. Pat. 66.

^{24.} Sec. 48 and illustration.
25. Sec. 32, cl. 4. illust. (i) and illustration to S. 42 which last section also deals with the subject (i) and

of public rights.

1. Per Jackson, J. Gujju Lall v. Fatteh Lall, (1880) 6 C. 171 (F.B.) (Mitter, J., dissenting).

2. Per Garth, C. J., 186 ib., Mitter, J. dissenting: and see Kalidhun v. Shiba, (1882) 8 C. 483 (F.B.).

The undermentioned cases decided prior to Gujju Lall v. Fatteh Lall, (1880) 6 C. 171, (F.B.) may be consulted on this point: Koondo v.

Dheer, (1873) 20 W. R. 345 (right of succession to office), Neamut v. Gooroo, (1874) 22 W. R. 365 (Itmahee right to land); Guttee v. Bhukut, 22 W. R. 457 (1); Daitarai v. Jugo, (1875) 23 W. R. 293 followed in Sabran v Oday, 1922 Pat. 488; I. L. R. 1 Pat. 375; Hunsa v. Sheo, 24 W. R. 431 (suit for lands); Mohesh v. Dino, 24 W. R. 265; Luchmeedhur v. Rughoo-R. 265: Luchmeedhur v. Rughoobur, 24 W. R. 284; Omer)v. Burn, 24 W. R. 470 (suits for rent); Naranji v. Dipa, (1878) 3 B. 3 (suit for Ghirda allowance).

^{5.} Gujju Lall v. Fatteh, Lall, (1880) 6 C. 171 at 180 (F.B.) Pontifex, J. expressed no opinion upon this particular point and Morris, J., merely agreed with Garth. C. J., in holding that the former judgment

was inadmissible,
4. In Tepu v. Rajani, (1898) 2
W. N. 501, 504: 25 Cal. 522. (1898) 2 C.

that the right spoken of in this section is an incorporeal right. I do not think that there is any sufficient reason for putting this limitation on the meaning of the term as used by the section." So also in Bombay, it has been held that the words "rights and customs" should be understood as comprehending all rights and customs recognized by law, and therefore as including a right of ownership⁵ and in Allahabad that the word , 'right' both in classes (a) and (b) includes a right of ownership, and is not confined, as held by the majority (sed quare majority) in Gujju Lall v. Fatteh Lall, to incorporeal rights.6 It would seem now to be generally held that the term "right" includes all rights and is not limited to incorporeal rights.7

As to antiquity, in the case of a right no less than of a custom, usage for a number of years, certainly raises a presumption that such right or custom has existed beyond the time of legal memory.8 The relationship between persons does not raise a question of a right or custom.9

4. Custom. (a) Essentials. "Custom", as used in the sense of a rule which, in a particular district, class, or family, has, from long usage, obtained the force of law, 10 must be (a) ancient, 11 (b) continued, unaltered, uninterrupted, uniform, constant, 12 (c) peaceable and acquiesced in, 13 (d) reason-

5. Ranchhoddas v. Bapu, (1886) 10
B. 439, per Sargent, C. J.
6. Collector v. Palakdhari, 12 A. I
(F.B.) and see Ramasami v. Appavu, (1887) 12 M. 9; Suit for money claimed under alleged right; Venkatasami v. Venkatreddi, (1891) 15 M. 12, suit for declaration of title Vythilinga v. Venkatachala, (1892) 16 M. 194, suit for possession of land, followed in Sabran v. Odoy, 1922 Pat. 488.
7. Rangayyan v. Innasimuthu, 1956 Mad. 226: (1955) 2 M. L. J. 687; Raghupat Tewari v. Pt. Namadeshwar Prasad Tewari, 1938 Pat. 103: 166 I. C. 664; Mahabir v. Sonmati, A. I. R. 1964 Pat. 66.
8. Ramasami v. Appavu, (1887) 12 M. 9 at 14.

M. 9 at 14.

M. 9 at 14,
9. Ajmer Singh v. Gangir Singh, 1952
Pepsu 76: 7 D. L. R. Pepsu 54.
10. Hurpurshad v. Sheo, (1876) 3 I. A.
259: 26 W. R. 55; Sivananja v.
Muttu Ramlinga, (1866) 3 M.H.C.
R. 75; Subramanian v. Kumarappa,
1955 Mad. 144: (1955) 1 M. L. J.
355: 68 L. W. 280.
11. Hurpurshad v. Sheo, (1876) 3 I. A.
259; Lala v. Hira, (1878) 2 A. 49;
Doed Jugomohan v. Nimu, Monttriou's cases of Hindu Law, 596
(length of time necessary); Joy v.
Doorga, (1860) 11 W. R. 348;
Juggomohun v. Manikchund, (1859)
7 M. I. A. 263, S. C.: 4 W. R.
(P.C.) 8; Amrit v. Gouri, (1870) 6
B. L. R. 232 P.C.: 15 W. R. P.C.

10; Naggendur v. Rughoonath, (1864) W. R. 20; Ramalakshmi v.

10; Naggendur v. Rughoonath, (1864) W. R. 20; Ramalakshmi v. Sivananantha. (1872) 17 W. R. 553; Perumal v. Ramalinga, (1866) 3 M. H. C. R. 75; Gopalayyan v. Raghupattiayyan, (1873) 7 Mad. H. C. R. 250 (usage must also be public). See Ramasami v. Appayu, (1887) 12 M. 9, 14 and Bhau v. Sundarbai, 14 Bom. H. C. R. 249, post; Durga v. Raghunath, (1913) 18 C. L. J. 559; 18 C. W. N. 55; Subramanian v. Kumarappa, supra; Mumtaz Begum v. Usaullah Khan, 1972 J. & K. L. R. 565.

12. Lala v. Hira, 2 A. 49; Jameela v. Pagul, (1864) i W. R. 250; Beni v. Jaikrishna, (1869) 7 B. L. R. 152; 12 W. R. 495; Juggomohan v. Manikchand, 7 M. I. A. 263; Amrit v. Gouri, 6 B. L. R. 232; Nagendur v. Raghoonath. (1864) W. R. 20; Ram Lakshmi v. Sivananantha, (1872) 17 W. R. 553; Patel v. Patel, (1891) 16 B. 470; Perumal v. M. Ramalinga, 3 Mad. H. C. R. 77; Soorendranath v. Heeranmonee, (1868) 12 M. I. A. 81; Tara v. Reeb, (1866) 3 M. H. C. R. 177 (acts must also be plural); Rajkishen v. Ramjoy, (1872) 1 C. 186 P. C. (discontinuance): Jugmohandas v. Mangaldas, (1886) 10 B. 528 (the consensus utentium, which is the basis of all legal custom must be uniform and constant.); Mumtaz the basis of all legal custom must be uniform and constant.); Mumtaz Begum v. Usaullah Khan, supra.

13. Lala v. Hira, 2 A. 49.

able,14 (e) certain and definite,15 (f) compulsory and not optional to every person to follow or not.16 The acts required for the establishment of customary law must have been performed with the consciousness that they spring from a legal necessity,17 and (g) must not be immoral.18 It must not be opposed to morality or public policy and it must not be expressly forbidden by the Legislature.19 A custom or a practice cannot be allowed to prevail over a statutory rule.20

In Mahamaya v. Haridas,21 it was said that a custom must be proved to be immemorial, reasonable, uninterrupted and also certain as regards its nature in the locality, and persons affected by it. In this case it was said that a custom is void at law if there is proof that it originated within the time of memory but proof of its existence for a longer period will put the onus on those who assail it.

But the English rule, stated in Blackstone's commentaries, that "a custom in order that it may be legal and binding, must have been used so long that the memory of man runneth not to the contrary; so that if anyone can show the beginning of it, it is no good custom," is not applicable to India. It is undoubted that a custom observed in a particular district derives its force from the fact that it has, from long usage, obtained in that district, the force of law. It must be ancient, but it is not of the essence of this rule that its antiquity must in every case be carried back to a period beyond the memory of man-still less that it is ancient in the English technical sense. It will depend upon the circumstances of each case what antiquity must be established before the custom can be accepted. What is necessary to be proved is that the usage has been acted upon in practice for such a long period, and with such invariability as to show that it has, by common consent, been submitted to as the established governing rule of the particular district.22 Where

168. See also Sankaralingam v. Subban, (1894) 17 M. 479; Ghasiti v. Umrao. (1893) 20 I.A. 193.: 21 Cal. 149 (P.C.).

19. Subramanian Chettiar v. Kumarappa Ghettiar, 1955 Mad. 144 at 150: (1955) 1 M. I. I. 255. 68 I. W.

(1955) 1 M. L. J. 355; 68 L. W.

28.

20. Kamal Nain v. State of Haryana, 1974 Rev. L. R. 409 (Punj.),

21. 1915 Cal. 161 (2): I. L. R. 42 C. 455: 27 I. C. 400: 20 C. L. J. 183: 19 G. W. N. 208,

22. Mst. Subhani v. Nawab, 1941 P.C. 21: 68 I. A. 1: I. L. R. 1941 Lah. 154: 193 I.C. 436: overruling Bahadur v. Mst. Nihal Kaur, 1937 Lah. 451: I. L. R. 18 Lah. 594: 169 1 C. 909, see also Gokal Chand v. Parvin Kumar, 1952 S. C. 231: v. Parvin Kumar, 1952 S.- C. 231: 1952 S. C. J. 331: 65 Mad. L. W. 646: 90 Cal. L. J. 73: I. L. R. (1953) Punj. 1.

^{14.} Hurpurshad v. Sheo, 3 I. A. 259;
Lala v. Hira, 2 A. 49; Lutchmeeput
v. Sadaulla, (1882) 9 G. 698; Ransordas v. Kesrisingh, (1863) 1 B.
H. C. R. 229; Arlapa v. Narsi,
(1871) 8 B. H. C. R. (A.C.) 19;
De Souza v. Pestanji, (1884) 8 B.
408; Vurma v. Ravi Vurmah, (1877)
1 M. 235 P. C.; Nyamutoollah v.
Gbind, (1866) 6 W. R. (Act X)
Rul, 40; Kuar v. Mamman, (1895)
17 A. 87; Shadi v. Muhammad,
(1910) 33 A. 257; Subramanian v.
Kumarappa, 1955 Mad, 144,
15. Hurpurshad v. Sheo, 3 I. A. 259;
Raj Kishen v. Ramjoy, (1872) 1 C.
186 at p. 195, 196; Lala v. Hira, 2

Raj Kishen v. Ramjoy, (1872) 1 C.
186 at p. 195, 196; Lala v. Hira, 2
A. 49; Luchman v. Akbar. (1877) 1
A. 440. Bhagwan Das v. Balgobind,
1 B. L. R. Sn. 9 (a); Tekaet v.
Tekaet, (1878) 20 W. R. 154; Ramalakshmi v. Sivanananth, 17 W. R.
553; Subramanian v. Kumarappa,
supra; Kommu Venkadu v. Chandrakota Subbaramiah, 1954 Andh.
54; (1954) 2 Mad. L. J. (Andh.)
24: 1954 Andh. L. J. 83.
16. Eshan v. Nilmoni, (1908) 35 C.
851 (riparian owner's right. to irri-

gate); Parbati v. Chandrapal, (1909) 8 O. C. 94; 36 I.A. 125; 31 A. 457. 17. Tara v. Reeb, 3 Mad. H. C. R. 177; Gopalayyan v. Raghupatiayyan, (1873) 7 Mad. H. G. R. 250. 18. Chinna v. Tegarai, (1876) 1 M. 168. See also Sankaralingan.

the custom alleged is a prohibitory custom, that is to say, a prohibition from doing an act which involves sacrilege to the temple itself, one cannot get innumerable instances in which such an attempt was made and was frustrated. The general rule that where a customary right is alleged several instances of the assertion of the right and its due recognition should be proved will not therefore apply.23

And in another case it was said that a custom must be reasonable, must apply to matters which the law has left undetermined, must be considered binding by at least a majority of a given class and must be established by a series of well-known and continuous instances.24

The essentials of a valid custom are that it should be continuous and uniform it must not be immoral or opposed to public policy, and must have the qualities of antiquity and certainty. But it is not necessary that a custom should be deducible from any accepted principle of law.25 A right established a long time since, and not shown to have since been denied or disputed in any decided case, cannot be overthrown on the strength of recently expounded theories regarding its basis.1 Zamindar's customary right in U. P. to recover one fourth of sale consideration of a house sold by Riyaya (Zare chaharum) is not affected by the Transfer of Property Act.2 Validity of customary right of burial depends on its being ancient, invariable, certain, continuous, peaceably and openly enjoyed and reasonable.3 Right of pre-emption against the stranger vendees cannot be defeated by the fact that partition of land had taken place between the plaintiff and the vendees by consent.4 No customary right of pre-emption is available against court auction purchaser; only a cosharer of undivided property has a right of preference if his bid is equal to that of a stranger as laid down in Order 21, Rule 88, C. P. C.5

Where the custom is so well recognised as to have become part of the law, it is unnecessary to adduce evidence thereof.6.

Where a right is claimed by virtue of a custom, all the essential characteristics of a custom, bearing on it, have to be established. It has to be seen, whether it has been proved that the right was certain and invariable, and that its enjoyment was not had by leave or permission. Then, it has to be seen, whether the custom could be said to be reasonable and whether it had been in existence for a fairly long period of time.7 New plea as to custom was not allowed to be raised for the first time in second appeal.8

Ramakrishna v. Gangadhar, A. I.
 R. 1958 Orissa 26.

1, R. 1973 All. 162,

3. Akram Sheikh v. Makid Sheikh, A. I. R. 1971 Cal. 405.

4. Bala Ram v. Amer Singh, 2 Sim. L. J. (H.P.) 268; A. I. R. 1973 H.P. 13.

P. P. Madhavan Nair v. Chuna Kunji, A. I. R. 1972 Ker. 17.
 Ghelladorai v. Chinnathambiar, I. L. R. 1960 M. 880: A. I. R. 1961

M. 42: 73 L. W. 578. Ramchandra v. Partap Singh, A. I. R. 1965 Raj. 217: 1965 Raj. L. W. 242

8, 1971 Cur. L. J. 660 (Punj.).

R. 1958 Orissa 26.
 Kunhambi v. Kalanthar, 1915 Mad. 711; 38 M, 1052; 24 I. C. 528; 27 M. L. J. 156; see also Amarchand v. Shankari, 1956 Raj. 51; Moult v. Halliday, (1898) 1 Q. B. 125.
 Chelladorai v. Chinnathambiar, I. L. R. 1960 M, 880; A. I. R. 1961 M. 42; 73 L. W. 578.
 Ibid; Fhangavelu v. Court of Wards, A. I. R. 1947 M, 38; (1946) 2 M. I. J. 143.
 I. B. Prasad v. Gauri Shankar, A. I. R. 1973 All. 162,

The Privy Council had held that it is permissible to adduce evidence of a family custom which varies the strict Mohammedan Law. But the effect of these decisions has been nullified by subsequent legislation. Section 2 of the Muslim Personal Law (Shariat) Application Act. 193710 now provides:

"2. Notwithstanding any custom or usage to the contrary, in all questions (save questions relating to agricultural land) regarding intestate succession, special property of females, including personal property inherited or obtained under contract or gift, or any other provision of Personal Law, marriage, dissolution of marriage, including talaq, ila, zihar, lian khula, and mubaraat, maintenance, dower, guardianship, gifts, trusts and trust properties, and wakfs (other than charities and charitable institutions, and charitable and religious endowments) the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law" (Shariat).

The right mentioned in the section being a public or private right, the 'custom' must also on proper principles of construction, include a private custom.11

- (b) Private custom. The word "custom" as used in this section is not, however, limited to ancient custom, but includes all customs and usages. So it has been held under Section 48, which deals with general customs and rights, that evidence of usage is admissible.12
- (c) Usage. The word 'usage' would include what the people are, now or recently, in the habit of doing in a particular place. It may be that this particular habit is only of a very recent origin, or it may be one which has existed for a very long time. If it be one which is regularly and ordinarily practised there is usage.18 So a business-usage as distinguished from a common law custom need not be long established or strictly uniform14 nor need an agricultural custom have existed from time immemorial.15 The word is used in this and other sections of the Act in its widest sense, including all customs, ancient or otherwise, and all usages. Three classes of custom or usage are thus dealt with in the Act, (a) private, (b) general¹⁶ and (c) public,¹⁷ instances of the first class are family customs and usages termed kulachar, or in Upper India, Rasm-wariwaj-i-khandan (v. post).18
- (d) General custom. The expression 'general custom" is defined to include customs common to any considerable class of persons.19 These are:
- (i) Local, termed desachar, e.g., in the Broach and other Gujarat districts wakf property, which is inalienable by Mahommedan law, may be by custom

Mahomed Ismail v. Sheomukh Raj,
 Bom. L. R. 76: 1 C. W. N.
 17: 17 C. L. J. 143: 18 I. C. 577:
 1913 M. W. N. 27 (P.C.) see also
 Akbarally v. Mahomed Ally, 1932
 Bom. 356: 138 I. C. 810: 34 Bom.
 I. R. 655

L. R. 655.

10. Act No. XXVI of 1937.

11. Collector v. Palakdhari, 12 All. 1.

12. Dalgish v. Guzuffer, (1896) 23 C.

427; Sariatullah v. Prannath, (1898) 26 C. 184.

^{13,} Dalgish v. Guzuffer, (1896). 23 C. 247: Sariatullah v. Prannath, (1898)

²⁶ C. 184. See also Abbas Ali Shah v. Mohammad Shah, 1951 M. B. 92.

^{14.} Juggomohun v. Manikchune, 7 M. I. A. 263, 282.

Tucker v. Linger, (1883) 8 App. Cas. 508, in which case the local custom had grown up within the last 30 or 40 years.

^{16.} v. S. 48 post.
17. v. S. 32, cl. (4), post.
18. v. Norton, Ev., 190.
19. v. S. 48, and illustration post.

of the district alienated.²⁰ In the same district, and more especially in parts of Eastern Bengal, the right of pre-emption which is based on Mohammedan law, is allowed and enforced by custom as between Hindus also.21

- (ii) Caste or class: of which Khojahs' and Memons' case,22 and the right of divorce by usage of particular castes, and the customs of religious brotherhood attached to Hindu temples and the like afford examples. English Municipal Law, owing to historical development, limits custom to a particular locality only. Sir Erskine Perry in the Khojahs' case has remarked that this peculiar Municipal rule of English law can have no application to India, where customs are seldom local and are mostly personal or caste customs.
 - (iii) Trade customs or usages (v. post).

A general custom may be varied by a special local custom.25

(e) Public custom. Public custom is nowhere defined in the Act. It is not clear, if any and if so, what meaning is to be attached to the word "public" as distinguished from the word "general" in the Act. In speaking of matters of public and general interest the terms "public" and general" are sometimes used as synonyms, meaning merely what concerns a multitude of persons,24 But regard being had to the admissibility of hearsay testimony, a distinction has (in English law) been made between them; the term "public" being strictly applied to that which concerns every member of the State; and the term "general" being confined to a lesser, though still a considerable portion of the community. In matters strictly public, reputation from anyone appears to be receivable. If, however, the right in dispute be simply general, that is, if those only who live in a particular district, or adventure in a particular enterprise, are interested in it, hearsay from persons wholly unconnected with the place or business would be not only valueless, but probably altogether inadmissible.25 But, as the Evidence Act1 makes no such distinction as to admissibility, merely requiring in all cases a probability of knowledge on the part of the declarant, the distinction ceases to be of importance in India.2 Again, the expression, "general custom or right" is explained to include (not "mean and include") 3 customs or rights common to any considerable class of persons, in fact such matters as would, according to the English rule, fall within the expression "matters of general interest." The expression, therefore, would appear to have a more extended meaning, and to be applicable also to those which are cases spoken of in English law as "matters of public interest."

^{20.} Abas Alli v. Ghulam Muhammad,

^{(1863) 1} Bom, H. C. R. 36. 21. Kodrutoolah v. Mohuree, 7 W. R. 537; Inder v. Mahomed, (1864) 1

W. R. 284. Perry's Or. Ca., 110; Karim v. Pardhan. (1886) 2 Bom. H. C. R.

^{23.} Salig Ram v. Mst. Maya Devi, 1955 S. C. 266: 1955 S. C. J. 248 (S. C.): 57 Punj. L. R. 247: 1955 S. G. A. 382; I. L. R. 1955 Punj.

^{24.} Taylor, Bv., s. 609; Gresley, Ev.,

^{305:} See notes to S. 32, cl. (4),

^{25.} Taylor, Ev., s. 609.

v. S. 32, cl. 4.
 See Norton, Ev., p. 186.

It does not therefore (accepting the distinction between "public" and "general") exclude public custom: 'When a definition is intended to be exclusive it would seem the form of words is "means and includes" per Jackson, J. R. v. Ashotosh, (1878) 4 C. 483, (F.B.).

- (f) Custom in Hindu law. Custom or usage occupies a prominent place in Hindu law (of which it forms a branch), and wherever it obtains, supersedes its general maxims "Immemorial custom," says Manu, "is transcendent law."4 Clear proof of usage will outweigh the written text of the law.5 The Digest subordinates in more than one place the language of texts to custom and approved usage.6 Where a custom is proved to exist, it supersedes the general law, which, however, still regulates all beyond the custom.7 A custom is some established practice at variance with general law. There cannot therefore be a custom to do that which the general law permits anyone to do or abstain from at his own will.8 No ceremony is necessary for Hinduisation of aboriginals.0
- 5. Facts. The third section contains the general definition of the term "facts" as used in this Act. The particular facts which are made relevant under this section are: (a) "Transactions" and (b) "Instances".10 Neither of these terms is defined by the Act.
- 6. Clause (a). (a) "Transaction." (i) Meaning of term. A "transaction" is the doing or performing of any business; management of any affair, performance, that which is done, an affair, as the transactions on the exchange. A transaction is something already done and completed: a "proceeding" is either something which is now going on, or if ended is still contemplated with reference to its progress or successive stages.11
- (ii) Proceedings distinguished. "We use the word 'proceeding' in application to an affray in the street and the word 'iransaction to some commercial negotiations that have been carried on between certain persons. The 'proceeding' marks the manner of proceeding, as when we speak of proceedings in a Court of law." The "transaction marks, the business transacted as the transactions on the exchange."12 A '-transaction' as the derivation denotes, is something which has been concluded between persons by a cross or reciprocal action as it were.13 "A 'transaction' in the ordinary sense of the word is some business or dealing which is carried on or transacted between two or more persons."14 The term "transactions", in the realm of law, bears the sense of

4. See the authorities set out in judgment of West, J., in Bhau v. Sandraba, (1874) 11 Bom, H. C. R. 249 and Tara v. Réch, (1866) 3 Mad. H. C. R. 177.

5. Collector v. Muttu, (1868) 1 B. L. R. 12: 12 M. I. A. 397, cited and applied in Bhagwan.

applied in Bhagwan v. Bhagwan, (1895) 17 A. 294 (F.B.): but held to have been misapplied by the Privy Gouncil in (1899) 21 A. 412

(P.C.).
 Bhayah Ram Singh v. Bhayah Ugar Singh, (1870) 13 M. I. A. 373; 14 W. R. (P.C.) 1.
 Neelkisto v. Beer, (1869) 12 M. I. A. 523: 12 W. R. (P.C.) 21.
 Braja v. Kundana, (1899) 3 C. W. N. 378, 380. (P.G.): 22 M. 431 (P.C.); Amarchand v. Shankari, 1956 Raj. 51.
 Langa Manjhi v. Jaba Majhian. A. I. R. 1971 Pat. 185.
 As to meaning of these terms v.

10. As to meaning of these terms v.

post, See also note on the admissibility of judgments (post)

also Secs. 3 and Il ante.

II. Webster's Dictionary, sub nom. "transaction". See also Channoo Mahto v. Jang Bahadur Singh, A.I. R. 1957 Pat. 293. 12. Carbb's Synonyms.

Carbb's Synonyms.
 Gujja Lall v. Fatteh Lall, (1880)
 C. 171, 185 Jackson, J. (transaction, in its largest sense, means that which is done), ib. 175, per Mitter, J., Mahabir v. Sonmati, A. I. R. 1964 Pat. 66.
 b. at p. 186, per Garth, C. J., who added: "If the parties to a suit were to adjust their differences inter

were to adjust their differences inter se the abjustments would be a transaction and by a somewhat strained use of the word the proceedings in a suit might also be called transactions but to say that the decision of a Court of Justice, is a transaction appears to me a mis

"any act affecting legal rights." It is not confined to a dealing between parties inter vivos, but includes a testamentary dealing with property.16 A litigation also is a transaction.17

Obviously, a benami document by which nothing really passes cannot be called a transaction within the meaning of this section. A fictitious transaction would not as such come within the section.18 So also, a suit is not a transaction within the meaning of this section.19

- (iii) Qualifying characteristics of transaction. The qualifying characteristics of the transaction spoken of in the section are (a) creation, (b) claim, (c) modification, (d) recognition, (e) assertion, (f) denial, (g) inconsistency. Of these (b) and (d) are also qualifying characteristics of "instances."
- (b) "By which." What is made relevant under this clause is a transaction "by which" and not "in which" the right or custom in question was created, etc.20 Thus, where the right in question was whether a tenant held lands under a nakdi or bhaoli system of rent, a statement contained in a deed of girt executed by the deceased ancestor of the tenant as to the nakdi nature of the tenancy was held to be not admissible in evidence because the nakdi nature of the holding was not asserted by the deed of gift though it was asserted in the deed of gift.21 So also, where the right in question was whether a certain tenancy was of a permanent nature or not, a statement as to the permanent character of the tenancy in a deed of partition was held to be not admissible as the partition could not be considered to be a transaction by which the right in question was asserted.22 On the other hand, where the question is whether a tenancy is permanent or not, a statement in a sale-deed by the tenant that it was a permanent one of is admissible, as every transaction of transfer will be a transaction by which the permanent right can be said to have been asserted.23

application of the term". See also Ranchhoddas v. Bapu Narhar, (1886) 10 B. 439; Rangayyan v. Innasimuthu, 1956 Mad. 226; Venkatarayagopala v. Narsayya, 1915 Mad. 746; 26 I.C. 747; 1914 M. W. N. 779; but see as to judgments,

15. Periasami v. Varadappa, 1950 Mad. 486; (1950) 1 M. L. J. 325; 63 L. W. 310.

17. Mahabir v. Sonmati, A. I. R. 1964 Pat. 66.

18. Brojendra Kishore v. Mohim Chandra, 1927 Cal. 1, 2; 99 I.C. 189; 31 C. W. N. 32.

19. Asaddar Ali Khan v. Province of Assam, 1944 Cal. 57; I. L. R. (1944) 1 Cal. 203; 211 I.C. 460; see also Gobinda Narayan Singh v. Sham Lal Singh, 1931 P. C. 89: 58 I. A. 125: I. L. R. 58 Cal. 1187: 131 I.C. 753; Ranchhoddas v. Bapu Narbar, I. L. R. 10 Bom. 439. 20. Brojendra Kishore v Mohim Chandra, 1927 Cal. 1: 99 I.C. 189: 31 G. W. N. 32-per Guming and Mukerji, JJ.; see also Bansi Singh v. Mir Amir Ali, 11 C. W. N. 703; Sarpalli Venkatarayagopala, v. Fota Narasayya, 1915 Mad. 746 at 747: 26 I. C. 747, but see Kameswar Singha v. Hridoy Nath Sahoo, 1938 Cal. 763: 67 C. L. J. 411; per contra.

21. Bansi Singh v. Mir Amir Ali, 11 C. W. N. 703.

 Narendra Nath v. Sannyasi Charan,
 1932 Cal. 398; 137 I.C. 658; 54 C. L. J. 353; see also Brojendra Kishore v. Mohim Chandra, infra; and Kanta Mohan v. Basudev, 39 C. W. N. 311, where a niskar right was asserted in a sale-deed.

23. Jogendra Krishna v. Subasni Dassi, 1941 Cal. 541: I. L. R. (1941) 2 Gal. 44: 197 I. G. 376; Sailendra Nath v. Bijan Lal, 1945 Cal. 283: 49 G. W. N. 133.

On account of the governing qualification "by which" in regard to any transaction, if it is a case which is sought to be made admissible on the ground of the right being created, claimed, modified, asserted or denied, then it must be shown to be not apart from the transaction by which it was created, claimed, etc. An instance of creation or modification of a right would be inconceivable apart from the transaction "by which" it was created or modified.24 But there may be a transaction by which there has been a recognition of a right or the exercise of a right which can be proved by recitals in a document not inter partes. In other words, a transaction in which there is a recognition by mere assertion and a recognition of the exercise of a particular instance of the same, as distinct from a transaction by which the right or custom is created, claimed, modified or denied, has to be distinguished.

- (c) "Claimed". The reason for this distinction is that the word "claimed" denotes a demand or assertion in relation to a thing or attribute, as against or from some person, showing the existence of a right to it in the claimant. A bare statement may or may not be a claim according to the attending circumstances in which it is made. It may amount to a claim or be a mere statement of a claim.25 A mere assertion of a right in a document to which the person against whom the right is asserted is not a party and of which he knows nothing, is not to claim the right.1
- (d) "Asserted". It will have been observed that the section distinguishes between a claim and an assertion. Under the second clause, however, instances are admissible in which the exercise of a right or custom was asserted. The word "assertion" includes both a statement and enforcement by Act. Ordinarily, the evidence tendered under this section will be evidence of acts done, but a verbal statement not amounting to, and not accompanied by, any act. would also be admissible if it amounted to a "claim." A document between third parties in which mention is made of one of the parties or his predecessor as holding the land lying on the boundaries of the land belonging to the executant of the document is inadmissible.3

The section in Clause (a) speaks of a transaction being inconsistent with the existence of the right in dispute and is not confined to the assertion of such a right.4

A statement by a deceased person relating to the purchase of shops in the names of other persons is an assertion of right: it falls within Section 13 (a) and is admissible under Section 32 (7) post.5

Rangayyan v. Innasimuthu, 1956 Mad. 226: (1955) 2 M.L.J. 687.
 Radha Krishna v. Saveswar Nag, 1925 Cal. 684 (2): 86 I. C. 674: 29 C. W. N. 469.

^{1.} Rangayyan v. Innasimuthu, supra; Brojendra Kishore v. Mohim Chandra, 1927 Cal. 1: 99 I.C. 189; 31 C. W. N. 32; Srish Chandra v. Kala Chand, 1942 Cal. 445; I. L. R. (1942) 1 Cal. 510; 202 I. C. 570; Kheman v. Chottu, 1938 Lah. 635: 179 I.C. 68: 40 P.L.R. 968; Jyoti Prashad v. Bharat Shah, 1936 Pat.

^{548;} I. L. R. 15 Pat. 260: 165 I.C. 589, but see Astaque Ali Khan v. Asharfi Mahaseth, 1951 Pat. 641; Kanhaiya Singh v. Bhagwat Singh, 1954 Pat. 326.

Rama Krishna v. B. Suryanarayana, 1939 Mad. 482: (1939) 1 M. L. J. 602: 49 L. W. 409.
 Chooni v. Nilmadhub, 1925 Cal. 1034: 86 I.C. 734.
 Mathra Singh v. Gurbachan Singh, 69 Punj. L. R. 119, 124.

^{5.} Ibid.

(e) 'Recital' and 'assertion', distinction between. It is also well settled now that there is a fundamental distinction between a mere recital and an assertion. A right is not asserted simply because it is recited in a certain document. It is asserted only when the transaction concerned is itself entered into in exercise of the right. For example, if a tenancy is not transferable unless it is of a permanent character, a transfer of the tenancy would be an assertion of a permanent right, but if a tenancy is transferable, whatever its nature may be, a transfer, accompanied by a statement in the deed that the tenancy was of a permanent character will not be an assertion of a permanent right.6

To be relevant under this clause the right or custom in question must be directly asserted and not merely casually referred to.7 It is not necessary that the right should be asserted successfully.8 But the assertion must be before the dispute arose.9

(f) "Recognised". In Karuppanna v. Rangaswami,10 Jackson, J., held that a mere statement of boundary as such cannot be classed with any of the verbs in Section 13. But in doing so, with respect, the learned Judge went too far and did not give full effect to the verbs 'recognised" and "exercised".

In the Concise Oxford Dictionary the word "recognised" is defined as "acknowledge validity or genuineness or character or claims or existence of, accord notice or consideration to, discover or realise nature of or, as, acknowledge for, realise or admit that." Where, therefore, the existence of a right is in question, it is permissible for the party relying on its existence to prove any transaction by which it was recognised, a particular instance in which it was exercised by means of recitals of boundaries in documents not inter partes.11

7. Admissibility of statements made in prior proceedings. An admission of a person is admissible in evidence as against him, though it can be explained away by the maker thereof or the person against whom it is sought to be proved. The same principle applies to an admission in a signed pleading, or in an affidavit, or in any sworn deposition given by a party in a prior litigation, though it is capable of rebuttal. The assertion of a right, whether in a pleading or other statement, is relevant under this clause and is, therefore, legally admissible in evidence.12

Statements constituting evidence of the assertion of a right are relevant under this section. Such documents, even if not inter partes and not relating to the property in dispute are relevant under this Section, though they are not binding on the opposite party who is not a party to the same.18 The words

Kumud Kanta Pahari v. Province of Bengal, 1947 Cal. 209 at 211: 81 C. L. J. 274.
 Moti Lal v. Baba Baldeo Dass, 1952

V. P. 36.

V. P. 36.
 Ramkumar Das v. Har Narain Das, 1926 Cal. 727; 92 I.C. 104.
 Motilal v. Babu Baldeo Das, 1952 V. P. 36. See also Dasondhi v. Milkhi Ram, 1939 Lah. 152; 181 I. C. 703; 41 P.L.R. 670; Jhingur Raut v. Emperor, 1931 Pat. 386; 32

Cr. L. J. 1224; 134 I. C. 625; 12 P. L. T. 647. 10. 1928 Mad. 105 (2); 107 I.C. 293. 11. Rangayyan v. Innasimuthu, 1956 Mad. 226; (1955) 2 M. L. J. 687. 12. Satya Deo Prasad v. Chanderjoti, A. I. R. 1966 Pat. 110; 1965 B. L. J. R. 800.

Harihar v. Nabakishore, I. L. R. 1962 Cut. 422; A. I. R. 1963 Orissa

used in this Section are not used in a narrow sense, and the claim need not necessarily be made in the presence and to the knowledge of the person to be affected thereby.14 Such documents are admissible, under this Section, as assertions of title. The principle has been clearly laid down that though the recital in the document cannot amount to admission of the party in whose favour the document has been executed, yet it is admissible and relevant under this Section. Where a document constitutes evidence of a person's assertion of the right, as, for instance, that he was adopted as a son by another person, that document is relevant under this Section, read with Section 32 (7), if he is dead. So, where a landlord is described as adopted son of a particular person in the descriptive portion of a document, the description of landlord, as adopted son, is not a superfluous recital but is made in assertion of a right, and is admissible under this Section,15

But a statement as to relationship is not admissible, when there is no question of any right or of custom within the meaning of this Section.16 But statements subsequent to the dispute have no evidentiary value at all.17

8. Clause (b). (a) "Instances". An 'instance' is that which offers itself, or is offered, as an illustrative case; something cited in proof or exemplification; a case occurring; an example.18 The qualifying characters of the "instances", spoken of by the section, are: (a) claim, (b) recognition (common both to "instances" and "transactions"), and (c) exercise (which is peculiar to "instances" only); and instances in which the exercise of the right or custom was disputed, asserted or departed from.

This clause does not bring in the particular instances in which the right was asserted. The clause speaks of the particular instances (1) in which the right was claimed or (2) in which its exercise was asserted. The word 'claimed' implies a demand which involves the presence of the party against whom such demand is made. Consequently, where, in a rent suit instituted by a landlord, the tenant claims a niskar right statements as to the character of the tenancy in documents such as a decree, a mortgage-deed or a kobala to which the landlord was not a party are not admissible under this clause. Moreover, the section does not bring in the statement itself, but only the instances in which the exercise of the right was asserted.19 The mere statement in a deed of sale that the vendor had a particular right cannot be said to be an instance in which the exercise of the right was asserted.20 The illustration to section also shows that an instance claiming a right means something more than a mere statement of boundaries in a deed or in a plan.21 A distinction has been drawn between a claim and a statement of it.22

Ashafaque Ali Khan v. Asharfi Mahaseth. A. I. R. 1951 Pat. 641.
 Harihar v. Nabakishore, supra.
 Naima v. Basant Singh, I. L. R. 56 A. 776: A. I. R. 1934 A. 406 (F.B.); Sevugan v. Raghunath. A. I. R. 1940 M. 273; 1939 M. W. N. 841: Bhogal Passwan v. Bibi Nabiban. 841; Bhogal Paswan v, Bibi Nabihan-

A. I. R. 1963 Pat. 450. 17. Adinarayanaswamy v. Papamma, A. I. R. 1963 A. P. 121.

Dictionary Webster's sub-nom,

[&]quot;instance."

Joy Chand v. Shyama Charan, 1942
 Gal. 448; 199 I.C. 425.

Brojendra Kishore v. Mohimchandra, 1927 Cal. 1: 99 I.C. 189: 31 C. W. N. 32; Jyoti Prasad Singh v. Bharat Shah, 1936 Pat. 543.

Kheman v. Chhotu, 1938 Lah. 635;

¹⁷⁹ I.G. 68: 40 P. L. R. 968. 22. ib. Radha Krishna v. Sarveswar Nag, 1925 Cal. 684 (2): 36 I. C. 674: 29 C. W. N. 469.

Instances "in which the right or custom is claimed, recognised, exercised" etc. must be instances prior to the suit in question, because this clause is in the past tense throughout.28

- (b) Illustrative cases: (i) Road-cess papers. Road-cess papers 24 old records of rights25 and deeds of sale were held to be evidence quantum valebat as transaction and instances in which rights were asserted and recognised. A transaction is something which has been concluded between two persons and a sale-deed is one such.1
- (ii) Sale-deeds and mortgage-deeds. An act of transfer by way of sale or mortgage of property necessarily involves an assertion that the transferor owns the interest transferred and is therefore a transaction by which such a right is claimed or asserted. It may be an assertion in one's favour. Sale-deeds and mortgage-deeds are therefore admissible under this section.2 Where the question is as to the existence of a custom of transfer of houses by tenants, the fact that certain sale-deeds or mortgage-deeds were executed and were duly registered and each contained assertions of the existence of the right of transfer would be in itself admissible, quite independent of the fact whether the genuineness of the signatures on the originals of those documents has been proved or not.3 Right to land is a right referred to in this section. Therefore sale-deeds of neighbouring lands is relevant as transaction recognising such right.4
- (iii) Sale certificates. Sale certificates are not instruments of transfers, but they may be admissible as documents evidencing a transaction, e.g., a rent execution sale by which a right to receive and a custom to pay rent in cash only were recognised and asserted.5
- (iv) Documents showing recognition of rights by Government. Docu ments showing recognition of alleged rights by Government have been admitted.6 An entry in a list of tenants prepared by a Tehsildar without any elaborate inquiry has no conclusive effect on the rights of a party for it raises only a rebuttable presumption. It is a piece of evidence to be taken into consideration when title to the property is in question.7

23. Shanker Lal v. Kailash Chand, 1939 Lah. 105: 183 I.C. 794: 41 P. L. R. 21.

24. Daitari v. Jugo, (1875) 23 W. R. 293. followed in Sabran v. Odoy, 1922 Pat. 488: I. L. R. 1 Pat. 375: 70 I.C. 18: 3 P.L.T. 792; Mahabir v. Bhadai, 1937 Pat. 561: 172 I.C.

Ganesh Das v. Jagabandhu Prusti,
 (1971) 37 Cut. L. T. 420.

1. Channoo v. Jang Bahadur, A. I. R.

1957 Pat. 293. Lachhmi Narain v. Manak Chand, 1938 Lah. 846; Ihsan Elahi v. Atau-llah, 1937 Lah. 688; 172 I. C. 769; 39 P. L. R. 389; Monmotha v. Rajeshar, 1928 Cal. 315; I. L. R.

55 Cal. 355; 107 I. C. 81.
3. Kallu Mal v. Ganeshi Lal, 1936 All.
119; 160 I. G. 1098; see also Narain
Singh v. Net Ram, 1940 All. 535;

I. L. R. 1940 All. 726.
 Abdul Ali v. Harija Bibi, 1972 Assam L. R. 148: A. I. R. 1972

Gauhati 52.

- Gauhati 52.
 Basanta Kumari Dasi v. Jnanendra Nath, 1940 Cal. 539; 191 I. C. 824; 71 C. L. J. 504; Amar Nath v. Trilochan Das, 1943 Cal. 565; 209 I.C. 292; 76 G. L. J. 251; Kameswar Singh v. Hridoy Nath, 1938 Cal. 763; 67 C. L. J. 111; see also Maharaja Bahadur Singh v. Barkatulla, 1946 Cal. 450; 224 I.C. Barkatulla, 1946 Cal. 450: 224 I.C.
- 6. Soorjo v. Bissambhur, (1875) 23 W. R. 311 and see Nitya Kali v. Sarat Ghandra, 51 I.C. 866; A. I. R. 1919 C. 333. Hanutmal Asaram Mandha
- 7. Hanutmal Nathu Venkoba, 65 Bom. L. R. 654: A. T. R. 1967 Bom. 654.

(v) Maps and plans. A map prepared by an officer of Government, while in charge of a khas mahal, Government being at the time in possession of mahal merely as a private proprietor, is not a map purporting to have been made under the authority of Government within the meaning of Section 83, post, the accuracy of which is to be presumed; but such a map may be evidence of possession or of assertion of right under this section.8 Entries in a thak map and field book prepared by a surveyor are admissible against the proprietors as well as against tenants,9 but not the entries as to irrigation rights which the surveyors had no authority to record.10

A map prepared by a private party is not admissible under this section unless it is proved that it was a transaction by which a right was recognised or asserted.11 But where a private map or plan is attached to, or referred to, in a document of title relating to the property in suit, it is admissible.12

A plan prepared long before the dispute between the parties by one of them would be a relevant piece of evidence to show whether there was some construction upon the land in dispute at the time of the filing of the suit,13

(vi) Documents not inter partes. Statements in documents not inter partes are admissible under this Section in fitting cases, where the circumstances permit such a course. In a suit for possession of land, the plaintiffs claimed title under a lease from the shrotriemdars of the village where the land was situated. The defendants, who had obstructed the plaintiffs from taking possession of part of the land, claimed to have permanent occupancy rights, and asserted that the shortriemdars were entitled not to the land itself but to the melvaram only. To meet this allegation the plaintiffs tendered in evidence documents executed by other tenants in the same village showing that they were pura kudis merely. Held, that these documents were admissible: that the defendants were not of course concluded by them, but that the documents were relevant evidence under this section as showing the tenure on which the village was held.14 The recital in a sale deed about the property being ancestral property of vendor is not binding on purchaser as an admission but is strong proof of the fact recited and admissible in evidence under his secion.15

In a suit to establish the existence of a family custom, the plaintiffs offered in evidence a deed containing a recital that the custom of the family was as

9. Dowlat Rai v. Khub Lal, 1914 Cal. 569: 22 I. G. 645, see also Jagadindra Nath Roy v. Secretary of State, I, L. R. 30 Cal. 291 (P.C.): 30 I. A. 44: 7 C. W. N. 193 (P.C.). 10. Hari Har Prasad Singh v. Janak Shashi Bhushan v. Wasif Ali, 1919 Gal. 231: 49 I.C. 951; Dwijesh Chandra v. Naresh Chandra, 1945 Cal. 492.

Kedar Nath v. Mahendra Nath, 1951
 Cal. 253; 54 C. W. N. 671.
 Lila Ram v. Mohar Chand, 68
 Punj. L. R. (D.) 276; A. I. R.
 1968 Punj. 60, 63.
 Vythilinga v. Venkatachala, (1892)

16 Mad. 194. 15. Hetram v. Bhader Ram, 1973, W. L. N. 981 (Raj.).

^{8.} Janmajoy v. Dwarkanath, (1879) 5
C. 287 and see Shashi v. Nawab of
Murshidabad, 49 I. C. 957; Dinomoni v. Brojomohini, I. L. R. 29
Cal. 187 (P.C.): 29 I. A. 24;
Madan Ghandra Pal v. Kirtiram,
1971 Cal. 592; 34 I. C. 163: 23
C. L. J. 578 (map prepared by the
Court Amin).

9. Dowlat Rai v. Khub Lal. 1914 Cal.

Hari Har Prasad Singh v. Janak Dulari Kuar, 1941 Pat. 118; 191 I. C. 275; Kesho Prasad Singh v. Mst. Bhagjogna Kuar, 1937 P. C. 69; I. L. R. 16 Pat. 258; 167 I.C. 329; see also Krishna Promada v. Dhirendra Nath 1929 P. C. Dhirendra Nath, 1929 P.C. 50; I.

L. R. 56 Cal. 813: 56 I. A. 74: 113 I.C. 465: Jagdeo Narain Singh v. Baldeo Singh, 1922 P.C. 272: 49 I. A. 399: I. L. R. 2 Pat. 38: 71 I. C. 984: Jarao Kumari v. Lalon-moni, 17 I. A. 145: I. L. R. 18 Cal. 224.

alleged in the plaint, and a covenant to do nothing contrary to it. The deed was executed before action was brought by the present plaintiffs and also by a plaintiff who had died since the institution of the suit, and, as the plaint alleged, by a considerable majority of the family; but the defendant was not a party to it. The deed was held to be admissible as evidence on behalf of the plaintiffs.16 In an English case, the Crown claimed the salmon fishing above the falls of a certain river against A, who in proof of his right to the fishery gave evidence, inter alia of (a) occasionally fishing there, (b) having watchers during the spawning season, and (c) of binding his tenants in their leases, to protect the fishing and prevent all others from fishing.17 The evidence was held to be admissible.

On the question whether a person's work was deceptively similar to another's trade mark already registered, within the meaning of Section 12(1) of the Trade and Merchandise Marks Act, 1958, judgments in other cases where the parties, the subject-matter and the alleged infringing trade marks were all different, cannot be used either in fact or in law.18

(vii) Recitals in documents. It has been held that a document is admissible in evidence, if it is a transaction by which a right is asserted or claim ed, but recitals in it are not admissible except when they amount to admissions and are otherwise relevant.19

The recitals of the boundaries of a land in dispute in the kobala executed by the tenant in favour of the transferee who came into occupation of the land as a tenant under the landlord and claims to be so, although the landlord is not a party to the kobala, are admissible in evidence against the landlord in a suit where the landlord seks to eject the transferee from the land in dispute in which the transferee sets up his tenancy right under the landlord.20 This is on the analogy of the decisions which hold that statement in a kobala executed by a tenant in favour of his transferee that his right in the land transferred was a permanent one is admissible in evidence against the landlord under this section in a suit by the landlord against the transferor for ejectment though the landlord was not a party to such a kobala,21

On the question whether certain lands are bakasht lands of the plaintiff, kabuliyats which indicate that lands were taken settlement of by different persons

16. Hurronath v. Nittanund, 10 B. L.

(1863) 10 H.L. Cas, 593.

18. Prem N. Mayor v. Registrar of Trade Marks, A. I. R. 1969 Cal.

 U. P. Government v. C. M. T. Association, Ltd., 1948 Oudh 54:
 I. L. R. 22 Luck. 93: 229 I. C. 421; see also the cases cited therein and Abdul Rahim Khan v. Fakir Mohammad Shah, 1946 Nag. 401:
I. L. R. 1946 Nag. 578: 1946 N. L. J. 511.

20. Ashutosh Roy v. Subodh Gopal Basu, 74 C. W. N. 478 at pp. 479,

21. Jnanendra Nath Dutt v. Nesa Dasi. 39 C. L. J. 526; Jogendra Krishna Banerjee v. Sm. Subashini Dasi. 45 C. W. N. 590; Sailendra Nath Bhattacharjee v. Bijan Lal Chakravarti, 49 C. W. N. 133: A. I. R. 1945 Cal. 283.

R. 263 (1873); see S. 32, cl. (7).

17. Lord Advocate v. Lord Lovat, (1880) L. R. 5 App. Cas. 273; in this case an ancient document was tendered to prove ancient posses-sion and held to be admissible, the rule being that such documents coming out of the proper custody and purporting on the face of them to exercise ownership such as a lease or licence, may be given in evidence as being in themselves acts of ownership and evidence of possession; see notes to S. 90 post. See also Malcolmson v. O'Dea,

from time to time and recognised the right of the plaintiff to settle those lands with them, are relevant under Clause (b) of this section.22

Documents in which there is clear assertion of rights of the plaintiff regarding cultivation and enjoyment of the disputed lands are admissible under Section 13 (b) read with Section 21 (3) post.28

(viii) Recitals of boundaries. The question, whether recitals in deeds between third parties are admissible, does not seem to have been finally settled. There have been attempts to admit such documents under Sections 11, 13 and 32 of this Act. Section 11 which lays down that facts not otherwise relevant are relevant, if they are inconsistent with any fact in issue or relevant fact can have nothing to do with this matter. Nor are the recitals, as regards the boundaries, admissible under Section 32 (2), as statement made by a person in the ordinary course of business. Section 32 does, however, make admissible or relevant a statement of relevant facts made by a person against his pecuniary or proprietary interest. To be admissible under that Section, a statement must be a statement of a relevant fact and must be against the pecuniary or proprietary interest of the person making it. The statement, relating to the boundaries in a document, would not be admissible, unless-

- (1) it is a statement of a relevant fact, and
- (2) it is a statement against the pecuniary or proprietary interest of the person making it.

The statement of a third party made in a document about the boundaries is inadmissible in law, where such person has not been examined in the case nor proved to be dead.24 It has, however, been held that recitals, of boundaries in documents not inter partes would be admissible under this section in fitting cases where the circumstances of the particular case permit such a course.25 In Rangayyan v. Innasimuthu) 1 Ramaswami, J., observed: "In many cases unimpeachable documents of neighbours who would be the best persons in our country where people are rooted for generations to the same place, about the possession and title of their adjoining properties would constitute the best evidence. There is no reason why, what the Americans would call the grass-root evidence, should be excluded and incur once more the reproach that the growth of the Evidence Act has been exercised under the influence of English precedents and Indian lawyers by so much restrictiveness that the law of evidence has become more remarkable for what it shuts out than what it lets in. The object of a judicial investigation seems to have become more the obscuring of the truth rather than the discovery of it. In this connection reference may be made to a brilliant exposition of this aspect by the late Mr. C. F. Arnold

Bilant Singh v. Hafiz S.S. Ahmad, 1968 B. L. J. R. 52, 63.
 A. Rajeswari Rao v. J. Patro, 34 Gut. L. T. 1131, 1142.
 See Soney Lall v. Darbdeo, I. L. 1087

See Soney Lall v. Darbdeo, I. L. R. 14 Pat. 461: A. I. R. 1935 Pat. 167 (F.B.); Ramautar v. Sheonandan, A. I. R. 1962 Pat. 273: 1962 B. L. J. R. 11; Pacha Khan v. H. D. Gopalakrishna, A. I. R. 1975 Kant. 179; R.C.R. Institution v. State, (1975) 2 Kant. L. J. 468; V. A. A. Nainar v. A. Chettiar, A. I. R. 1972 Mad. 154.

^{25.} Rangayyan v. Innasimuthu, 1956 Mad. 226; see also Ashfaque Ali Khan v. Asharfi Mahaseth, 1951 Pat. 641; Kanhaiya Singh v. Bhag-wat Singh, 1954 Pat. 326; but see S. K. Acharji v. Umed Ali, 1922 Cal. 251: 25 C. W. N. 1022: 63 I.C. 954; Ambikacharan v. Kumud Mohun, 1928 Cal. 893; 110 I. C. 521; Kheman v. Chottu, 1938 Lah. 635; 179 I.C. 68; Nanak Chand v. Mian Mohd. Shabbaz Khan, 1936 Lah. 114. 1. 1956 Mad. 226.

I.C.S., in his Psychology Applied to Legal Evidence and Other Constructions of Law.2 But a contrary view has been taken in Madan Lal v. Durga Dutt,3 Kalappa Siddappa Udayar v. Bhima Govind Uppar, Sakaladeep Rai v. Sarjug Rais and V. A. A. Nainar v. A. Chettiar.6

(ix) Previous judgments and decrees. Decisions are conflicting as to whether previous judgments and decrees, not inter partes. are7 or are not,8 included in the term "transaction", or are or are notio included in the words "particular instances" (v. post). In some cases, it has been held, that judgments and decrees are not themselves "transactions" or "instances", but the suit in which they were passed and made is a "transaction," or "instance". In the undermentioned case, Banerji, J., observed as follows:-

"If the existence of the judgment is not a transaction within the meaning of clause (a) of the thirteenth section, it proves that a litigation terminating in the judgment took place; and the litigation comes well within the meaning of the clause as being a transaction by which the right now claimed by the defendants was asserted. So, again, litigation which is evidenced by the existence of the judgment was a particular instance within the meaning of clause (b) of the thirteenth section in which the right of possession now claimed by the defendants was claimed."11

(a) A judgment in another suit not inter partes is not evidence to establish the truth of the matters decided in the judgment. The findings of fact arrived at on the evidence in one case, could not be the evidence of that fact in another case,12 civil or criminal. except in fitting cases. But judgments which are not inter partes, and

2. Thacker Spink & Co., Calcutta,

have been accepted by the Privy Council and its correctness is ques-tioned in the Full Bench judgment of the Allahabad High Court in Collector v. Palakdhari, in so far as the exclusion of such judgment from being received as evidence under

any section is concerned." Lakshman v. Amrit, (1900) 24 B. 591.

9. Koondo v. Dheer, (1873) 20 W. R. 345; Jianutullah v. Romoni, (1887) 15 C. 393; Ramasami v. Appavu, (1887) 12 M. 9 and see Byathamma v. Ayulaa, (1891) 15 M. 19.

"Record and not the judgment along

"Record and not the judgment alone admissible as an instance," Gollector v. Palakdhari, 12 All. 1 at pp. 14, 28 per Edge, C. J. and Tyrrell, J., "former judgment not itself an instance but suit in which it was made is an instance:" ibid, 25, per Strai-

ght, J. and see Gujju v. Fatteh, (1880) 6 C. 171.

11. Tepu v. Rojoni, (1898) 2 C. W. N. 501, 504; Alijan v. Hara, S. A. 106 of 1902, Cal. H.C. 1st July, 1904; and see Mahomad v. Hasan, (1906) 31 B. 143.

Ramaji v. Manohar, 62 Bom. L.
 R. 322; A. I. R. 1961 Bom. 169.

A. I. R. 1958 Rajasthan 206; I. L. R. (1957) 7 Raj. 865.
 A. I. R. 1961 Mysore 160.
 A. I. R. 1961 Patna, 460.

A. I. R. 1961 Patna, 460.
 A. I. R. 1972 Mad. 154.
 Neamut v. Gooro, (1874) 22 W.R. 365; Gujja Lall v. Fatteh Lall, (1880) 6 G. 171 (F.B.) 175; per Mitter, J., cur. dissent: Collector v. Palakdhari, (1889) I. L. R. 12 All. 1 (F.B.) at p. 43 per Mahmood, J. cur dissent: see Radha Krishna v. Sarbeswar, 1925 Cal, 684 (2) 29 C. W. N. 469; 86 I. C. 674.
 Gujju Lall v. Fatteh Lall, (1880) 6

^{8.} Gujju Lall v. Fatteh Lall, (1880) 6 C. 171. 183. 185, 187 (F.B.) per curiam, Mitter, J. dissent; Collector v. Palakdhari, 12 All. 1 (F.B.) at pp. 27, 28; see remarks of Sargent C. J. in Ranchhoddas v. Bapu, (1886) 10 B. 439, 442. "Former judgments are not themselves transactions, but the suit in which they were made is a "transaction" Straight, J., 12 A. 1 supra. It was said by Ranade, J., "that the interpretation placed upon the words 'right' and 'transaction' in Gujja Lall v. Fatteh Lall, seems not to

- therefore, not res judicata, have been held to be admissible in evidence under the provisions of this Act. 18
- (b) In addition to the judgments which are admissible under Sections 40 to 42 of this Act, Section 43 makes the existence of judgments relevant, if covered by any other provision of this Act. Judgments, which do not operate as res judicata, can be admitted in evidence to show the existence of a judgment in favour of a party.
- (c) The existence of a judgment may be of some probative value as for instance, in determining the question of possession.¹⁴ And it may create a paramount duty in appropriate cases to displace the finding.¹⁵
- (d) Judgments may be admitted as proof of the fact of litigation or its results and effects upon the parties, which make a certain course of conduct probable or improbable on the part of one of the parties.¹⁶
 As between one of the parties to a litigation and a stranger, a question may have been conclusively decided, but that judgment is not binding upon the person who was not a party to that litigation.
- (e) Even the findings of the highest Court of Appeal in that litigation are not admissble against that party. The question in dispute between the parties has, therefore, to be decided upon independent evidence. Indeed, a judgment in another suit, which is not interpartes, is not evidence to establish the truth of the matter decided in that judgment, and the findings of fact arrived at on the evidence in one case are not evidence of that fact in another case. Is
- (f) But a judgment in another suit, which is not inter partes, may be evidence under this Section for certain purposes, e.g., to prove the fact of the judgment; to show who the parties to the suit were; to show what was the subject-matter of the suit; to show what was decided or declared by the judgment; to show what documents had been filed by the parties in the proceedings; to establish the transaction referred to in the judgment; to show the conduct of the parties, or particular instances of the other side of a right or assertion of title; 19 to identify property; or to show how property had been previously dealt with; to establish a particular transaction in which

Shiv Charan v. State, A. I. R. 1965
 A. 511.

 Midnapur Zamindari Co. Ltd. v. Naresh, L. R. 48 I.A. 49; A. I. R. 1922 P.C. 241.

Shivcharan v. State, A. I. R. 1965
 A. 511.

17. Onkarmal v. Bireswar, A. I. R.

Bom. L. R. 322.

19. Harihar Prasad v. Deo Narain, 1956 S. G. R. 1; A. I. R. 1956

S.C. 305.

^{13.} Collector v. Palakdhari Singh, I. L. R. 12 A. I, (F.B.); Ram Ratan Lal v. Kashinath Tewari, 1966 B. L. J. R. 237; A. I. R. 1966 Pat. 235, 241; Kesho Prasad v. Bhagjogna, A. I. R. 1937 P.C. 69 at p. 75, where the Privy Council observed: "There are undoubtedly cases in which a judgment is evidence of weight even against third parties."

¹⁹⁵⁹ G. 195; 61 C. W. N. 970.

18. Harihar Prasad v. Deo Narain, 1956 S. C. R. 1: A. I. R. 1956 S. C. 305; 1956 B. L. J. R. 306; 35 Pat. 22; Kesho Prasad v. Bhagjogna, I. L. R. 16 Pat. 258: A. I. R. 1937 P. C. 69; Gobinda Narain Singh v. Sham Lal, L. R. 58 I.A. 125; A. I. R. 1931 P.C. 89; Gopika Raman v. Atal Singh, L.R. 56 I.A. 119; A. I. R. 1929 P.C. 99; Ramaji v. Manohar, A.I.R. 1961 B. 169; 62 Bom. L. R. 322.

. 13-N. 8, cl. (b) FACTS RELEVANT WHEN RIGHT OR CUSTOM IS IN QUESTION

a right was asserted in the name of a person, if any, who was declared in the judgment as entitled to possession; but the judgment is not evidence to establish the truth of the matters decided in that judgment.20 The findings of fact arrived at on the evidence in one case are not evidence of that fact in another case.21 But the reasons upon which a judgment is founded cannot be regarded as, nor can any finding of fact there come to other than the transaction itself, relevant in another case,22

(g) The judgment in a previous suit, though not inter partes, is admissible under this section in proof of a transaction or particular instance, in which the right in question was asserted and recognised or denied.28

The recitals in a judgment are no evidence whatever to prove the exact admissions made by a party or witness unless the whole of the statement is recited therein.24

(h) But a judgment may be admissible to prove that a right was asserted or denied under this section.25

In a land acquisition reference for determining the value of property a judgment of previous suits though not inter partes is admissible.1 Award of the Collector though unaccepted can be relied upon by the claimant in another acquisition proceeding as evidence of value of similar land1-1 but a previous judgment in a land acquisition reference not inter partes cannot be used by the Collector² the reason being that the Collector who is always a party to a land acquisition proceeding may be bound by a judgment against him but cannot be allowed to rely on a judgment in his favour.

A right in dispute cannot be proved on the basis of the finding in respect of that right in a previous suit not inter partes. A judgment recording a finding recognising a certain right cannot be used as evidence to prove that right in another suit not between the same parties.8

In a suit under Section 92, C. P. C., in which the subject-matter was a tank, an earlier decree granted to the defendant for evicting trespassers from the tank can be relied upon by the defendant as a transaction or instance under Section 13 (a) and (b) in which the defendant's right to the tank was recognised.4

Kesho Prasad v. Bhagjogna, I. L.
 R. 16 Pat. 2:8; A. I. R. 1937 P.C.

21. Gopika Ran; an v. Atal Singh, L. R. 56 1. A. 125: A. I. R. 1929 P.C.

Gobinda Narain v. Sham Lal, L. R.
 I.A. 125; A.i.R. 1931 P.C. 89.

23. See Srinivas v. Narayan, (1955) 1
S. C. R. 1: A. I. R. 1954 S.C. 379:
(1954) 1 Mad. L. J. 630: 57 Bom.
L. R. 678: 1954 Mad. L. W. 515;
Abdulla v. Kunbammad, A. I. R.
1960 Ker. 123: I. L. R. 1959 Ker.
1304; Kesavan v. Narayana, 1969
Ker. L. R. 236: 1969 Ker. L. T. 110.

Indra Singh v. Income Tax Commissioner, I. L. R. 22 Pat. 55; A. I. R. 1943 Pat. 169; Abdulla v.

- Kunhammad, supra. Mahabir v. Sonmati, A. I. R. 1964
- Pat. 66.

 1. Hemant Kumar v. State of W. Bengal, (1975) 79 Cal. W. N. 378.

 1-1. Pratima Ghosh v. State, A. I. R.

1973 Cal. 284.

- Special Land Acquisition Officer v. Lakhamsi, A. I. R. 1960 B. 78: 61 Bom. L. R. 1033; see also Nageswara v. Special Deputy Collector, A. I. R. 1959 A. P. 52; (1958) 2 Andh. W. R. 116, per Krishna Rao,
- J.; Umamaheswaram, J. contra.

 S. Hira Lal v. Hari Narain, A. I. R.
 1964 A. 302.
- 4. N. Swaramabrahmam v. V. Satyanarayana, A. I. R. 1967 Andh. Pra.

Where the right of an adopted son is disputed and he brings a suit against trespassers who dispute his right and the factum of adoption, an order passed in an earlier revenue case, directing the impleading of plaintiff as the adopted son of one of the defendants in the case, is admissible to show that right as an adopted son was claimed and recognised, even though the order was not inter partes.5 So, where the issue in the suit was whether a particular person was an adopted son and it was found that he was the adopted son, the judgment in that suit is admissible for the purpose of showing that there was an assertion and denial with regard to the adoption and that it was ultimately found that he was the adopted son.6 Where, however the question of adoption is agitated in a previous litigation and it is held that the person in question is not the adopted son, and the same finding is given in another suit, then, although these decisions do not operate as res judicata, yet they have evidentiary value under this section.7

- (x) Award in partition suit. Where an award contains recitals showing that the plaintiff had claimed the money before the arbitrators, making that fact a relevant circumstance under clause (1) of this section, the Court can proceed on the evidence contained in the award, unmistakably supporting the plaintiff's claim.8 In the above-noted case, there was an arbitration. In finding out the extent of the estate, the arbitrators excluded the deposits made by others because they were not assets but liabilities of the estate. They, however, showed the depositors and their sums in the schedule annexed to the award. But as the depositors were not parties to the partition suit, no direction as to the repayment of those deposits was made in the decree made on the basis of the award. The depositors filed a suit on the basis of the award. It was held, that the award, though it might not be an admission of the assets held, yet it did not make the decree in the partition suit, incorporating in it the award, wholly irrelevant. The award contained recitals showing that the plaintiffs had claimed the money before the arbitrators, making that fact a relevant circumstance under clause (1) of this section. Therefore, the Court could proceed on the evidence contained in the award.
- (xi) Malicious prosecution. Admissibility of judgment of criminal court. Proceedings in the Criminal Court are not evidence in the suit for malicious prosecution. The civil Court must go into evidence and decide for itself whether there was want of reasonable and probable cause, or the prosecution was actuated by malice. The judgment of the criminal Court is admissible in evidence in the civil suit only for the limited purpose of establishing the fact that the prosecution had ended in the plaintiff's favour but not for the purpose of ascertaining the grounds on which the judgment had proceeded.9
- (xii) Compromise decrees. It is no doubt true that a judgment based upon a compromise or confession cannot be placed on the same footing as that in which after contest a custom was held to be proved or negatived,10 yet it

Subbarao v. Venkata Rama Rao,
 A. I. R. 1964 A. P. 53: (1963) 2
 Andh. W. R. 307.

Venkataratnam v. Venkatanarasa-yamma, A. I. R. 1964 A. P. 109: (1963) 2 Andh. W. R. 169.
 Maheswar v. Maiana Bewa, A. I. R. Venkatanarasa-

¹⁹⁶⁴ Orissa 174.

^{8.} Hrishikesh v. Khantamani, A. I. R. 1959 G. 257.

T. Y. Singh v. T. K. Singh, A. I. R. 1959 Manipur 32.

^{10.} Imperial Oil Soap and General Mills Co. v Misbahuddin, 1921 Lah. 69: I. L. R. 2 Lah. 83: 61 I.G., 325; 1974 J. & K. L. R. 462,

cannot be said that such a document is of no value. It does show the assertion of the right and acceptance of the same by the other party, whatever be the reasons for such acceptance.11

In a case, where a dispute existed between the proprietors of two estates, A and B, as to the right to water flowing through an artificial watercourse on Estate B, belonging to the defendants, proceedings were taken in the Criminal Courts by the owners of estate A against some ryots of estate B in consequence of their having closed the watercourse. These proceedings led to a razinamah, or deed of compromise, which was relied on as evidence before the Privy Council. Their Lordships said: "This agreement is a clear acknowledgment of right to this overflow. It was objected that this razinamah does not bind the proprietors of B; but although it was apparently made between tenants, it seems to have been subsequently acted upon, and may be properly used to explain the character of the enjoyment of the water". Their Lordships also referred to certain proceedings under Section 320 of the Code of Criminal Procedure of 1861 (corresponding to Section 147 of the Codes of 1882 and 1898), in which a claim was made as to the right to use the water collected in the tal, observing that the proprietors of B do not seem to have challenged the decision of the Magistrate, in these proceedings, in the Civil Court. 18 An order under Section 145, Criminal Procedure Code, was held admissible as an instance in which the right in dispute had been recognized.14

(xiii) Chittas. In a case decided prior to the Act, measurement chittas were admitted as prima facie evidence that long before the case originated and the suit was thought of the plaintiff put forward his right to certain lands as mal lands,18

(xiv) batwara papers. Batwara papers (partition papers) have been held to be admissible under this section as instances in which the right in question was claimed and recognised.16

(xv) Leases. An amalnama patta, in which a predecessor of a co-sharer party made a statement in derogation of his own interest, was held to be admissible for the purpose of showing the existence of a paragannah custom.17

Abdul Karim v. Shiv Narain, 1952 Punj. 356; 54 P.L.R. 255; 1974 I. & K. L.R. 462.

^{12.} Ramessur Persad v. Koonj Behary, (1878) 4 C. 640.

^{13.} As to this case, in Collector v. Palakdhari, 12 All. 1 at p. 16 Edge, C. J., observed: "apparently those proceedings and the razinamah in which they resulted would be ad-missible under Section 9 as evidence of facts necessary to explain or introduce a fact in issue. The record of the proceedings in the Criminal Court in 1884 which the Judicial Committee admitted in evidence might be admissible under Sec. 9 or under Sec. 13 (b). In Run Bahadur Singh v. Mst. Lucho Koer, 11 G. 301, the Judicial Committee would possibly have held that the record in the rent suit, of which

the judgment referred to at p. 38 formed part was admissible under Sec. 13 (b)." And see Hira Lal v. Hills, (1882) 11 C. L. R. 528, 530. See also Venkatasami v. Venkatreddi, (1891) 15 M. 12, post and note on "Admissibility of Judg-

ments" post. Brajraj v. Ajiman Nisa Bibi, 1950 Orissa 19: I. L. R. (1949) 1 Cut. 465.

^{15.} Debee v. Ram, (1868) 16 W. R.
443; Abdul Khaleque v. Sushil
Chandra, 39 C. W. N. 330; Dwijesh Chandra v. Naresh Chandra,
1945 Cal. 492; 49 C. W. N. 791;
see note to s. 32, cl. (7); post.
16. Ghoghar Raut v. Jagarnath Prasad
Singh, 1947 Pat. 475.
17. Jugul Kishore Birla v. Vishnu Hari
Jana. 1955 Cal. 419

Jana, 1955 Cal. 419.

Although the Inam Fair Register is entitled to great weight as an act of State, the entries therein would not override or nullify the effect of registers prepared long before. It is only in the absence of authentic evidence that utmost importance will be given to the Inam Fair Register; but it will not displace earlier documents, the authenticity of which could not be questioned.18 Report by a local agent upon an enquiry made by him under Act XIX of 1810, whether a particular temple is a private or public temple is admissible under this section, when the question of the nature of the temple is under consideration,19

Where the question is whether A has a right of fishery in a river, licences to fish granted by his ancestors, and the fact that the licensees fished under them are relevant.20 And where the question is whether A owns land, the fact that A's ancestors granted leases of it is relevant.21

9. Miscellaneous cases. The question is: Whether there is a public right of way over A's land. The fact that persons were in the habit of using the way, that they were turned back, that the road was stopped up, that the road was repaired at the public expense, and A's title-deeds showing that for a length of time, reaching beyond the time when the road was said to have been used, no one had power to dedicate it to the public, are all relevant.22 A petition to the Collector in which the right of primogeniture is stated has been held to be an instance of the recognition of such a custom.28

Where it was alleged that land was debutter and it was contended that there was no legal evidence from which the Court was justified in inferring that it was; held that a rubkar by which the Collector released the land in dispute as being debutter property was a "transaction" and a relevant fact from which the lower court was entitled to infer that there had been a previous grant, though the release of itself did not constitute such a grant.24

On the question of mere user of waste land as a passage as being a matter of right, the court should consider and apply its mind to the quality and the quantity of the evidence in particular.25

The user of a land for over 50 years for burying the dead of the members of a particular community to the complete exclusion of strangers is a conclusive circumstance against the land being a public waqf.1

Validity of customary right of burial depends on its being ancient, invariable, certain, continuous, peaceably and openly enjoyed and reasonable.2 In U.P. Zamindars had a customary right to recover one fourth of sale cons'deration of a house sold by Riyaya.3 This custom has now been abolished

Lakshminarasamma v. Raghavayya, (1958) 1 Andh. W. R. 343.
 Commissioner of H. R. E. v. Kanak Durga, A. I. R. 1958 Orissa

Rogers v. Allen, 1 Campt, 309; see also Neill v. Duke of Devonshire, L. R. 8 App. Cas. 135.

^{21.} Doe v. Pulman, (1842) 3 Q. B. 622, 623, 626.

Steph, Dig. Art. 5, illust. (c). As to proof of custom by instances, see Vishnu v. Krishnan, (1883) 7 M. 3.

^{23.} Shyamanand v. Rama, (1904) 32

G. 6, 17. 24. Lakhi v. Kali, (1905) 10 C. W. N.

Chidambara v. Vedayya, I. L. R. (1967) 3 Mad. 582: (1968) 1 M. L. J. 110; A. I. R. 1967 Mad. 164, 170.

Abdul Salam v. Mohammad Ismail, 1965 A. W. R. (H.C.) 296, 298.

Akram Sheikh v. Majid Sheikh, A. I. R. 1971 Cal. 405.

L. B. Prasad v. Gauri Shanker,
 A. I. R. 1973 All. 162.

with effect from 25th August, 1951 by U.P. Abolition of Zare-Chaharum Act, 1951, (Act No. 30 of 1951).

The rent note executed by a tenant of a complainant in respect of land in dispute and copy of the judgment of Nyaya Panchayat in a case filed by the complainant against the tenant for recovery of arrears of rent respecting that very land are admissible for the proving of charges under Sections 426, 447 and 506, I. P. C.4

An inspection note by a Magistrate strictly in conformity with Section 539-B, Cr. P. C., may be treated as admissible under Sections 13 and 35 of the Act.5

An order of mutation of the Revenue Officer and a judgment of a civil court though not inter partes in which the right of the plaintiff to succeed to a particular estate was recognised, is relevant and admissible in a subsequent suit for possession by way of redemption in which the same right is claimed.6 For admissibility of declarations in mutation proceedings in Punjab, please see the undernoted case.7

Where a Magistrate does not rely solely upon the judgment of the High Court in a previous case in order to find possession of property in respect of a disputed land, he can use the judgment as a piece of evidence of possession quantum valebat (as much as it was worth).8

Recital in sale-deed that property sold was ancestral property of vendor is strong proof of the fact recited, though not an admission of vendee.6

Judgment of Municipal Committee is relevant only to show that permission to construct was granted. It is submitted that this was not a case of judgment but only of grant of permission in discharge of statutory duty.10

10. Pleadings. The plaint or written statement filed by a party in a previous litigation is admissible evidence of the right claimed therein.11 An admission contained in a plaint or written statement or an affidavit or any sworn deposition given by a party in a previous litigation will be regarded as an admission in a subsequent action, though it is capable of rebuttal.12 The assertion by the husband in his written statement in a previous suit for partition that his wife was benamidar for him in respect of certain property is rele-

^{4.} Chingongbam Ibomocha v. Okram Tambi, 1970 Cr. L. J. 360: A. I. R. 1970 Manipur 23, 25.

^{5.} Baroo v. Thakurji Singh, 1968 A. W. R. (H.C.) 614, 616; Baldeo Das v. Gobind Das, A. I. R. 1914 All. 59.

^{6.} Hiralal v. Shivlal, (1969) 71 Punj.
L. R. 735, 738 relying on Kuldip
Raj v. District Board, Gurdaspur,
A. I. R. 1948 Lah. 109; Tahilram
(Tackchand v. Mst. Miral, A. I. R. 1938 Sind 132. See also Rangayyan v. Innasimuthu, A. I. R. 1956 Mad. 226.

Bisakhu v. Jaishi, 1971 Sim. L. J. (H.P.).70.

^{8.} Ramkawal Upadhya v. Dudhanath,

¹⁹⁶⁹ Cr. L. J. 1197: A. I. R. 1969 Pat. 317, 320 (rights of cultivation and enjoyment); Abdul Shakur v. Abu Sayged, A. I. R. 1925 Pat,

^{9.} Hetram v. Bhader Ram, 1973 W.

L. N. 981 (Raj.). 10. Hazari Lal v. Nagar Parishad, A.I. R. 1976 Raj. 91.

^{11.} Srichandra Choor Deo v. Bibhuti Bhushan Deva, 1945 Pat. 211; I. I. R. 23 Pat. 763: 220 I.C. 260; Gopi Nath v. Nand Kishore, 1949 Ajmer 2.

^{12.} S. T. Chendikamba v. K. I. Vishwanathamayya, A. I. R. 1939 Mad. 446.

vant, in a partition suit filed by the wife after her husband's death; as the husband was dead, the assertion was also relevant under Section 32 (7) post.13

Where it was shown, that it was the practice in old times for the lower Courts in Bengal to set out the pleadings in their judgments and that the practice was recognized by circulars issued by the Sudder Dewany Adalut these judgments were held admissible under this section as instances in which the right in question was claimed and disputed and disallowed.14

Generally speaking, title to property, corporeal or incorporeal, may be proved under this section, or (if the section be held to be applicable to incorporeal rights only, which it is submitted is not the case) under this and the preceding sections by evidence of acts of ownership and enjoyment, such as the receipt of rents and profits, the discharge of the burdens or repairs of the property, the granting of licences and leases and the like; while in rebuttal, proof is admissible that these acts were disputed, or done in the absence of persons interested in disputing them.15

As to Wajib-ul-arad, see note to Section 35.

11. Admissibility of judgments and decrees as transactions or instances. Judgments qua judgments, or adjudications upon questions in issue and proofs of the particular points they decide are only admissible either as (a) res judicata¹⁶ or (b) as being "in rem", ¹⁷ or (c) as relating to matters of public nature.18 In, (a) they are conclusive between the same parties; in (b) they are declared by law to be conclusive proof against all persons of certain19 matters only; in (c) though not conclusive, they are relevant as adjudications against persons not parties to them, the reason being that, in matters of public right, the new party to the second proceeding, as one of the public, has been virtually a party to the former proceeding.20 But judgments, orders and decrees other than those admissible by Sections 40, 41 and 42 may be relevant under Section 43, if their existence is a fact in issue or is relevant under some other provisions of the Act.21 In the sections relating to judgments, the judgment is admissible as the opinion of the Court on the questions which came before it for adjudication. Ordinarily, judgments are not admissible as between persons who were not parties and do not claim under the parties to the previous litigation. But there are exceptions to this general rule.22 The cases contemplated by Section 43 are those where a judgment is used not as res judicata or as evidence more or less binding upon an opponent by reason of the adjudication it contains (because judgments of that kind are already

Evidence Act and is admissible,

Under S. 40, post.
 Under S. 41, post.
 Under S. 42, post.
 See Kanhaya v. Radha, (1867) 7

W. R. 338.

20. Per Pontifex, J., in Gujja Lall v. Fatteh Lall, (1880) 6 G. 171 (F.B.).

21. S. 43, post.

22. Hira v. Hills, (1882) 11 C. L. R. 528, 530, per Field. J.

Satyadeo Prasad v. Smt. Chander-joti Debi, 1965 B. L. J. R. 800: A. I. R. 1966 Pat, 110; Srichandra Choor Deo, v. Bibhuti Bhushan, A. I.R. 1945 Pat. 211 (the allegation in plaint in previous suit by plaintiff's father that the family was governed by the Banaras School of Hindu Law is admissible under Sec. 138, Evidence Act. Rangaswami Pillai v. Vaidyalinga Mudaliar, A.I.R. 1917 Mad, 807 (Statement of Hindu widow in answer to a suit for partition against her and other members of her husband's family by one of them as to how she treated a porticular piece of the property claimed to be possible property, is relevant under Sec. 13 of

Bhaya v. Pande, 3 C. L. J. 521.
 Will's Ew., 3rd Ed., 62: Phipson, Ev., 11th Ed., 198; Jones v. Williams, (1837) 2 M. & W. 326. As to repairs constituting an act of ownership, see 4 C. W. N. ccii.

dealt with under one or other of the immediate preceding section), but the cases referred to in Section 43 are such as the section itself illustrates, viz., when the fact of any particular judgment having been given is a matter to be proved in the case.23 Section 43 is one of the group of sections relating to judgments and contains the provisions applicable to cases relating to the relevancy of judgments as evidence against strangers.24 Under that section, a judgment may be admissible as relevant under some other provision of the Act. So a previous judgment has been admitted, not in order to prove an adjudication but in order to prove an admission made by a predecessor-in-title of the party against whom the document was sought to be used.25 This being so, the question arises whether, and if so, how, previous judgments and decrees, and the litigation in which they were pronounced, not being between the same parties, are admissible in evidence in proof of "right" and "custom" (not being of a public nature) under this section, either as "transactions" clause (a) or as "particular instances" under clause (b).1

The Privy Council have admitted in evidence judgments and orders not between the same parties.2

Where to actions of ejectment by a zamindar, the defendants pleaded a ghatwali tenure of the mouzahs in dispute under permanent mokurruri and durmokurruri rights at fixed rents from before the decennial settlement, it was held, that certain decrees in 1817 and 1845 relating thereto, to which the zamindar's predecessors in title were not parties, but which sustained the defendant's claim to hold at fixed rents, were admissible in evidence as showing ancient possession and assertion of title many years ago; and that taken with other evidence, they established the defendant's possession at a uniform rent for so long a period as to raise the presumption that the tenure was and is of permanent nature.8 The judgments and decrees had also been admitted by the lower Courts. The first Court was of opinion that they might be accepted as showing ancient possession and that the title on which the detendants relied was openly asserted as early as 1788, and at subsequent dates irrespective of the findings come to in those decrees; that the orders passed in those decrees would not be evidence against the plaintiff's title, nor could they be considered as proving the defendant's title; but that they might be accepted to show ancient possession and to show that the title was asserted rightly or wrongly many years ago. The High Court observed that the lower Courts had only used those judgments as evidence, that there was litigation between the parties thereto at the dates to which they relate; and that in former suits the parties asserted the same rights which they were then asserting and that to this extent the judgments were admissible even though the plaintiff was no party to them. The Privy Council made no reference to this section. It is true that it cited the findings of the lower Courts without disapproval, but it does not appear whe-

Per Garth, C. J.., in Gujja Lall v. Fatteh Lall, (1880) 6 C. 171 (F.B.).
 Tepu Khan v. Rajani Mohun Das, (1898) 2 C. W. N. 501, 505: (1898) 25 C. 522.
 Krishnasami v. Rajagopala, (1895)

¹⁸ M. 73, 78.

Other than public or general rights and customs in regard to which (being matter of public nature) adjudi-cations inter alia have always been admissible and are now so under S.

⁴² of the Act: Taylor, Ev., p. 1683; Madhub v. Tommee, (1867) 7 W.R. 210; Nallathambi v. Nellakumara, (1878) 7 Mad. H. C. R. 306; Ramasami v. Appavu, 12 M. 9 and

S. 42, post.

Tepu Khan v. Rajani Mohun Das, (1898) 2 C. W. N. 501, 505; (1898)

²⁵ C. 522. 3 Ram v. Ram, (1894) 22 C. 533 (P.G.).

ther it approved of them. These findings appear to have been referred to, on the contrary, for answering the appellant's contention that the lower Courts had used certain of the statements of the parties as recorded in the judgments as evidence against him. The Privy Council by reference to the findings show that they did not. But the ground on which the Privy Council itself admitted the evidence was that inasmuch as by the earlier judgment a decree for rent was given at a certain rate, at which rate the land had all along been held, it was competent to use the judgment as evidence showing the rent paid for the possession at and prior to that date, then nearly 80 years ago. It was not the correctness of the decision, but the fact that there had been a decision that was established by the production of the judgment; and the existence of the judgment was admissible as a fact in issue under Section 43, post.4 The result of this decision appears to be that the judgments were admitted under Section 43 as facts in issue and also (if the Privy Council be taken to have affirmed the decision of the High Court on this point) as evidence of assertions of right under this section. But neither Court treated the judgments as adjudications having the effect of a kind of qualified and inconclusive as res judicata, which appears to have been the view entertained by Ghose, J., in the last mentioned suit. In Bitto Kunwar v. Kesho Persad Misr,5 their Lordships of the Privy Council, speaking of a judgment in a former suit against one of the defendants, Bacha Tewari, observed: "This decision is not conclusive against Bacha Tewari, as the suit was not between the same parties as the present suit, but their Lordships agree with the Subordinate Judge that it was admissible as evidence against him." In this case, a decree obtained against the defendant that a will was revoked was held not to be res judicata in a suit against him brought by other plaintiffs, but admissible as evidence against him. There is no mention of this section in the judgment; and the grounds upon which the previous decisions were admitted are not stated in the report. An opinion, however, has been expressed that as the matters in controversy in the suit in which the decree was passed related to public charitable purposes, the prior decision was brought within the terms of Section 42 which treats of judgments relating to matters of a public nature.6 Whether the judgment might or might not have been admissible on this ground, it appears from the records of the Allahabad High Court7 that this was not the ground on which the Subordinate Judge (whose decision was approved by the Privy Council) admitted it in evidence. The plaintiff claimed the property in suit as the heir of Ramkishen. If the property were subject to a trust and Ramkishen had been in possession as trustee, then the plaintiff had no title to it; otherwise if there were no trust and both Ramkishen and Bacha Tewari had beneficial possession. The fifth issue, therefore, was whether there was a trust, and this involved the question whether Bhawani had revoked the will creating the trust. The second and fourth issues were as to the time since when possession had been held and what was the nature of the possession of Ramkishen, the plaintiff's alleged predecessor, and of the defendant Bacha Tewari: These were all facts in issue. As showing that they did not hold as trustees, evidence was given of an agreement of 4th January.

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(1897) 24 I. A. 10: 19 All. 277:
 1 C. W. N. 265 (P.C.).
 Abinash v. Paresh, (1904) 9. C. W.

7. See Appendix where the judgment of the Subordinate Judge, Benares, has been reproduced in full.

^{4.} Per Geidt, J., in Abinash Chandra v. Paresh Nath, (1904) 9 C.W.N. 402. The judgment, however, was not treated as proof that the amount decreed was the correct amount payable, but that that particular amount was by the decree made payable ib., at p. 410.

^{6.} Abinash v. Paresh, (1904) 9. C. W. N. 402 at p. 409; per Geidt, J., this was doubted by Ghose, J. in the same case, see p. 382.

1850, under which Ramkishen and Bacha Tewari held the property in moieties as proprietors, an agreement which was subversive of the provisions of the will had it been existent and operative; secondly, the fact that they got possession under the agreement; thirdly, a mortgage by the defendant as proprietor on 4th September, 1877, and lastly, a suit in 1880 (which is that referred to by the Privy Council), by which certain outsiders sought to have it declared that the estate was in possession of Bacha Tewari (who was as well as his mortgagee, a party to that suit), as a trustee under the will. It was, however, held in that suit that the will was revoked and therefore the property was not subject to a trust. At the date of that suit Bacha Tewari was in possession of his moiety. He continued to hold after the suit and held under a title which negatived the trust, namely, the title declared by the judgment in question. This decision (the Subordinate Judge said and, as the Privy Council held, correctly) in the opinion of the Court is admissible as evidence against Bacha Tewari, although the plaintiff was not a party to it-as showing the character of the possession of Ramkishen and Bacha Tewari over the estate in respect of which the agreement of 1850 was made. He could not, after this decree, have held as trustee when the trust was negatived by it. The judgment was, therefore, relevant and admitted, not under this section, but its existence was either a fact in issue under the forty-third and fifth sections or relevant as explaining a fact in issue under the forty-third and ninth sections

Neither of these decisions appear to affect the Full Bench decision in Guija Lall v. Fateh Lall.8

In the later case of Dinomoni Chowdhrani v. Brojomohini Chowdhrani,9 in which however this section was expressly referred to. the facts were as follows:

The suit was instituted by B.M.C. as the widow and executrix of H.N.C. against J.C., to recover possession of certain land on the allegation that it was partly a reformation on the original site of, and partly an ascretion to, certain of her villages. In 1886, J.C., commenced to raise disputes as to the possession of H.N.C., whereupon proceedings took place in the Criminal Court under Section 318 of the Criminal Procedure Code, XXV of 1861, in the course of which H.N.C. was found to be in possession of the land, and an order was passed by the Magistrate confirming his possession. Some time after a thirdparty, a neighbouring proprietor, commenced a dispute which also terminated by an order of the Criminal Court under Section 530 of the Criminal Procedure Code (Act X of 1872), dated 19th June, 1876, in favour of H.N.C. In 1888, further possessory proceedings took place in the Criminal Court under Section 145 of the Criminal Procedure Code of 1882, as the result of which the defendant J.C. was found to be in possession, and by an order of 31st December, 1888, she was confirmed in possession of the land in dispute. The Subordinate Judge dismissed the suit and rejected the Criminal proceedings of 1876 as being inadmissible in evidence against the defendant, she not having been a party to them. The High Court in appeal admitted these proceedings as being relevant for the purpose of showing the identity of the land claimed in the suit with that which was claimed in 1876 and as showing that it was in existence at that time. On appeal to the Privy Council, their Lordships observed: "These orders (made in 1867, 1876 and 1888), are merely police orders made to prevent breaches of the peace. They decide no question of title; but under Section 145 of the Criminal Procedure Code of 1882 (relating

^{8. (1880) 6} C. 171 (F.B.).

^{9. (1901) 29} C. 187.

to disputes as to immovable property), the Magistrate is, if possible, to decide which of the parties is in possession of the land in dispute; and if he decides that one of the disputants is in possession, the Magistrate is to make an order declaring such party to be entitled to retain possession until evicted in due course of law and forbidding all disturbance of such possession until such eviction. The Criminal Procedure Acts in force in 1866 and 1876 were to the same effect. These police orders are, in their Lordships' opinion, admissible in evidence on general principles as well as under the thirteenth section of the Indian Evidence Act to show the facts that such orders were made. This necessarily makes them evidence of the following facts, all of which appear from the orders themselves, viz., who the parties to the dispute were, what the land in dispute was; and who was declared entitled to retain possession. For this purpose and to this extent such orders are admissible in evidence for and against every one when the fact of possession at the date of the order has to be ascertained. If the lands referred to in such an order are described by metes and bounds, or by referene to objects or marks physically existing, these must necessarily be ascertained by extrinsic evidence, i.e., the testimony of persons who know the locality. If the orders refer to a map, that map is admissible in evidence to render the order intelligible and the actual situation of the objects drawn or otherwise indicated on the map must, as in all cases of this sort, be ascertained by extrinsic evidence. So far there appears to be no difficulty. Reports accompanying the orders or maps and not referred to in the orders may be admissible as hearsay evidence of reputed possession.¹⁰ But they are not otherwise admissible, unless they are made so by the thirteenth section of the Evidence Act. To bring a report within that section the report must be 'a transaction in which the right or custom in question was created, claimed, modified, recognized, asserted or denied or which was inconsistent with its existence.' These words are very wide and are wide enough to let in the reports forming part of the proceedings in 1867, 1876 and 1888. Their Lordships are of opinion that the High Court did not err in receiving the report made in the proceedings of 1876, to the reception of which Mr. Cohen objected."

Summary. It is true that the Privy Council refer to this section but their judgment shows that the 'police orders' as they are called but which were apparently the judgments or orders of Magistrates in proceedings under Section 145 of the Criminal Procedure Code, were also admissible on 'general principles'. What these are is not stated. But as the Judicial Committee has also held that before a document can be admitted, it must be shown to be admissible under the Evidence Act, it must have here referred to some other section than the present one. This being so, the expression of opinion as regards this section was obiter. In fact the judgments or orders were admissible as facts in issue under the fifth section. The suit was to recover possession, and it was obviously admissible to show on the question whether a party had possession at a particular time that an order had been passed retaining him in possession. It might, of course, have been shown that notwithstanding such order he had not, or did not, get possession, but in the absence of such evidence the presumption would be that what was ordered to be done was carried out. It is, however, clear that neither as facts in issue nor as 'transactions' nor 'instances' under this section were these orders treated as a kind of inconclusive res judicata, that is, it was not the correctness but the fact of the decision which

^{10.} Taylor on Evidence, s. 517.

was relevant. Were it not that the judgment of the Privy Council refers to this section, it would create no difficulty at all. With all respect, however, it may be questioned how the order of the Magistrate could be a 'transaction' or 'instance' of the character mentioned in this section, except on the ground that it 'recognized' the right to possession of a particular party or was 'inconsistent' with the possession of the opposite party as to which, see post. What the reports were which were admitted is not stated in the decision, but this matter does not immediately touch that under discussion. It does not appear that the section was originally intended to refer to judgments, but to the acts and statements of persons which may be submitted for the consideration and determination of a Court and not to the judgments, decrees and orders of the Court itself. The section itself, which is intelligible enough, seems to have been intended to refer to matters such as those given in illustrations of it. Considerable difficulties, however, arise from the case-law treating of the applicability of the section to judgments, decrees and orders. It must be remembered that some of the judgments, in the case referred to, were in fact admissible under other sections of the Act. There is no question that for some purposes and apart from this section judgments may be relevant. The point is whether this section can be quoted as a ground for their admission.

In the first place, the evidence rendered must be that of a 'transaction', or 'instance'. Then assuming it is a 'transaction' it must be one of the characters mentioned in clause (a) or if it is an 'instance' it must be an instance of the facts mentioned in clause (b). It seems, with all respect to contrary views, to be an incorrect use of language to describe a judgment as a 'transaction.' But if it can be so described or as an 'instance' it must come also within the other terms of the clauses in which these words appear. It is obvious that a Court does not claim or assert, or deny, or exercise a right or custom. Nor does it dispute, or depart from the exercise of a right or custom. The parties do that. What it does is to determine the cause presented to it for trial, and for that purpose it considers the claims, assertions, denials, exercise, and so forth of the litigants before it, or of those persons whose acts and statements the law treats as their own. Then even assuming a judgment is a transaction it cannot be said to create or modify a right or custom. The right or custom either exists or it does not before the cause comes to trial. The Court merely finds that before and at the date the suit was instituted the right or custom did or did not exist. If the parties litigating had no right the Court cannot give it to them. And if a right or custom exists the Court has no jurisdiction to modify either. The only words in the section which may, with any show of reason, be made applicable to judgments is the word 'recognized' in clauses (a) and (b), and the phrase 'which was inconsistent with its existence' in clause (a). But it seems that neither was in fact intended to apply. The recognition referred to in the section appears to be, like the other acts mentioned, an act of a person and not of a tribunal. It is an act of admission. A Court, however, does not admit a right, but adjudicates upon it. Lastly, apart from the question whether a judgment is a 'transaction', the 'inconsistency' mentioned would appear to refer to the same class of facts as the others stated in the section. In one sense, if a right is claimed and a judgment is produced which pronounces against it, that judgment may be said to be inconsistent with the existence of that right. But the inconsistency referred to in the section appears to be that which is inherent in the nature of two opposed facts, such as that referred to in the first part of illustration (a) to the eleventh

section and not the 'inconsistency' (if indeed it can be correctly so described), which exists between facts evidencing a right or custom and an opinion (for such is the judgment of a Gourt), pronouncing against the existence of such right or custom. A judgment is indeed inconsistent in no sense unless it has been correctly rendered. Inconsistency of fact, however, is shown when two opposed facts are proved and no explanation is offered to their apparent inconsistency.

If this view of the section be correct, then as held by the Full Bench in Gujja Lall v. Fatteh Lall,11 a judgment or decree is not admissible at all under this section, though it may be admissible either as a fact in issue or as a relevant fact under other sections of the Act. Whatever, however, may be the effect of the first two Privy Council decisions cited12 the third and last13 expressly recognize that a judgment or order of a Court is admissible under this section. as under other sections of the Act, as, either 'transaction' or 'instance' (which is not stated). The opinion was obiter, but assuming it to be otherwise, the further question is as to the use which may be made of judgments so admitted. It is not possible with certainty to say anything as to the last decision of the Privy Council as the particular grounds on which the judgment of 1896 was held to be admissible under this section were not stated. Possibly it was admitted as a recognition of right, or as being inconsistent with the right claimed by the defendant, or as evidence of an assertion of right on the part of the plaintiff. It is on the last-mentioned ground that the argument for the admissibility of judgments has commonly been founded. Acts of ownership in respect of the subject-matter of a litigation may be shown by proof of particular transactions or instances of the character mentioned in the section. These may be transfers of property such as gifts, sales, leases, mortgages or acts of enjoyment, such as the actual exercise of a right and the like. A claim, however, may be asserted or denied in a litigation as well as by any other of the modes mentioned. It has therefore been said that such a litigation and not merely the judgment or decree only,14 is a transaction15 or instance16 within the meaning of this section and that the judgment and decree are admissible as evidence of the litigation in which they were rendered and pronounced.17 In this view of the case, the relevant fact is the litigation, and the judgment is only the proof of it. There may be cases in which a judgment is the only proof of assertions of the parties. But it may be objected that a claim is asserted or denied in the pleadings, in the issues, or in the evidence given in support or denial of those issues. If these are available, are not they the proper evidence of the claim made? The judgment is the judicial opinion rendered on the claims of the parties. It is not their claim, though it may in common with other parts of the proceedings record it. Whether judgments can be said to recognize or be inconsistent with rights has already been dealt with. In short, great difficulties ensue in the application of this section to judgments.

^{11. (1880) 6} C. 171 (F.B.).

^{12.} Ram Ranjan v. Ram Narain, (1884) 22 C. 533; Bitto Kunwar v. Kesho

Kunwar, (1896) 19 A. 277, 13. Dinomoni v. Brojomohini,

²⁹ C. 187. 14. Collector v. Palakdhari, (1889) 12 All. 14, 25, 28 (F.B.); Tepu Khan v. Rajani Mohun Das, (1898) 2 C. W. N. 501, 504; (1898) 25 C. 522.

ib., v. ante. It seems, however, a somewhat forced use of language to

call a litigation a transaction.

16. ib., v. ante. Jainutullah v. Ramani, (1887) 15 C. 233; Ramasami v. Appavu, (1887) 12 M. 9.

17. Tepu Khan v. Rajani Mohun Das, (1898) 2 C. W. N. 501, 504; (1898) 25 C. 522; Alijan v. Hara, S. A. 106 of 1902 Cal. H.C. j July 1904.

But whether admissible under this section or not, it is clear that the reasons18 given for a former judgment or decree cannot be relied on to show that in subsequent litigation either of the parties were right or wrong in their assertion or uehial of the claim litigated and adjudicated upon. If, in a suit by A against B, the former asserts a claim which is declared to be well founded by the judgment in that suit, such assertion may be evidence in a subsequent litigation between A and C, tending to show that in the last-mentioned litigation A is also entitled to a decree. But the opinion given in favour of A in the first suit is not relevant to prove that the judgment should also be in his favour in the subsequent suit. So to use a judgment is to use it in respect of the judicial opinion which it contains. Such an opinion may have been given on a different state of facts and was moreover rendered in the absence of the parties sought to be affected by it. Judgments considered as judicial opinions are only relevant under Sections 40-42. In this respect and to this extent the law appears to be the same now as it was before the Privy Council decisions which have been said to materially qualify it. The decision of the Full Bench holds that a judgment not in rem or of a public nature and not inter partes is not relevant under this section 'as proof of the particular point it decides' in the sense indicated. The sole object for which it was sought in this case to prove the former judgment was to show that in another suit against another defendant the plaintiff had obtained an adjudication in his favour on the same right claimed. The plaintiff, in short, said, 'Another Court had decided the same point in my favour; so the decision should be in my favour again.' The dissentient Judge thought that because the plaintiff produced this prior favourable decision it therefore rendered the case of the plaintiff in the subsequent suit more probable. No decision of the Privy Council has ever sanctioned such a use of a judgment. But the existence of a judgment may be a fact in issue, 19 or otherwise relevant. 20 Thus, if A has obtained a decree for the possession of land against B, and C, B's son murders A in consequence, the existence of the judgment is relevant as showing motive for a crime.21 So, again, in a suit for malicious prosecution, the judgment in the criminal proccedings is evidence to establish the fact of acquittal, the fact, namely, that the criminal proceedings terminated in favour of the plaintiff in the civil action,22 Again, a reference to the finding of a judgment may explain the character of party's possession and the nature of the enjoyment had in the property in suit.23 And so the finding of a judgment may be referred to in all other cases where the record is a matter of inducement or merely introductory to other evidence.24 And judgments are admissible where sought to be used to show the conduct of the parties, or to show particular instances of the exercise of a

The Collector v. Palakdhari, (1889)
 All. 14, 25, 28, (F.B.); Alijan v. Hara, S. A. 106 of 1902 Cal. H.C.
 July 1904.

^{19.} Ram Ranjan v. Ram Narain, (1894) 22 C. 533 (P.C.); Dinomoni v. Brojomohini, (1901) 29 C. 187.

^{20.} Apparently (amongst others) under this section, Dinomoni v. Brojomohini, supra; though it should be noted, as already stated, that in one sense the opinion was obiter as the judgment in question was held also to be admissible on general principles; v. ante, Ram Ranjan v. Ram

Narain supra, if that decision admitted the decrees also on the ground stated by the High Court, In so far as it may be held that these decisions admit judgments under this section they appear to have altered the law laid down in Guija Lall v. Fatteh Lall, according to which the section did not apply to judgments at all.

^{21.} S. 43, illus. (d). 22. v. S. 43 post.

^{23.} Peari v. Drobomoyi, (1885) 11 C. 745 v. ante.

^{24.} See Commentary to S. 43 post.

right, or admission made by ancestors, or how the property was dealt with previously.25 Other instances are afforded by the Privy Council decision cited.

Whatever conflict there had been must be deemed to have been set at rest, and the law on the subject at present must be taken to be as laid down by the subsequent decisions of the Privy Council, which have been followed by the Indian High Courts, and Supreme Court of India.

Privy Council decisions. Thus, in Kumar Gopika Raman v. Atal Singh,1 it was held, that the Evidence Act does not make hndings of fact arrived at on the evidence before the Court in one case evidence of that fact in another case. Again, in Gobinda Narain v. Sham Lal,2 where a previous judgment in a partition suit not inter partes was produced in evidence in support of the rights claimed by the defendants, Sir John Lowndes observed as tollows:

"The judgment in question is only admissible under the provisions of Sections 13 and 43, Evidence Act, as establishing a particular transaction in which the partibility of the Pandara estate was asserted and recognized, viz., the partition resulting from the 1793 suit. The reasons upon which the judgment is founded are no part of the transaction and cannot be so regarded, nor can any finding of fact there come to, other than the transaction itself, be relevant in the present case. The judgment therefore is no evidence that Thakur Sib Singh got the Achra villages by partition; it is, at the most, evidence that he might have done so, and this is plainly not sufficient."

In Collector of Gorakhpur v. Ram Sunder,3 in order to prove a pedigree set up by one of the parties, certified copies of a decree in a previous suit and two pedigrees round with it were produced in evidence. The decree recited that pedigrees had been filed by both the parties, and set out, according to both pedigrees, the descent of a person from a common ancestor. Holding that the statements in the decree that the pedigrees were filed was evidence either under Section 35 as an entry in a public record, or under Section 13 as evidence of the course of proceedings in a suit, and that the particular pedigree relied on was admissible under this section as being a relevant admission, their Lordships observed4:

"The question whether statements in judgments and decrees are admissible under Section 13 read with Section 43 is elaborately discussed by Sir John Woodroffe in his new edition of the Evidence Act (1931), p. 181 et seq. He would hold that they are not admissible at all under Section 13; but this view is not in accordance with the decisions of the Board in Ram Ranjan Chakerbati v. Ram Narain Singh,5 and Dinomoni v. Brojo Mohini.6 At the bottom of page 194 however, the learned author treats judgments as evidence of admissions by ancestors."

In the subsequent case of Kesho Prasad Singh v. Mst. Bhagjogna Kuer,7 Sir George Rankin, delivering the judgment of the Board observed:8

^{25.} Lakshman v. Amrit, (1900) 24 B. 591, 598, 599.

^{1. 1929} P.C. 99; 56 I. A. 119; I. L. R. 56 Cal. 1003; 114 I.C. 561.
2. 1931 P.C. 89; 58 I.A. 125; I. L. R. 58 Cal. 1187; 131 I.C. 753; 33

Bom. L. R. 885. 3. 1934 P.C. 157: 6 I.A. 286; I. L. R. 56 All. 468: 150 I.C. 545.

^{4.} Collector of Gorakhpur v. Ram

Sunder, A. I. R. 1934 P. C. 157

at p. 165. 5. (1894) 22 Cal. 533: 22 I.A. 60

⁽P.C.). (1901) 29 Cal. 187: 29 I. A. 24

^{7. 1937} P.G. 69; I. L. R. 16 Pat. 258;

¹⁶⁷ I.C. 329. 8. At pp. 74, 75 of A. I. R. 1937 P.C. 69.

"The admissibility of the decree of 1916 is the next question. Whether based upon sound general principle or merely supported by reasons of convenience, the rule that so far as regards the truth of the matter decided a judgment is not admissible evidence against one who is a stranger to the suit has long been accepted as a general rule in English Law. Exceptions there are, but the general rule is not in doubt. A well-known statement of it was given by Sir William de Grey (afterwards Lord Walsingham) in (1776) 2 Howell's State Trials, p. 538n,9 and a striking instance of its application by the Board may be seen in (1868) 2 P.C. 121, 133.10 That the same rule applies in India, though it is not expressly formulated in these terms, may be seen from a reference to Section 43, Evidence Act, 1872, and the illustrations given thereunder. On the other hand, apart from all discussions whether a judgment is or is not a 'transaction within the meaning of Section 13, Evidence Act, cf. 6 Cal. 17111 and 29 I.A. 2412 the judgment of 1916, together with the plaint which preceded it, and the steps in execution which followed, are evidence of an assertion by the Raj of the right which it claims to have acquired in 1903 and are thus admissible evidence of the right. There are undoubtedly cases in which a judgment is evidence of weight even against third-parties.... But the fact that a person not in possession of the land now in suit claimed in 1911 to have been entitled to it since 1903, is not by itself serious evidence of his right. There is and was no lack of assertion on the other side. It adds little or nothing that having got decree he took symbolical possession (dakaidahani) or even that he set up boundary pillars well to the north of the land now in suit. The respondents could not prevent his doing these things and their rights are not in any way affected by them. Of course if it could be said that had the respondents the right they claim, they would have at once challenged these acts by bringing a suit for a declaration of their title-some weight might be attached to the fact that they did not. But in the present case such an argument would be quite hollow. It is difficult to think that any Court would grant relief upon the sole basis of the plaintiff's assertion made against other parties and because the parties now impleaded waited to be sued. That on this basis alone possession should be disturbed would be indefensible especially in Ramsarup's case seeing that he was recovering decrees for rent in 1919 and 1920. Their Lordships find themselves in agreement with the observation of Ross, J.:

"The judgment is not inter parte, nor is it a judgment in rem, nor does it relate to a matter of a public nature. The existence of the judgment is not a fact in issue; and if the existence of the judgment is relevant under some of the provisions of the Evidence Act, it is difficult to see what inference can be drawn from its use under the sections.

"Serious consequences might ensue as regards titles to land in India if it were recognized that a judgment against a third party altered the burden of proof as between rival claimants, and much 'indirect lying' might be expected to follow therefrom."

In Mst. Subhani v. Nawab,13 where the question was as to the existence of a custom it was observed:14

^{9.} Kingston's Duchess Case, (1776) 2 State Trials, 355 n.

Natal Land and Colonisation Co. v. Good, (1868) 2 P. C. 121, 133: 5
 Moo. P.C. (n.s.) 132: 16 .W. R.

^{11.} Gujja Lall v. Fatteh Lall, (1880) 6

Cal. 171: 6 C. L. R. 439 (F.B.).

12. Dinomoni Chaudharani v. Brojo Mohoni, (1901) 29 Cal. 187: 29 I. A. 24: 8 Sar. 224 (P.C.).

13. 1941 P.C. 21: 68 I. A. 1: I. L. R. 1941 Lah. 154: 193 I.C. 436.

^{14.} At p. 32 of A. I. R. 1941 P.C.

"A judicial decision, though of comparatively recent date, may contain, on its records, evidence of specific instances, which are of sufficient antiquity to be of value in rebutting the presumption. In such a case, the value of the decision arises from the fact not that it is relevant under Sections 13 and 42, Evidence Act, as forming in itself a 'transaction' by which the custom in question was 'recognized, etc. etc.' but that it contains on its records, a number of specific instances relating to the relevant custom. To ignore such judicial decisions merely on the basis of the riwaj-i-am would add greatly to the perplexities and difficulties of proving a custom."

In a case15 from Canada, Lord Russell of Killowen reiterated the view that the Court is not entitled to refer to, or rely upon, a judgment given in proceedings to which neither the plaintiff nor the defendant was a party, as proving the facts stated therein.

Supreme Court decisions. In Srinivas v. Narayanan16 in a suit for partition the question was whether certain properties were joint family properties, and a judgment in a previous litigation in which a lady of the family claimed maintenance and prayed that it should be charged on the family properties and the prayer was granted, was tendered in evidence. It was contended that the dispute between the parties in that litigation was only about the quantum of maintenance to be awarded, that no question of title to the properties was directly involved and that Section 13 was inapplicable. Repening this contention their Lordships observed as follows:17

"The amount of maintenance to be awarded would depend on the extent of the joint ramily properties, and an issue was actually framed on that question. Moreover, there was a prayer that the maintenance should be charged on the family properties, and the same was granted. We are of opinion that the judgments are admissible under Section 13 of the Evidence Act as assertions of Rukminibai that the properties now in dispute belonged to the family."

But the reasons upon which the judgment is founded cannot be treated as part of the same transaction nor can any finding of fact there come to, other than the transaction itself, be relevant in the subsequent case.18

In a subsequent case, where the dispute was to the succession to the office of a Mahant it was held, that a previous judgment could be received in evidence under this section as a transaction in which a person, from whom one of the parties purported to derive his title, asserted his right as a spiritual collateral of a previous Mahant and got a decree on that footing.19

Decisions of Indian and other High Courts. Following the above Privy Council decisions, the High Courts in India and other places have generally held that although a judgment in a previous case not inter partes may be admissible under the provisions of Sections 13 and 43, Evidence Act, as establish-

^{15.} Goca-Cola Company of Canada, Ltd., v. Pepsi Cola Company of Canada,

v. Pepsi Cola Company of Canada, Ltd., 1942 P.C. 40: 202 I.C. 203. 16. 1955 S. C. R. 1: 1954 S. C. A. 878: 1954 S. C. J. 408: 57 Bom. L. R. 678: (1954) 1 M. L. J. 630: 1954 M. L. W. 515: A. I. R. 1954 S. C. 379, 383. 17. At p. 383 of A. I. R. 1954 S.C. 379. 18. Srinivas v. Narayanan, 1955 S.C.R.

^{1: 1945} S.C.A. 878: 1954 S. C. J.

^{408: 57} Bom. L. R. 678: (1954) 1 M. L. J. 630: 1954 M. L. W. 515: A. I. R. 1954 S. C. 379; Abdulla v. Kunhammad, I. L. R. 1959 Ker. 1304: A. I. R. 1960 Ker. 123; Subramonia Kesavan v. Narayana, 1969 Ker. L. R. 326: 1969 Ker. L. T. 110.

^{19.} Sital Das v. Sant Ram, 1954 S. C.

ing a particular transaction, that is, the decision arrived at, and the reasons upon which the judgment was founded, are no part of the transaction and cannot be considered in evidence, nor can any finding of fact there come to, other than the transaction itself, be relevant evidence.20

Calcutta. In some cases the Calcutta High Court treated previous judgments not inter partes as evidence of the facts found therein.21 Thus, in Gopi Sundari v. Kherod Gobinda,22 it was held, that the previous litigation was a transaction or instance in which the right of the plaintiffs to hold the disputed lands as their putni was successfully asserted, and that this transaction or instance was relevant or admissible in evidence. But the general tendency has been to admit previous judgments, not inter partes, in evidence under certain circumstances and for limited purposes under the provisions of Section 43 read with Section 11 and this section, and to treat such judgments only as a piece of evidence to be considered along with other evidence, if indeed any such evidence exists.²⁸ In Radhu Ray v. Raja Jyoti Prasad,²⁴ it was held that previous decrees were not evidence in proof of title, but in Kumud Behari v. Himansu Kumar,25 a previous judgment not inter partes was held to be admissible as evidence of a transaction in which permanent tenancy rights in land were previously claimed. In Gadadhar Chowdhury v. Sarat Chandra Chakravarty,1 it was held that "Though the recitals and findings in a judgment not inter partes are not admissible in evidence, such a judgment and decree are, in our opinion, admissible to prove the fact that a decree was made in a suit between certain parties and for finding out for what lands the suit had been decreed."

The law on the subject, as finally crystallised, has, in the undernoted case,2 been stated as follows:

"A judgment not inter partes may be admissible in evidence under Section 13 only as establishing a particular transaction, if any, by which, or an

20. Sanveerangouda v. Basangouda, 1939
Bom. 313; 184 I.C. 337; 41 B. L.
R. 561; Gadadhar v. Sarat Chandra, 1941 Cal. 193; 195 I. C. 412;
72 C. L. J. 320; 44 C. W. N. 935;
Asaddar Ali Khan v. Province of
Assam, 1944 Cal. 57; I. L. R.
(1944) 1 Cal. 203; 211 I.C. 460;
Muhammad Suleiman v. Badr Uddin 1940 Lah 309; 190 L. C. 689; din 1940 Lah. 309: 190 I. C. 689; Inayat Ullah Khan v. Kanshiram, 1937 Lah. 437: 174 I.C. 722; Maroti Laxman Koshti v. Jaganathdas Laxman Koshti v. Jaganathdas Lachhmandas Gadewal, 1939 Nag. 72: 180 I.C. 118: 1938 N.L.J. 466; Shankar Ganesh v. Kesho, 1930 Nag. 1: 121 I.C. 644: 12 N.L.J. 164 (F. B.); Tahil Ram Tackchand v. Mst. Miral, 1938 Sind 132: I.L.R. (1939) 5 Kar. 18: 176 I.C. 549: Shamdas v. Gurmukh Singh, 1945 Sind 57: I.L.R. 1945 Kar. 40; Purnima v. Nand Lal, 1932 Pat. 105: I.L.R. 11 Pat. 50: 136 I.C. 577; I.L.R. (1971) 1 Delhi 64; A. B. Sharma v. H. T. Singh A.I.R. 1973 Gauhati 38; Daniraiji Vrajlalji v. M. Ghandraprabha. A.I.R. 1971 M. Ghandraprabha, A.I.R. 1971

- Gujarat 1881; 1974 J. & K. L. R.
- 21. See Anukul Ghandra v. Kamla Kanta, 1923 Cal. 270: 67 I.C. 787; Sarada Prasanna v. Umakanta, 1928 Cal. 485; I.L.R. 50 C. 370: 17 I.C. 450; Purna Chandra v. Ramesh Chandra, 1925 Cal. 1218: 87 I.C. 753; Kanta Mohan v. Gopinath, 1928 Cal. 355; 112 I. C. 785; Kiran Ghandra v. Jagannath. 1928 Cal. 479
- 22. 1925 Cal, 194: 82 I.C. 99: 28 C.W. N. 942.
- Hem Chandra v. Purna Chandra,
 1934 Cal, 788; 153 I.C. 134; 59 C. L.J. 320; see also Kameswar Singha v. Hridoynath 1938 Cal. 763: 67 C. L.J. 111.
- 24. 1933 Cal. 21; 140 I.C. 385; 36 C.W.
- 25. 1937 Cal. 373: 65 C.L.J. 333. 1. 1941 Cal, 193 at 201: 195 I.C. 412: 72 C.L.J. 320: 44 C.W.N. 935. 2. Asaddar Ali Khan v. Province of Assam, 1944 Cal. 57; I. L. R. (1944) 1 Cal. 203: 211 I.C. 460.

instance in which, the relevant right was asserted, recognised, etc. The fact that there was a litigation or that as a result of that litigation the then plaintiffs recovered possession of the lands may be relevant under Section 11. The judgment not inter partes will be evidence only to the extent of showing the existence of those facts. But findings of fact in, or reasons for, the judgment are irrelevant and not admissible under Section 13.

"The proposition to be proved is the right claimed or denied in the suit. A transaction by which this right might have been asserted or denied etc., is only a material evidencing the proposition. The ultimate factum probandum is the right claimed or denied in the suit. The transaction is only an evidentiary fact, the factum probans. This factum probans itself in its turn may require proof and may thus become an intermediate proposition to be proved. A judgment may come in under Section 13 only as an evidentiary fact to establish this intermediate proposition. When established the proposition only brings in a factum probans and nothing else."

Bombay. So far as the Bombay High Court is concerned, in the case of Anya Shidya Patil, In re.3 where a right of fishery was in question, a previous judgment declaring that a party had an exclusive right of fishing in a particular season each year was held to be relevant, and a very important piece of evidence under this section, shough it was not necessarily conclusive. But judgments in cases between a Jagirdar and particular tenants were held to be not admissible in a suit between the jagirdar and other tenants to prove the relation between the jagirdar and his tenants and the rights under which the jagir is held.4 Although a judgment in a previous case not inter partes may be admissible under the provisions of Sections 13 and 43, Evidence Act, as establishing a particular transaction, the decision arrived at and the reasons upon which the judgment was founded are not part of the transaction and cannot be considered in evidence, nor can any finding of fact there come to, other than the transaction itself, be relevant evidence.5 The judgment of a foreign Court is admissible in proof of the customary law in that foreign country.6 The award made by a Land Acquisition Officer, who is an agent of the Government, is a mere offer which at best is opinion evidence. It cannot become evidence in another case in which different parties and different properties are concerned. The principle is that a judgment not inter partes is admissible neither as a transaction nor as an instance and this section has no reference to judgments which are opinions in regard to the existence of facts.7

Madras. In a Full Bench case of the Madras High Court, Tripurana Seethapathi Rao v. Rokkam Venkanna Doras in which it was held that Section 35 has no application to judgments, Kumarswami Sastri, J., delivering the judgment of the Full Bench, agreed with the principle laid down by Mukherji, J., in Basinath (Kashinath Pal) v. Jagat Kishore9 that "although a judgment not

 ¹⁹²⁷ Bom. 654; 102 I.C. 546; 29
 Bom. L.R. 715; 28 Cr. L.J 378.

Pandu Mahipat v. Shiyshankar Das, 118 I.C. 702: 31 Bom. L.R. 335.

Sanveerangouda v. Basangouda, 1939
 Bom. 313: '184 I.C. 337: 41 Bom. L.R. 561.

^{6.} Suganchand v. Mangi Bai, 1942 Bom, 185: I.L.R. 1942 Bom. 467: 201 I. G. 759; see also Nataraja Pillai v. Subbaraya Chettiar, 1950 P.C. 34:

⁷⁷ I.A. 33: J.L.R. (1950) M. 862. 7. Special Land Acquisition Officer v. Lakhamsi, A.I.R. 1960 Bom. 78. As

to recitals in a judgment, see Abdulla v. Kunhammad, 1959 Ker. L.T. 971; A.I.R. 1960 Ker. 123. 8. 1922 Mad. 71; I.L.R. 45 Mad. 332: 66 I.C. 280; 15 L. W. 316. 9. 1916 Cal. 176; 35 I.C. 298: 20 C.W.

inter partes may be used in evidence in certain circumstances as a fact in issue or as a relevant fact or possibly as a transaction, the recitals in the judgment cannot be used as evidence in a litigation between the parties."

Observations in a judgment relating to a different matter, though connected, cannot bind a third party and the judgment itself cannot be evidence against him.10 Where, however, in a suit for ejectment, the tenant pleaded the title of a third person to the leased property as against the plaintiff, a judgment negativing the title of that third person against the plaintiff was held to be admissible.11 The principle applicable to a case of this description was thus explained by Kumarswami Sastri, I., in Secretary of State v. Syed Ahmed Badsha Sahib12:

"In all cases of jus tertii the person who sets up the rights of a third party is bound to prove that the third party has or had the rights alleged and it is always open to the other party to displace the title of the person so set up by showing that he was a party to the litigation which has negatived that title. Whatever would estop or bar the persons whose title is set up must also bar the person pleading jus tertii whether the estoppel is by record, deed or in pais."

In the undernoted case in which a reversioner of a deceased holder, of an office of karnam claimed certain properties from alienees, previous proceedings relating to the existence of the right to the office and the property were held to be relevant under this section as being transactions by which the right was recognised.13

Allahabad. The Allahabad High Court has held that though a previous judgment is admissible, it cannot be accepted as evidence of the facts stated therein.14 In another case, a previous judgment was held to be admissible as an instance in which the right in dispute was not only asserted but recognized as against one of the parties.15 In yet another case the order of the settlement officer in a previous settlement proceeding was held to be admissible in evidence under this section as recognizing the custom in dispute.16

Ordinarily and in the absence of special circumstances, a judicial decision in recognition or denial of a custom is good evidence in proof thereof. There may be cases in which the judicial decision relating to a custom may not be of great value; but where it was arrived at in a well-contested case in which there is no reason to suppose that the parties could not, or did not, produce all evidence available to them, the value of the decree as a piece of evidence

^{10.} Narasimha Sastri v. Official Assignee, Madras, 1930 Mad. 751: 129 I.C. 650: 59 M.L.J. 321: 32 L.W. 850.

Krishnan Nair v, Kambi, 1937 Mad,
 544: 172 I.C. 268: 1937 M.W.N.

^{12. 1921} Mad. 248; I.L.R. 44 Mad. 778

at p. 801: 67 I.C. 971: 41 M.L.J. 223 and 278 (F.B.).

13. Mudala Sithanna v. Kuppili Lakshminarasimhulu. 1940 Mad. 540: (1940) 1 M.L.J. 302; 51 L.W. 339,

^{14.} Chhiddu v. Desraj, 1924 All. 294: 77 I.C. 753 : 21 A.L.J. 793; Mst. Phulwanti Kunwar v. Janeshar Das. 1924 All. 625: I.L.R. 46 All. 575: 83 I.C. 782 per Lindsey, J.

^{15.} Muhammad Abdul Karim Khan v. Bishan Sahai, 1930 All. 9: 121 I. G. 387; 1929 A.L.J. 741.

^{16.} Shri Krishna Dutt Dube v. Ahmad Bibi, 1935 All. 187: L.L.R. 57 All. 588: 153 I.C. 708.

is great.¹⁷ A custom or usage that has been repeatedly brought to the notice of the Court and has been recognized in a series of cases in different parts of the country acquires the force of law, and it is no longer necessary to prove it in each case by oral evidence.¹⁸ In the undernoted case it has been held that a judgment of another Court interpreting a similar decree of a settlement Court relating to a third person as conferring under-proprietary rights, although not inter partes, is admissible under this section.¹⁹

Patna. In a suit in which the landlord sought to prove that the prevailing rate of rent was a certain amount, the Patna High Court held that the question at issue being one of fact and not of right or custom the judgment in a previous suit not inter partes was not admissible under this section.20 In another case, the judgment in a previous case in which it was held that the property then in dispute was endowed property was held to be not admissible in a subsequent suit to prove that the property was endowed property, because even though a previous judgment may be admissible under this section, a finding in the judgment is not admissible.21 A judgment in a previous criminal case, in which the plaintiff asserted his possession to the disputed land and possession was held to be with him, was held to be admissible under this section to prove the plaintiff's assertion of title but not prove his possession at the date of the judgment against third person who was not party to the criminal proceedings.22 In the under-noted case,23 the plaint, the written statement and the judgment in a previous suit taken together were held to be admissible evidence of the right claimed by a party, namely, that his family was governed by the Banaras School of Hindu Law. A judgment in a previous litigation, where all the parties who were impleaded in a subsequent suit were not impleaded, though it may not operate as res judicata on the validity of a transfer or dedication of property, yet it would be admissible under this Section to show that whenever an attempt was made by the owner of the property to claim the property as his private property, the Court refused to accept that contention.24

Nagpur. According to the Nagpur High Court, though the judgment in a previous case is inadmissible to prove the truth of the fact, which it states, yet where the right of party has already been concluded by a previous judgment that fact can be proved by production of the judgment since the existence of the judgment itself is relevant.²⁵ But the judgments in the previous suit are not admissible under this section if the right in dispute in the subsequent suit was not then in dispute.¹

Lahore. In a Lahore case,3 a suit instituted by the plaintiff's ancestors against some persons in respect of a plot of land was decreed on the ground

Mahadeo v. Baleshwar Prasad, 1989
 All 696, 1989 A. J. 7, 708

Mahadeo v. Baleshwar Prasad, 1939
 All, L. J. 708: A. I. R. 1939 A.

 Raghupat Tewari v. Narbadeshwar Prasad, 1938 Pat. 103; 163 I.C. 664.

21. Sri Thakurji Ramji v. Mathura Pra-

sad, 1941 Pat. 354: 192 I. C. 789: 22 P. L. T. 239: 7 B. R. 569.

Paranmunda v. Santosh Mahto, 1942
 Pat. 372: 199 I.C. 144.

Chandrachoordeo v. Bibhuti Bhushan Deva, 1945 Pat. 211: I. L. R. 23 Pat. 763: 220 I.C. 260.

Ram Ratan Lal v. Kashi Nath, A.
 R. 1966 Pat. 235: 1966 B. L. J.
 R. 237.

Maroti v. Jagannath Das, 1939 Nag.
 180 I.G. 118.

 Ganpat Rao v. Nago Rao, 1940 Nag. 382: 1940 N. L. J. 437.

 Muhammad Sulaiman v. Badruddin, 1940 Lah. 309: 190 I.C. 689

All. 626; 1939 A. L. J. 708.

18. Banarsi Das v. Sumat Prasad, 1936
All. 641; 164 I.C. 1047; 1936 A. L.
J. 1237; see also Suganchand Bhikamchand v. Mangi Bai, 1924 Bom.
185; I. L. R. 1942 B. 467; 201
I. G. 759.

that the land in dispute formed part of a royal grant. In a subsequent suit against different persons for a different plot of land the plaintiff sought to rely on the previous judgment. It was held that the judgment was not relevant to show that the land in dispute in the subsequent suit formed part of the land which the plaintiff's ancestors got by the royal grant.

Oudh. The Lucknow Court has, in a number of cases, held previous judgments not inter partes to be admissible under this section either as transactions or as instances.³ When a judgment has established the right to any property between two parties, it is not open to a third person to set up the right of that party whose title has been found against as against the successful party. Such cases form the exception to the rule of res inter alios acta.⁴ Where an issue which has been decided against a successful party in a prior suit arises in a subsequent suit between the same parties, the judgment in the prior suit is admissible under Section 13, Evidence Act, and though the finding on such issue in the prior suit does not operate as res judicata, still it throws upon such party a heavy responsibility of proving that that finding in the former suit was wrong.⁵

Rangoon. The Rangoon High Court also has held that previous judgments, not inter partes are admissible under this section.6

Sind. The law on the subject is well summarised by Davis, C. J., as follows:

"Though a judgment in other proceedings even not inter partes is admissible in evidence as, what has been described as an integration of judicial proceedings, themselves held to be a transaction within the meaning of Section 13, its admissibility is subject also to other provisions of the Evidence Act, and is subject to the overriding principle that the Evidence Act does not make a finding of fact arrived at on the evidence before the Court in one case evidence of that fact in another case. And after all the purpose of Section 13 is clear. It is to enable a right which may be constituted by a number of facts by the exercise of the right itself animo-domini, on numerous occasions, to be proved by transactions or particular instances in which the right or custom in question was asserted or denied, but by evidence otherwise admissible. A judgment is admissible because it is the evidence or integration of a litigation or a judicial proceeding, a transaction within the meaning of Section 13. Evidence Act, for the purpose of ascertaining the parties to the dispute, and the contentions of the parties, the subject of the dispute and the final decision of the Court but not for purpose of proving the reasons for the Court's decision and for using its findings of fact as evidence of those facts in another case."7

 Ajodhia Prasad v Mst. Sanjhari Kuar, 1932 Oudh 342; I. L. R. 6 Luck. 710: 139 I.C. 631; 9 O. W.

^{3.} Muhammad Ali Khan v. Ghazanfar Ali, 60 I.C. 147; Mst. Anjumanunnissa v. Ashiq Ali, 1922 Oudh 178; 66 I. C. 222 (F.B.); Galstaun v. Mirza Abid Husain, 1924 Oudh 19: 73 I. C. 428; Hari Kishen v. Raghubar Dayal, 1926 Oudh 578; I. L. R. 1 Luck, 489: 97 I. C. 853; Raja Fateh Singh v. Baldeo Singh, 1928 Oudh 233; I. L. R. 3 Luck, 416: 109 I.G. 310.

N. 813. See also Rahimunnissa v. Srinivasa Ayyangar, 1920 Mad. 580: 54 I.C. 565.

Mst. Aziman v. Ibrahim, 1936 Oudh 189; 165 I. C. 132: 1935 O. W. N. 894.

Vednath Singh v. Mahomed, 1934 Rang. 212: 154 I.C. 123.
 Tahil Ram Tackchand v. Mst.

Tahil Ram Tackchand v. Mst. Miral. 1938 Sind 132 at 137: 176
 C. 549, see also Shamdas v. Gurmukh Singh, 1945 Sind 57: I. L. P. 1945 Kar. 40.

Conclusion. The decided cases seem to establish the following propositions:

- (I) The Act does not make findings of fact arrived at on the evidence before the Court in one case evidence of that fact in another case.
- (2) A previous judgment is only admissible under this Section and Section 43, as establishing a particular transaction in which the right or custom was asserted etc., and recognised.
- (3) A judgment is not admissible as evidence against a stranger to the suit.
- (4) A judicial decision may contain evidence of specific instances in which the right or custom in question was created, etc., asserted or denied and which are of value. In such a case, the decision is valuable, since it contains a number of specific instances relating to the right or custom.
- (5) A previous judgment can be received in evidence under this Section as a transaction in which a person asserted his right and got a decree on that footing.
- (6) Although a judgment in a previous case, not inter partes may be admissible under this Section, as establishing a particular transaction, that is, the decision arrived at, the reasons upon which the judgment was founded, are no part of the transaction and cannot be considered in evidence, nor can any finding of fact there come to, other than the transaction itself, be relevant evidence.
- (7) Ordinarily and in the absence of special circumstances, a judicial decision in recognition or denial of a custom is good evidence in view thereof.
- (8) A custom or usage, that had been repeatedly brought to the notice of the Court and has been recognised in a series of cases in different parts of the country, acquires the force of law, and it is no longer necessary to prove it in each case by evidence.
- (9) The object of this Section is to enable a right, which may be constituted by a number of facts by the exercise of the right itself animo-domini, on numerous occasions, to be proved by transactions or particular instances in which the right or custom in question was asserted or denied, but by evidence otherwise admissible.
- 11-A. Judgment of criminal court. The judgment of a criminal court is not admissible in a civil suit as proof of the point decided by the criminal court. It is relevant in a civil court only to show that there was a trial resulting in conviction. The judgment of conviction cannot in a subsequent civil suit be treated as evidence of facts on which the conviction is based.8
- 12. Ex parte judgments. An ex parte judgment of the High Court, whether it is an instance of custom or opinion on a question of law, does not become less valuable merely on the ground of the absence of a respondent.

Bai Nanda v. Shivabhai, 7 Guj. L.
 R. 662, 668; Raghunath Rai Beria Rameswarlal. 1974 Assam L.R. 66.

Abdul Karim v. Shiva Narain, 1952
 Punj. 356: 54 P.L.R. 255.

- 13. Subsequent judgments. Judgments pronounced subsequent to the suit in which they are relied on as evidencing a transaction are not admissible under the section.10
- 14. Judgments shifting onus of proof. Previous judgment not inter partes cannot alter the burden of proof as between rival claimants to property.11 But a judgment inter partes may do so.12 It must, however, be remembered that the question as to the probative value of a finding in a previous suit depends on the nature of the finding and of the issues involved in the two different suits.13
- 15. Judgments relating to matters of public nature. Judgments, orders and decrees relating to matters of a public nature relevant to the enquiry, that is, public or general rights and customs, are relevant and admissible, but are not conclusive proof of that which they state.14
- 16. Proof of custom and right. Ordinarily, custom is a mixed question of law and fact; first, certain facts have to be proved, and from those facts an inference of the existence of a valid custom is drawn. The inference is a legal inference.

Where a local custom or usage is pleaded by one party and denied by the other the onus is on the party pleading it to show its existence, and not on the other party to show its non-existence. There is, however, no presumption as to the existence or non-existence of any custom or usage.15 The question whether usage has developed into the customary law of the locality or community is a question of law and it can be considered in second appeal.16

A custom must be alleged in precise terms and must, by evidence be established as pleaded.17

The existence of any custom or right may be proved under this section by evidence of "transactions" or "instances." A costom is proved either by actual instances or by general evidence of the members of the community who

Jhingur Raut v. Emperor, 1931
Pat. 386: 134 I. C. 625: Dasondhi
v. Milkhi Ram, 1939 Lah. 152:
181 I. C. 703.
Kesho Prasad Singh v. Mst. Bhagjogna Kuer, 1937 P.C. 69: I. L. R.
16 Pat. 258: 167 I.C. 329.
Gopal Rap v. Sita Fam. 1997: Nag.

12. Gopal Rao v. Sita Ram, 1927 Nag. 19; 97 I.C. 694; see also Midnapur Zamindary Co., Ltd. v. Naresh Narayan Ray, 1922 P.C. 241: 48 I. A. 49; I. L. R. 48 Cal. 460; 64 I.C. 281.

13. Prahlad Chandra Singh v. Bhim Mahto, 1940 Pat. 341: I. L. R. 19 Pat. 172: 185 I. C. 685; 21 P. L. T. 577

1. 577. 14. V. S. 42 post, and note.

 Bhagwat Sharma v. Baijnath Sharma, 1954 Pat. 408: I. L. R. 1954
 Pat. 423 (F.B.); Mahommed Ibrahim v. Shaik Ibrahim 1922 P.C. 59: 49 I.A. 119: I.L.R. 45 Mad. 308: 67 I.C. 115,

16. Janardhanan Pillai v. Kaliamma, I.

10. Janardhanan Piliai V. Kaliamma, I.
L. R. (1968) 1 Mad. 548; (1968)
2 M. L. J. 94; 80 M. L. W. 388;
A. I. R. 1968 Mad. 105.

17. Abdul Hussein V. Bibi Sona,
1917 P.C. 181; 45 I. A. 10; I. L.
R. 45 Cal. 450; 43 I.C. 306; Kishan
Singh V. Santi, 1938 Lah. 299
at 301; 175 I.C. 87 (F.B.); The at 301: 175 I.C. 87 (F.B.); The State v. Kangan Suba Gujjar, 1953 Punj. 201 at p. 203: I. L. R. (1953) Punj. 635.

18. See in Jugmohandas v. Mangaldas, 10 B, 528 at 543: observations on proof by instances and Anant v. Durga, (1910) 37 I. A. 191; 32 A. 363. But custom may be proved without proof of specific instances; Ahmad Khan v. Channi Bibi, A. I. R. 1925 P. G. 267; 50 M. L. J. 637; 91 I. C. 455; (1925) 52 I. A. 379.

would be naturally cognisant of its exercise.19 When a custom has been repeatedly brought to the notice of the courts, the custom may be held to have been introduced into the law without necessity for proving it in each case.20 A statement contained in any deed, will or other document which relates to any such "transaction," as is mentioned in clause (a) is relevant, if the persons by whom such statement is made is dead or cannot be found, or if he is incapable of giving evidence, or his attendance cannot be procured without an unreasonable amount of delay or expense.21 The statement, written or verbal, giving the opinion of a person, not called as a witness for similar reasons, as to the existence of any public right or custom, or matter of public or general interest, as to the existence of which he would have likely been aware, is relevant, provided it were made before any controversy as to such right, custom or matter had arisen.22 But such evidence, after the controversy has arisen is inadmissible.23 When the Court has to form an opinion as to the existence of any general custom or right (this includes customs or rights common to any considerable class of persons), the opinion as to the existence of any general custom or right of persons who would be likely to know of its existence, if it existed, is relevant24 and the grounds upon which such opinions are based are also relevant.25 Judgments, orders and decrees are relevant if they relate to matters, that is, rights and customs, of a public nature, but they are not conclusive proof of that which they state.1 "The most satisfactory evidence," it has been said "of an enforcement of a custom is a final decree based on the custom."2

One of the modes of proof of a customary easement of privacy is to establish the particular instances referred to in Section 13 (b) in which it was claimed, recognised or exercised.3

A decision in a custom case is not a judgment in rem. It is only relevant under this section as an instance of the custom being judicially recognized.4 When a custom has been repeatedly brought to the notice of the Courts and judicially recognized, it becomes a part of the law of the locality where it pre-

Janardhanan Pillai v. Kaliamma, I. L. R. (1968) 1 Mad. 548: (1968) 2 M. L. J. 94: 80 M. L. W. 388: A. I. R. 1968 Mad. 105, 107.
 Premraj v. Chand Kanwar, A. I. R. 1948 P.C. 60, at p. 61; Rama Rao v. Rajah of Pittapur, A. I. R. 1918 P.C. 81 at p. 83: Janaren

S. 32, cl. (7), post and Hurronath v. Nityanund, 10 B. L. R. 263,
 S. 32, cl. (4) post.
 Ekradeshwar v. Janeshwari, 1914 P. C. 76: 41 I. A. 275: 42 Cal. 582: 25 I. C. 417: 12 A. L. J. 1217; 17 Bom. L.R. 18.

24. S. 48, post.
25. S. 51, post.
1. S. 42 post, and notes.
2. Gurdayal v. Jhandu, (1888) 10 A.
585; Barkat Ullah v. Zulfiqar Ali
Shah, 1950 Lah. 6: Pak. Cas. 1950
Lah. 91; Pak. L. R. 1949 Lah. 679

v. s. 42, post. 3. Syed Habib Hussain v.

Chand, 1968 Raj. L. W. 580: A. I. R. 1969 Raj. 31, 35.

4. Mst. Janat Bibi v. Ghulam Hussain, 1934 Lah. 861: 16 Lah. 307: 36 P. L. R. 256.

R. 1918 P. C. 81, at p. 83; Janar-dhanan Pillai v. Kaliamma, supra, dhanan Pillai v. Kaliamma, supra, See also Sivanananja v. Muttu Ramalinga, (1864) 3 Mad. H. C. R. 75 at p. 77 affirmed in Ramalakshmi v. Sivanantha, 14 Moo. Ind. App. 570, 585 (P.C.); S. N. Koya v. Administrator of Union territory of Laccadives, Minicoy and Amindivi Islands. Kozhikode, 1967 Ker. L. J. 482: 1967 Ker. L. T. 395: A. I. R. 1967 Ker. 259, 261 (custom prohibiting alienation of properties of a tarwad even after acperties of a carwad even after actual division).

vails, and it is not necessary to prove its attributes in each individual case.5 Oral evidence as to instances which can be proved by documentary evidence cannot safely be relied upon to establish custom, when no satisfactory explanation for withholding the best kind of evidence is given. Custom being in derogation of the general rules of law must be construed and proved strictly.7 In Ramalakshmi Ammal v. Shivananatha Perumal Sethurayer,8 the Privy Council said:

"Their Lordships are fully sensible of the importance and justice of giving effect to long-established usages existing in particular districts and families in India, but it is of the essence of special usages, modifying the ordinary law of succession, that they should be ancient and invariable; and it is further essential that they should be established to be so by clear and unambiguous evidence."

The burden of proving existence of a custom overriding a personal law is on him who pleads such custom. It must be proved to be invariable, certain, continuous and acted upon for a fairly long time.9 But in this case the Jammu and Kashmir High Court has gone one step further to observe that the practice developing into custom must be shown to have prevailed not merely by agreement of parties but on contest, that is the practice must have been set up, denied by the other party and upheld. It is submitted that this is too wide an observation to be accepted because the origin of all customs must be in amiable acceptance of the practice by the class or community otherwise how can a practice develop into a custom at all.10

Thus, evidence which may suffice to raise a presumption may be insufficient to prove a customary right.11 The course of practice upon which the custom rests must not be left in doubt but be proved with certainty.12 "The most cogent evidence of custom is not that which is afforded by the expression of opinion as to its existence, but the examination of instances in which the alleged custom has been acted upon, and by the proof afforded by judicial, or revenue records, or private records, or receipts, that the custom has been enforced."13 "The acts required for the establishment of customary law ought to be plural, uniform and constant. They may be judicial decisions, but these are not in-

L. J. 1237.
6. T. Saraswathi Ammal v. Jagdambal, 1953 S.C. 201; 1953 S. C. J. 287; (1953) 1 M. L. J. 697; 66 L.W. 540.

7. Hurpurshad v. Sheo Dayal, 3 I.A. 259: 26 W. R. 55; Beni v. Jai, 7 B. L. R. 152: 12 W. R. 495; Janki v. Dwarka, (1913) 35 A. 391 (case of insufficient proof).

8. 17 W. R. 553.

Chettiar 9. Subramanian V. Kumarappa Chettiar, 1955 Mad. 144; (1955) 1 M. L. J. 355: 68 M. L. W. 28; Parbati v. Chandrapal, 8 O.C. 94: 31 A. 457; (1909) 36 I. A. 125; Janki v. Ranno, (1913) 35 A. 472 (strict proof of each sale to stranger where custom of pre-emption disputed).

10. Mumtaz Begum v. S. A. Khan,

A. I. R. 1973 J. & K. 28: 1972 J. & K. L. R. 565.

11. Ramakanto v. Shamanand, (1908)-36 C. 590 (P.C.).

12. Sivananja v. Mutu, 3 Mad. H. C. R. 75.

 Lachman v. Akbar, (1877) 1 A. 440, per Turner, J., as to proof of instances, see Rahimathai v. Hirbai, (1877) 3 B. 34.

^{5.} Jugal Kishore Birla v. Bishnu Hari Jana, 1955 Cal. 419 at 421; Raja Rama Rao v. Raja of Pittapur, 1918 P.C. 81: 45 I.A. 148: I. L. R. 41 Mad. 778: 47 I. C. 354; Banarsi Das v. Sumat Prasad, 1936 All. 641: 164 I. C. 1047: 1936 A.

dispensable for its establishment, although some have thought otherwise."14 The evidence should be such as to prove the uniformity and continuity of the usage, and the conviction of those following it, that they are acting in accordance with law, and this conviction must be inferred from the evidence. Evidence of acts of the kind, acquiescence in those acts, their publicity, decisions of Court, or even of panchayats, upholding such acts, the statement of experienced and competent persons of their belief that such acts were legal and valid, will all be admissible, but it is obvious that, although admissible, evidence of this latter kind will be of little weight if unsupported by actual examples of the usage asserted.15 A customary right to impose a charge is not proved when all the evidence of such custom is the testimony of a single witness who says that he paid it, and accounts extending back to twenty-five years, which show that demands for the charge were made on certain tenants but which do not show that it was ever paid. A custom shown to have been well established in a family cannot be defeated by proof that in one case it was not enforced.17 The existence of a custom may be inferred from long enjoyment not exercised by permission, stealth or force.18 What the law requires before an alleged custom can receive the recognition of the Court and so acquire legal force is, satisfactory proof of usage so long and invariably acted upon in practice as to show that it has, by common consent, been submitted to as the established governing rule of the particular family, class or district or country.19

In appreciating evidence of proof of a custom or usage, no general rule about the quantum of evidence can be given.20

- 17. Local usage. Local usage (desachar), if it really exists, being a custom prevalent over a whole district and not confined to one particular estate must, from its universality, be more easily susceptible of proof than family custom or usage. To prove a local custom, the evidence must be precise and conclusive.21 See in the undermentioned case observations on the usage of books of history to prove a local custom.22
- 18. Caste custom. A caste custom prohibiting widows from adopting, is one which before the Court can give judicial effect to it, ought to be established by very clear proof that the conscience of the members of the caste had come to regard it as forbidden. It must be shown that uniform and persistent usage has moulded the life of the caste.28 The requisites of a valid custom
 - 14. Tara v. Reeb, 8 M. H. C. R. 50, 57. As to the plurality of acts and the onus probandi in the case of an allegation of custom, see Desai v. Rawal, (1895) 21 B. 110 at 116, 117 and see further as to onus, the case of Rahimatbai v. Hirbai. (1877) S B. 34.

Gopalayyau v. Raghupatiayyan, (1873) 7 Mad. H. C. R. 250, 254, but see Eranjoli.v. Eranjoli, (1883) 15. Gopalayyau

7 M. 3 (F.B.).

16. Kummai'i v. Nagayasami, (1907)

31 M. 17 and see Peary v. Jote, (1906) 11 C. W. N. 83.

17. Ekradeshwar v. Janeshwari, (1914)

42 C. 582 (P.C.): 25 I.C. 417:
A. I. R. 1914 P. C. 76.

- 18. Shadi v. Muhammad Ishaq Khan (1910) 33 A. 257; 8, A.L.J. 10; 9 I.C. 198.
- S. Perumal v. Ramalinga, 3 Mad.
 H. C. R. 75, 77 and Muhammad
 v. Muhammad, (1911) 39 C. 418

20. Janardhanan Pillai v. Kaliamma, L. L. R. (1968) 1 Mad. 548; (1968) 2 M. L. J. 94; 80 M. L. W. 388; A. I. R. 1968 Mad. 105. Tekaet v. Tekaetnee, 20 W. R.

157 ante.

Vallabha v. Madusudanan, (1889) 12 M. 495.

23. Patel v. Patel, (189i) 16 B. 470; sce Jugmohandas v. Mangaldas, 10 B. 528, ante.

are that the same should be ancient, certain and reasonable and that it should also not be opposed to decency or morality. So custom which is opposed to public policy can be recognized by any Court of law. Nor can immoral usages, however much practised, be countenanced. As to the test of immorality, it must be determined by the sense of the community as a whole and not by the sense of a section of the people.²⁴

An alleged custom among the Reddiars of South India, according to which a man can marry his own daughter's daughter, cannot be recognized by a Court of law. The chief attributes of a custom, namely, that the same should not be opposed to public policy, abhorrent to decency and morality or inconsistent with the practices of good men are not present. The civilised and cultured society in which we live and the progressive country in which we are, should not approve of an incest which would not find favour even under primitive or tribal societies.²⁵ It is not correct to say that amongst non-regenerate Telugu castes in Telangana performance of customary rites and not of the rites sanctioned by the smritis is the ordinary law, hence a custom derogatory to the ordinary law need not be strictly proved.¹

19. Family custom. In order to establish a family custom at variance with the ordinary law of inheritance it is necessary that it should be established by clear and positive proof (v. ante).² The proof of absence of a uniform customary law among a tribe ('kannikara' in this case) does not entitle the Court to conclude that the family is governed by any particular personal law ('marumakkathayam' law in this case) which might have been pleaded by one party but not proved.³ And the more unusual the custom the stricter must be the proof.⁴ To establish a kulachar or family custom of descent, one at least of two things must be shown—either a clear, distinct and positive tradition in the family that the kulachar exists; or a long series of instances of anomalous inheritance from which the kulachar may be inferred.⁵ A long series of instances on which a custom has been recognized is not the only mode of proving a custom; it may also be proved by showing a clear, distinct and positive tradition.⁶ It is said in the case of Sumrun Singh v. Khedun Singh,⁷ that "to legalise any deviation from the strict letter of the law, it is necessary that the usage should have been prevalent during a long succession of ancestors, when

Chelladorai v. Chinnathambiar,
 A. I. R. 1961 Mad. 42.
 Balusami v. Balakrishna, A. I. R.

1. Malkayya v. Arate Buchanna, (1972) 2 Andh. L. T. 253; A. I. R. 1973 A. P. 208 (reversing A. I. R. 1971 A. P. 270).

Nugendra v. Rughoonath, (1864)
 W. R. 20 ante. For Privy Council decision on family custom see Nitr Pal v. Jai Pal, (1896) 19 A 1;
 Mohesh v. Satrughan, (1902) 29 C. 343; in which decrees not interpartes were admitted as evidence of custom; Chandrika v. Muna Kunwar.

(1901) 24 A. 237: see also Mailathi v. Subbarayya, (1901) 24 M. 650. (Migration by widow of a Hindu subject of French-India to British India).

 Kunjuraman v. Mathevan, 1971 Ker, L. T. 458; (1971) 1 S. C. W. R. 732; 1971 S. C. D. 793; (1971) 2 S. C. C. 345; (1971) 3 Um. N. P. 494; (1971) 2 L. W. A. P. J. 46 (S.G.): 1971 (Supp.) S. C. R. 786; A. I. R. 1971 S.C. 398.
 Ganga v. Chedi, (1911) 33 A. 605, Maharani v. Bahoo Para (1872) 9

Ganga v. Chedi, (1911) 33 A. 605.
 Maharani v. Baboo Ram, (1872) 9
 B. L. R. 274, 294; 17 W. R. 316.
 Somar Puri v. Shyam Naraingir,

7. (1814) 2 Sel. Rep. 147.

Balusami v. Balakrishna, A. I. R. 1957 Mad. 97; I. L. R. (1957) M. 164; see also Ramakrishna v. Gangadhar, A. I. R. 1958 Orissa 26.

Somar Puri v. Shyam Naraingir, 1954 Pat. 586: 1954 (2) B. L. J. R. 381.

it becomes known by the name of kulachar." But a tradition in the family supplies the place of ancient examples of the application of the usage.8 It has been doubted whether evidence of the acts of a single family; repugnant or antagonistic to the general law, can establish a valid custom or usage. There is, however, nothing to prevent proof of such family usage.9 The Courts will, from modern uniform usages, presume an indefinitely ancient usage of the like kind in the absence of circumstances leading to a contrary inference, but no such presumption can be made where the practice is traced to a recent agree ment.10 Where the plaintiff sued the defendants for possession of an estate on the assertion that she was the daughter of the last undisputed owner, and the defendants resisted the claim on the ground that she was excluded by a custom prevailing in the family and tribe to which the parties belonged, it was held that there was no objection to a party pleading that a custom exists both in a family and in the tribe to which the family belongs, but he must prove that it is binding on the family; and on appeal it was held by the Privy Council that evidence of a family custom excluding or postponing daughters from the inheritance of an impartible estate is admissible on an issue as to the custom of a succession in a partible estate governed by ordinary Hindu Law, since the mere fact of partibility does not make the evidence necessarily inapplicable.11 Well-established discontinuance must be held to destroy family-custom and usage.12 As to "Usage of trade," v. post.

It must be proved that the right or custom shown to have been exercised on some particular occasion is the same with the right or custom which has to be proved. In England, the custom of one manor is not admissible to prove the instance of another unless some connection can be shown between them, as, for instance, that the custom in question is a particular incident of the general tenure which is proved to be common to the two manors.18 So also, where evidence of a right exercised in a particular locality was given, it was said: "Ownership may be proved by proof of possession, and that can be shown by acts of enjoyments of the land itself; but it is impossible in the nature of things to confine the evidence to the very precise spot on which the alleged trespass may have been committed; evidence may be given of acts done on other parts, provided there is such a common character of locality between those parts and the spot in question as would raise a reasonable inference that the place in dispute belonged to the plaintiff if the other parts did. It has been said in the course of argument that the defendant had no interest to dispute the acts of ownership not opposite his own land; but the ground on which such acts are admissible is not the acquiescence of any party; they are admissible

^{8.} Maharani v. Baboo Ram, (1872) 9 B. L.R. 274 at p. 295 as to Kulachar determining succession to an impartible estate, see Subramanya v. Siva, (1894) 17 M. 316; Mohesh v. Satrughan, (1902) 29 C. 343.

Tara v. Reeb, (1886) 3 Mad. H.C.
 R. 50, 57; Madhavrav v. Balkrishna, (1886) 4 B. H. C. R. (A.C.) 113, distinguished in Bhau v. Sundrabai, (1874) 11 Bom. H. C. R. 249, Parbati v. Chandrapal, 31 A. 457; 6 A. L.J. 767; 19 M.L.J. 605; see also Mayne's Hindu Law, S. 51, 9th Ed.,

^{10.} Bhau v. Sundrabai, (1874) 11 Bom.

H. C. R. 249 ante, following Shephard v. Payne, 31 L. J. C. P. 297, and Water-park v. Feneel, 7 H. L.

^{650;} see also Ramasami v. Appavu, 12 M. 9, 14 ante, and Joy Kishen v. Doorga, 11 W. R. 38, ante.

11. Parbati v. Chandarpal, (1909) 8 O. C. 94, 96 and Katama v. Shivagunga, (1863) 9 M. I. A. 539.

^{12.} Soorendranath v. Heeramanee, (1868) 10 W. R. (P.C.) 35.

⁽Marquis of) Anglesey v. Lord Hatherton, (1842) 10 M. & W. 235 and Taylor, Ev. s. 320; Ros-coe, N. P. Ev., 85 as to manorial rights, see note to S. 42, post.

of themselves proprio vigore, for they tend to prove that he who does them is owner of the soil; though if they are done in the absence of all persons interested to dispute them, they are of less weight,-that observation applies only to the effect of the evidence.14 (See notes to Section 42, post). The fact that a custom was not pleaded in litigations between members of the community, where it might have been pleaded, is relevant evidence, and the question of its relevancy is not affected by the circumstance that some of those suits were still pending in Courts at the time of the trial.15

20. Proof of customs. The law in regard to the proof of customs is not in doubt.16

If a right is claimed by virtue of a custom, all the essential characteristics of the custom, bearing on it, have to be established. Thus, it has to be seen, whether it has been proved that the right was certain and invariable, and that its enjoyment was not by leave or permission. Then, it has to be seen whether the custom is reasonable and whether it has been in existence for a fairly long period of time. The evidence, by the very nature of the claim, has to be such that it may go to establish that the right was consciously accepted, as governing the locality or family concerned, in respect of the point covered by it.17 It is of the essence of special usages, modifying, for example, the ordinary law of succession, that they should be ancient and invariable. And it is further essential that they should be established to be so by clear and unambiguous evidence. It is only by means of such evidence that the Courts can be assured of their existence. They must possess the conditions of antiquity and certainty on which alone their legal title to recognition depends.18 In dealing with a family custom, the same principle will have to be applied, though, in the case of a family custom, instances in support of the custom may not be as many or as frequent as in the case of customs pertaining to a territory, or to the community, or to the character of any estate. In dealing with family customs, the consensus of opinion amongst the members of the family, the traditional belief entertained by them and acted upon by them, their statements, and their conduct would all be relevant, and it is only where the relevant evidence of such a character would appear to the Court to be sufficient that a specific family custom pleaded in a particular case would be held to be proved.19

The rule of custom should prevail in all cases and if the court comes across to departure from the rule it must endeavour to re-establish the rule of custom.20

Jones v. Williams, (1887) 2 M. & W. 326, per Parker, B., Taylor Ev., 309, 310; see S. 11, ante.
 Mariam v. Mohammad, (1916) 28 C. L. J. 306: 48 I. C. 561; A. I.

R. 1918 C. 363. 16. Pushpavathi Vijayaram v. Visweswar, (1964) 2 S. C. R. 403; A. I. R. 1964 S.G. 118.

Ramchandra Singh v. Partap Singh,
 A. I. R. 1965 Raj. 217: 1965 Raj.
 L. W. 242.

^{18.} Ramalakshmi Ammal v. Shivanatha. 14 M. I. A. 570, 585; re-

ferred to in Pushpavathi Vijayaram v. Visweswar, A. I. R. 1964 S. C. 118.

^{19.} Abdul Hussain v. Sona, L.R. 45 I. A. 10: A.I.R. 1917 P.C. 181, cited with approval in Pushpavathi Vijayaram v. Visweswar, (1964) 2 S. C.R. 403; A.I.R. 1964 S.C. 118.

^{20.} Rajendra Ram Doss v. Devendra. (1973) 1 S.C.G. 14: 1973 S.C.D. 59: (1973) 5 Giv. App. J. 1 (S.C.): (1973) 2 S.C.R. 911: (1974) 2 S.C. J. 87: (1975) 1 An. W.R. (S.C.) 4: A.I.R. 1973 S.C. 268.

In the customary mode of selection of successor to the Mahant of the mutt in question ability, efficiency in management, good moral character and adherence to religious rites practised at the mutt were found to be relevant considerations and seniority was not the decisive factor as appeared from the oral and documentary evidence.21

There is a presumption that the entries in the Riwaj-i-am are correct. Oral and documentary evidence of mutations and other transactions in which the custom (of collateral succession to the adoptive father governing facts of Amritsar district) are relevant material to prove or disprove the custom, besides judicial decisions which furnish reliable instances in which the custom was recognised or departed from.22

21. Proof of Custom of Primogeniture. In the case of customs which are ancient, it is difficult to expect direct testimony of persons who were living since when the custom originated. In such cases, a party has to remain content by examining witnesses who may otherwise be competent to speak either about the inheritance or the custom governing succession to the property belonging to any family. The question still remains for consideration as to whether the witness who comes to depose about this custom heard this from his ancestors and whether there was an occasion for his having any conversation with his ancestors about that custom.28 The burden of proving that the custom in a particular family of primogeniture regulated the succession to their property rests upon the person who claims to inherit in that right.24

In a case, where there are several families all descending from a common ancestor, and the rule of primogeniture is found to prevail in several families, it gives rise to a probability that this custom was prevalent in the family in question as well.25 Where a custom prevails in one branch of a family, it is strong evidence to be relied on that it applied with equal force to another branch of the same family. The above rule, namely, if one family has branches, and if, in one or more of such branches, the rule of primogeniture governs, the greater probability is that such custom also prevails in other branches, is neither a presumption of law nor of fact. It is only a rule of probable inference. But the evidence about the existence of such a custom can get strength from that probability.2

22. Usage of trade. It has been said "that these words are to be understood as referring to a particular usage to be established by evidence and perfectly distinct from that general custom of merchants, which is the universal established law of the land, which is to be collected from decisions, legal principles and analogies, not from evidence in pais." Thus, evidence of general

Mahant Bhagwan Bhagat v. Grija Nandan Bhagat, (1972) 1 S.C.C. 486: (1972) 2 S.C.J. 730: 1973 Cri. L. J. 470: (1972) 2 S.C.R. 1005: 1972 B.L.J.R. 851: 1972 F. A. C. 109: A.I.R. 1972 S.C. 814.
 Kehar Singh v. Dewan Singh, (1966) 2 S.C.J. 363: 1966 Cur. L.J. 472: A. I. R. 1966 S. C. 1555, 1557 overruling Dewan Singh v. Kehar Singh, 60 P.L.R. 657.

Kameshwar Prasad v. Mithilesh
 Kishori Devi, A.I.R. 1964 Pat. 150.
 Garurudhwaja Prasad v. Saparan-

dhwaja Prashad, L.R. 27 I.A. 238: I.L.R. 23 A. 37.

^{25.} Ibid.

Gajendra Nath v. Mathurlal, A.I.R. 1916 Pat. 337; 1 Pat. L.J. 109.
 Kameshwar Prasad v. Mithilesh

Kameshwar Prasad v. Mithilesh Kishori Devi, A.I.R. 1964 Pat. 150 per Mahapatra, J. 3. Smith L. Gas., 9th Ed. 581, 582.

custom is not admitted to contradict the law-merchant. A custom or usage of trade must in all cases be consistent with law.4 That law has, however, been gradually developed by judicial decisions, ratifying the usage of merchants in the different departments of trade; where a general usage has been judicially ascertained and established, it becomes part of the law-merchant which Courts of justice are bound to know and recognize; but it is not easy to define the period at which a usage so becomes incorporated into the law merchant.6 Mercantile usage should be proved by evidence of particular instances and transactions in which it has been acted upon, and not by evidence of opinion only.6 Usage of trade may be proved by multiplying instances of usage of different merchants, if it appears to be the same as that of other merchants.7 With reference to the evidence necessary to support an alleged usage, the Privy Council said that "there needs not either the antiquity, the uniformity, or the notoriety of custom, which in respect of all these becomes local law. The usage may be still in course of growth; it may require evidence for its support in each case; but in the result it is enough if it appears to be so well known and acquiesced in that it may be reasonably presumed to have been an ingredient tacitly imported by the parties into their contract."8 The usage must be shown to be certain,9 and reasonable,10 and so universally acquiesced in11 that everybody in the particular trade knows it, or might know it, if he took the pains to enquire.12 If effect is to be given to it, it must not be inconsistent with the provisions of the Contract Act18 or repugnant to, or inconsistent with, the express terms of the contract made between the parties.14

In the absence of uniform and definite usage regarding the issue of waybills by a public carrier and their transfer on endorsement as equivalent to pledge of documents, the way-bills cannot be treated as documents of title within the meaning of sub-section (4) of Section 2 of the Sale of Goods Act, 1930. If the way-bill is not a document of title, it cannot under Section 172 of the Indian Contract Act, 1872, be pledged by transfer of the same. 15

14. Facts showing existence of state of mind, or of body or bodily feeling. Facts showing the existence of any state of mindsuch as intention, knowledge, good faith, negligence, rashness, ill-will or good-will towards any particular person, or showing the existence

Mayer v. Desser, (1864) 16 C.B.N.
 S. 646: Indian Contract Act, S. 1.
 Roscoe, N.P. Ev. 24, 25, and cases

there cited.

^{6.} Mackenzie v. Dunlop, (1856) 3 Macq. 22; Cunnigham v. Fonblanque, (1833) · 6 C. & P. 44; but see S. 49, post.

^{7.} Volkart v. Vettivelu, (1888) 11 M.

^{8.} Juggomohun v. Manickchund, (1859)
7 Moo, Ind. App. 263, per Sir
Coleridge, J. cited and applied in
Palakdhari v. Manners, (1895) 23 C.
179, 183 (usage in landholder's estate).

^{9.} Volkart v. Vettivelu, 11 M. 459, 462, 466 ante.

Arlapa v. Narsi & Co., (1871) 8 Bom-H.C.R. (A.C.) 19; Ransordas v.

Keshrising, (1863) 1 Bom. H.C.R.

^{11.} See Maqkenzie v. Chamroo, (1889) 16 C. 702; Volkart v. Vettivelu, 11

M. 459, 462, 466 ante. 12. Volkart v. Vettivelu, 11 M. 459, 462; Plaice v. Alcock, (1866) 4 F. & F. 1074, per Wills, J.; Foxal v. International Land Credit Co., (1867)

¹⁶ L.J.T. 637. 13. Act IX of 1872, S. 1; see Madhab

v. Rajcoomar, (1874) 14 B.L.R. 76: 22 W.R. 370.

14. Volkart v. Vettivelu, 11 M. 459; Smith v. Ludha, (1892) 17 B. 129; see note to S. 29 proviso 5, post.

^{15.} Canara Industrial and Banking Syndicate v. V. Ramachandra, 8 Law Rep. 737: (1967) 1 Mys, L.J. 490: A.I.R. 1968 Mys. 133.

of any state of body or bodily feeling-are relevant, when the existence of any such state of mind or body or bodily feeling, is in issue or relevant.

¹⁶[Explanation 1. A fact relevant as showing the existence of a relevant state of mind must show that the state of mind exists, not generally, but in reference to the particular matter in question.

Explanation 2. But where, upon the trial of a person accused of an offence, the previous commission by the accused of an offence is relevant within the meaning of this section, the previous conviction of such person shall also be a relevant fact].17

Illustrations

(a) A is accused of receiving stolen goods knowing them to be stolen. It is proved that he was in possession of a particular stolen article.

The fact that, at the same time, he was in possession of many other stolen articles is relevant, as tending to show that he knew each and all of the articles of which he was in possession to be stolen.

18 (b) A is accused of fraudulently delivering to another person a counterfeit coin which, at the time when he delivered it, he knew to be counterfeit.

The fact that, at the time of its delivery, A was possessed of a number of other pieces of counterfeit coin is relevant.

The fact that A had been previously convicted of delivering to another person as genuine a counterfeit coin knowing it to be counterfeit is relevant.]

(c) A sues B for damage done by a dog of B's which B knew to be ferocious.

The facts that the dog had previously bitten X, Y and Z and that they had made complaints to B, are relevant.

(d) The question is, whether A, the acceptor of a bill of exchange, knew that the name of the payee was fictitious.

The fact that A had accepted other bills drawn in the same manner before they could have been transmitted to him by the payee if the payee had been a real person, is relevant, as showing that A knew that the payee was a fictitious person.

(e) A is accused of defaming B by publishing an imputation intended to harm the reputation of B.

The fact of previous publications by A respecting B, showing ill-will on the part of A towards B, is relevant; as proving A's intention to harm B's reputation by the particular publication in question.

^{16.} Subs. by the Indian Evidence (Amendment) Act. 1891 (3 of 1891). S. 1 (1), for the original explanations,

^{17.} See the Code of Criminal Procedure, 1973, Ss. 236, 248 (3).18. Subs. by Act 3 of 1891.

The facts that there was no previous quarrel between A and B, and that A repeated the matter complained of as he heard it, are relevant, as showing that A did not intend to harm the reputation of B.

(f) A is sued by B for fraudulently representing to B that C was solvent, whereby B, being induced to trust C, who was insolvent, suffered loss.

The fact that, at the time when A represented C to be solvent, C was supposed to be solvent by his neighbours and by persons dealing with him, is relevant, as showing that A made the representation in good faith.

(g) A is sued by B for the price of work done by B, upon a house of which A is owner by the order of C, a contractor.

A's defence is that B's contract was with C.

The fact that A paid C for the work in question is relevant, as proving that A did, in good faith, make over to C the management of the work in question, so that C was in a position to contract with B on C's own account, and not as agent for A.

(h) A is accused of the dishonest misappropriation of property which he had found, and the question is whether, when he appropriated it, he believed in good faith that the real owner could not be found.

The fact that public notice of the loss of the property had been given in the place where A was, is relevant, as showing that A did not in good faith, believe that the real owner of the property could not be found.

The fact that A knew, or had reason to believe that the notice was given fraudulently by C, who had heard of the loss of the property and wished to set up a false claim to it, is relevant, as showing that the fact that A knew of the notice did not disprove A's good faith.

(i) A is charged with shooting at B with intent to kill him.

In order to show A's intent, the fact of A's having previously shot at B may be proved.

- (j) A is charged with sending threatening letters to B. Threatening letters previously sent by A to B may be proved, as showing the intention of the letters.
- (k) The question is, whether A has been guilty of cruelty towards B, his wife.

Expressions of their feeling towards each other shortly before or after the alleged cruelty, are relevant facts.

(1) The question is, whether A's death was caused by poison.

Statements made by A during his illness as to his symptoms, are relevant facts.

(m) The question is, what was the state of A's health at the time when an assurance on his life was effected.

Statements made by A as to the state of his health at or near the time in question, are relevant facts.

(n) A sues B for negligence in providing him with a carriage for hire not reasonably fit for use, whereby A was injured.

The fact that B's attention was drawn on other occasions to the defect of that particular carriage, is relevant.

The fact that B was habitually negligent about the carriages which he let to hire, is irrelevant.

(o) A is tried for the murder of B by intentionally shooting him dead.

The fact that A, on other occasions, shot at B is relevant, as showing his intention to shoot B.

The fact that A was in the habit of shooting at people with intent to murder them, is irrelevant.

(p) A is tried for a crime.

The fact that he said something indicating an intention to commit that particular crime, is relevant.

The fact that he said something indicating a general disposition to commit crimes of that class, is irrelevant.

s. 3 ("Fact"). s. 3 ("Relevant").

s. 21, cl. (2) ("Admission consisting of

statements of existence of state of mind or body."

ss. 102, 106, 111 ("Burden of proof").

Steph. Dig., Ar. II and Note VI, Taylor, Ev. ss. 580-586, 150, 160, 812, 1665, 1666, 340 - 347, 188; Phipson, Ev., 11th Ed., 96 - 100, 140, 411 - 437; Lindley, Partnership, 536; Chitty's Equity Index, 4th Ed., "Notice"; Brett's Leading Cases in Equity, 2nd Ed., 260; Roscoe, N.P. Ev., 633-635, 847-855, 736 et seq; Norton, Ev., 131-140; Swift, Ev., 111; Cunningham, Ev., ss. 117, 119; Pollock's Law of Fraud in India (1894) 44, 45, 61, 65, 66, 68, 77; First Report of the Select Committee presented on 31st March, 1871; Roscoe, Cr. Ev., 13th Ed., 79-85; Lindley's Company Law, 6th Ed., 432, 433; Bevan's Principles of the Law of Negligence (1889); Cr. Pr. Code, Ss. 236, 248 (3); Contract Act, S. 17; Best, Ev., p. 66, ss. 255, 433; Wills, Ev., 3rd Ed., 85-92; Wigmore, Ev., ss. 309-370, 581, 658-661, 1962-63.

SYNOPSIS

1. Principle.

2. States of mind, or of body, or bodily feeling.

3. Proof of mental and physical conditions.

(a) General.

Proof to rebut suggestion of accident or mistake.

(i) By evidence of person concerned.

- (ii) By evidence of other per-SOUS.
- (iii) Contemporaneous manifestations.

(iv) Collateral facts. (v) Similar acts.

(c) Admissibility of evidence to prove knowledge, or intention or other state of mind.

subsequent (d) Previous and events.

Scope of the section.

5. Overlaping of Sections 14 and 15.

6. Intention.

(a) General.

(b) Mens rea in Indian Penal and other statutory Code offences. England.

America. (c) Conclusion.

(d) Proof of intention.

7. Knowledge.

- General. (a)
- (b) Knowledge may be inferred or presumed.

Notice.

- General. (a)
- (b) Wilful abstention.
- (c) Gross negligence.
- (d) Registration.
- (e) Notice to agent.

9. 10.	Good and bad faith: Fraud, Negligence,		(c) (d)	Illustration (c). Illustration (d).
11.	Rashness.		(c)	Illustration (e).
12.	Similar acts.		(1)	Illustration (f).
13.	Malice.		(g)	Illustration (g).
14.	State of body and bodily	feeling.	(h)	Illustration (h).
15.	Explanations:		(i)	Illustration (i).
	(a) Explanation 1.		(i)	Illustration (j).
	(b) Explanation 2.		(k)	Illustration (k).
16.	Sedition, charge of.		(1)	Illustration (1).
17.	Illustrations.		(m)	Illustration (m).
	(a) Illustration (a).		(n)	Illustrations (n) and (o).
			(0)	Illustration (p).
	(b) Illustration (b),		(0)	Tituation (b).

- 1. Principle. If the existence of a mental or bodily state or bodily feeling is, as is assumed by the section, in issue or relevant, it is clear that facts from which the existence of such mental or bodily state or bodily feeling may be inferred are also relevant.19 The second explanation is merely a particular application of the general rule contained in the body of the section. The rejection of the general fact by the first explanation rests on the ground that the collateral matter is too remote, if indeed there is any connection with the factum probandum.
- 2. States of mind, or of body, or bodily feeling. Facts, it has been seen, are either physical or psychological; the former being the subject of perception by the senses, and the latter the subject of consciousness.²⁰ A person may testify to his own intent. But, if his acts and conduct are shown to be at variance and inconsistent with the intent he swears to, his own testimony in his own favour would ordinarily obtain very little credit.21 Of facts which cannot be perceived by the senses, intention, fraud, good faith and knowledge are examples.²² But a man's intention is a matter of fact capable of proof. "The state of a man's mind is as much a fact as the state of his digestion. It is true that it is very difficult to prove what the state of a man's mind at a particular time is; but if it can be ascertained it is as much a fact as anything else."23 The latter class of facts, however, are incapable of direct proof by the testimony of witnesses; their existence can only be ascertained either by the confession of the party whose mind is their seat or by presumptive inference from physical facts.²⁴ It has been debated whether the "opinion rule" excludes testimony to another

Deputy Remembrancer v. (1894) 22 C. 164, 174; R. v. Rhutten, (1865) 2 W. R. Cr. 63; R. v. Beharee, (1865) 3 W. R. Cr. 23, 24, 27 (exclamations as evidence of guilty intention; conduct of prisoner) (Re) Meer, (1870) 13 W. R. Cr. 70; R. v. Roorkni, (1865) 3 W. R. Cr. 58 (province of Jury to judge of intention); R. v. Gokool, (1876) 5 W. R. Cr. 33, 38 (to some degree of course the intentions of parties to a wrongful act must be judged of by the event; R. v. Gora, (1866) 5 W. R. Gr. 45, 46 (presumption of intention depends upon the facts of each particular case); R. v. Shuruffooddeen. (1870) 13 W. R. Cr. 26 (a guilty knowledge is not necessarily a thing on which direct evidence can be afforded. It

^{19.} Evidence under this section or next is not admissible when the case depends on proof of actual facts and not upon the state of mind, Gokul v. R., 1925 Cal, 674; 29 C. W. N. 483: 86 I. C. 970.

v. ante, S. 3, illust. (d).

Wigmore, Ev., s. 581.
 See First Report of the Select Committee, 31st March, 1871; R. v. Panchu, 1920 Cal. 500; I. L. R. 47 C. 671 (F.B.): 58 I.C. 929. Edington v. Fitzmaurice, (1885) 29 Ch. D. 459 per Bowen, L. J. See Balmukand v. Ghansam, (1894) 22 C. 391, 406 [proof of intention need not be direct; it will be enough

need not be direct; it will be enough if it is proved like any other fact (and the existence of intention is a fact) by the evidence of conduct and surrounding circumstances.] The

person's state of mind.25 But, it may be safely and in general said that a witness must speak to facts and let the inference from those facts be drawn by the Court or jury.¹ This action is in accordance with the principle laid down in numerous cases² that, to explain states of mind, evidence is admissible, though it does not otherwise bear upon the issue to be tried. As regards this principle there is no difference between Civil and Criminal cases.3 The present section makes general provision for the subject, and the next section is a special application of the rule contained in the present one. The subject of the existence of states of mind is one of the most important topics with which judicial enquiries are concerned; in Criminal cases they are the main considerations; and in Civil cases they are often highly material, as for instance, where there is a question of fraud, malicious intention, or negligence. The present section is framed to avoid all technicalities as to the class of cases or the time within which the fact given as evidence of mental or bodily condition, must have occurred. The only point for the Court to consider, in deciding upon the admissibility of evidence under this section, is, whether the fact can be said to show the existence of the state of mind or body under investigation.4 The same considerations will, it is apprehended, determine the question of the admissibility of facts subsequent to the fact in issue to prove intent and other like questions.5 So also, though the collateral facts sought to be proved should not be so remote in time as not to afford a reasonably certain ground for inference, yet such remoteness will, as a rule, go to the weight of the proffered evidence only.6. In the next case cited, the appellant was convicted under Sec. 209, Indian Penal Code, of having made false claims

> is a matter of conscience and con-nected with the secret motives of a nected with the secret motives of a man's conduct and it must be inferred from fact): R. v. Bleasdale, (1848) 2 C. & K. 765 (felonious intent); R. v. Mogg, (1830) 4 C. & P. 364 (ib); R. v. Lloyd, (1836) 7 C. & P. 318 (lustful intent); R. v. Bholu, (1900) 23 A. 124; cited in notes to S. 106. (Assembling for the purpose of committing dacoity; evidence of intention); R. v. Papa Sani, (1899) 23 M. 159; Deputy Legal Remembrancer v. Karuna, (1894) 22 C. 164 (obtaining girls for prostitution, evidence of intent), for prostitution, evidence of intent),

see R. v. Petcherini, (1856) 7 Cox 79. As to burden of proof, see Ss. 102, 105, 106, post.

25. Wigmore, Ev., ss. 1962, 1963. The answer to the object in s. 661 seems to be that in such case the witness to submitting his inference to the Is submitting his inference to the jury. Because the jury have themselves to draw the inference that there is no reason why the witness should be allowed to do so. As to the different meanings of "belief" or "impression" as signifying the degree of positiveness of original observation or recollection (in which case there is no legal objection) or lack of actual personal observation (in which case the evidence is excluded), see ib., 658.

Swift, Ev., 111. "A witness must swear to facts within his knowledge

and recollection and cannot swear to mere matters of belief."

2. See judgment of Williams, J., in R. v. Richardson, (1860) 2 F. & F. 343.

Blake v. Albion Life Assurance Society, (1878) 4 C. P. D. 94.

4. Cunningham, Ev., 117. 5. See R. v. Mason, (1914) 10 Cr. App. Rep. 169; R. v. adamson, (1911) 6 Cr. App. Rep. 205; R. v. Debendra Prosad, I. L. R. 36 Cal. 578; 2 I.C. 601; Raghunath v. R., 1919

Cal. 1084; 46 I. C. 696.
6. R. v. Whilley, (1892) 2 Leach's C. G. 983 cited in R. v. Vajiram, 16 B. 414; "True it is that the more detached the previous utterings are in point of time, the less relation they will bear to the particular uttering stated in the indictment; and when they are so distant the only question that can be made is whether they are sufficient to war-rant the jury in making any inference from them as to the guilty knowledge of the prisoners, but it would not render the evidence inadmissible", per Lord Ellenborough. See also per Lord Blackburn in R. v. Francis. (1874) 12 Cox. C. C. 612, 614.

in three suits brought against certain persons. Two other persons besides the appellant were similarly prosecuted and convicted for bringing other false suits against the same defendants. Held, that evidence relating to suits by the appellant other than those specified in the charges were properly admitted under this and the next section for the purpose of showing the ill-will or enmity of the appellant towards defendants, in those suits as a body, but the evidence relating to suits brought by other persons, when no case of a conspiracy between them and the appellant was alleged or established, was inadmissible.7 When the allegation against the accused, an officer, was that he was acting in pursuance of the policy of the Ittehad-ul-Muslimeen, that his state of mind was to exterminate the Hindus, it was held that he was entitled to lead evidence to show that he did not possess that state of mind but that, on the other hand, his behaviour towards the Hindus throughout his official career had been very good and he could not possibly think of exterminating them.8

3. Proof of mental and physical conditions. (a) General. The mental and physical conditions of a person may be proved either by that person speaking directly to his own feelings, motives, intentions, and the like, or by the evidence of another person detailing facts from which the given condition may be inferred; but such other person may not, in general, testify the state of mind of the first, as to which he can have no direct knowledge, and may only state those external and perceptible facts which may form the material of the Court's decisions.9_10

The state of a man's mind is a question of fact.11 Whether the state of mind of a person should be proved by the evidence of that person himself or by the evidence of another person, it is not a question of law. As a matter of abstract law, the state of a man's mind can be proved by evidence other than that of the man himself. But whether that would be enough in any given case, or whether the "best evidence rule" should be applied in strictness in that particular case, must necessarily depend upon its facts. 12

A distinction has to be drawn between simple mental phenomena which can be inferred from the acts relevant and complex mental phenomena which will be no guide on the basis of which one can prove those phenomena and raise an inference about their existence.18

In assessing the value of medical evidence to prove injuries on the body of a person who took the plea of the exercise of the right of private defence, what the doctor had done in the matter of the grant of certificate in another case is irrelevant.14

^{7.} Raghunath v. R., A. I. R. 1919
Cal. 1084: 22 G. W. N. 494: 19
Cr. L. J. 781: 46 I.C. 696.
8. Habeeb Mohammad v. State of
Hyderabad, A. I. R. 1954 S. C.
51: 1953 S. G. J. 678: 1954 Mad.
W. N. 233: 1954 Cr. L. J. 338.
9-10. See Phipson, Ev., 11th Ed., 96, 97:
Cunningham, Ev., 117; but as to
the opinion of expert, see S. 45,
post: Wigmore, Ev., 8. 581 (1962post; Wigmore, Ev., s. 581 (1962-63).

Ramzan v. Emperor, A. I. R. 1935
 S. 203: 159 I. C. 466: 37 Cr. L.

J. 106.

12. State of Bombay v. Purshottam, 1952 S. G. 317: 1952 S. C. J. 503: 1952 Cr. L. J. 1269; 54 Bom. L. R. 869: (1952) 2 M.L.J. 338.

13. Anant Baburao Sawant v. State, I. L. R. 1966 Bom. 803: 68 Bom. L. R. 187: 1967 Cr. L.J. 440: A.I.R.

¹⁹⁶⁷ Bom. 109, 117.

^{14.} Dariyao v. State, 1969 Cr. L.J. All. 1273. 1276.

The question of the admissibility of evidence of similar facts under this section is not free from difficulty. That the question is not yet solved in a wholly satisfactory way appears from a collation of criminal appeals.15 A careful examination of the cases where evidence of this kind has been admitted shows that they may be grouped under three heads: (1) Where the prosecution seeks to prove a system or course of conduct. (2) Where the prosecution seeks to rebut a suggestion on the part of the prisoner of accident or mistake.16 (3) Where the prosecution seeks to prove knowledge by the prisoner of some fact.17

Cases under the first head, that is where the prosecution seeks to prove a system or course of conduct, fall more particularly under Sec. 15, post.18

- (b) Proof to rebut suggestion of accident or mistake.—The admissibility of evidence under the second head, that is, where the prosecution seeks to rebut a suggestion on the part of the prisoner of accident or mistake, has already been considered in the notes under Sec. 7, ante. The existence of a particular state of mind may be proved in the following woys:
- (i) By evidence of person concerned. The state of a man's mind may be proved by the evidence of the person himself. In a case for malicious prosecution, where the defendant himself was called and asked in chief, "Had you any other object in view, in taking proceedings, than to further the ends of justice?" The question was admitted.19 And in cases of obtaining goods on false pretences, the prosecutor is constantly asked, not only in cross-examination, but in chief, with what motive, or for what reasons, or on what impression he parted with the goods.20 So, on a question of domicile, A may state what his intention was in residing in a particular place.21 In a suit by a house agent against the former owner of a house, in which the question was, whether the former was entitled to receive from the latter a commission by reason of having effected the sale of the house "through his intervention," the Judge at the trial, in order to ascertain whether any acts of the plaintiff conduced to the completion of the sale, put the following question to the purchaser: "Would you, if you had not gone to the plaintiff's office and got the card (a card to view the premises, with terms of sale written by the plaintiff's clerk on the back), have purchased the house" and, overruling an objection, received his answer, which was, "I should think not."22

18. Raghunath v. Emperor, 1919 Cal. 1084; 46 I. C. 696: 19 Cr. L. J. 781; 22 G. W. N. 494. 19. Hardwick v. Coleman, (1859) 1 F.

& F. 531. 20. Hardwick v. Coleman, (1859) 1 F. & F. 531; and see R. v. Hewgill,

Dear C. 315; R. v. Dale, (1836) 7 C. & P. 352.

21. Wilson v. Wilson, (1872) L.R. 2 P. & C. 435, 444.

Mansell v. Clements, (1874) L. R. 9 C. P. 139. In a suit by A against B for goods sold and delivered in which B pleaded that the debt became due from him jointly with one C, who was still alive and the replication traversed the joint liability: Held that with a prove B's sole liability the witness who proved the giving of the order could not be asked the question "With whom did you deal?," but that the proper enquiry was as to the acts done; Bonfield v. Smith, (1844) 12 M. & W. 405.

^{15.} Roscoe's Criminal Evidence, (1952) 16th Ed., p. 96. See the cases cited therein.

^{16.} R. v. Armstrong. (1922) 2 K. B. 555.

17. R. v. Bond. (1906) 2 K.B. 389 at 398: 75 L.J.K.B. 693: 54 W.R. 586: 21 Gox C.C. 252 [followed in R. v. Porter, (1935) 25 Cr. App. R. 59]; R. v. Fisher, (1910) 1 K.B. 149: 79 L.J.K.B. 187; 192 L.T. 111: 74 L.P. 104 J.P. 104.

- (ii) By evidence of other persons. It is obvious that in many cases such evidence may not be reliable, and in other cases may not be had. The mental and physical conditions of a person must then be proved by the evidence of other persons who speak to the outward manifestations known to them, of states of mind and body. Such manifestations may be either by conduct, conversation or correspondence.22
- (iii) Contemporaneous monifestations. To prove mental and physical conditions "all contemporaneous manifestations" of the given condition, whether by conduct, conversation, or correspondence may be given in evidence as part of the res gestae, it being for the Court or jury to consider whether they are real or feigned. Thus, the answers of patients to enquiries by medical men and others are evidence of their state of health, provided they are confined to contemporaneous symptoms and are not in the nature of a narrative as to how, by whom, such symptoms were caused.24 And, if the condition of the patient before or after the time in issue, be material, his declarations at such times as to his then present condition are equally receivable.25 A statement of an accused immediately after an occurrence may be relevant to show the state of his mind.1 Not only may a party's own statements, but those made to him by third persons,2 be proved for the purpose of showing his state of mind at a given time.3 Thus, where the question was whether a person knew that he was insolvent at a certain time, his own statements implying consciousness of the fact as well as letters from third persons refusing to advance him money, were held to be admissible after the fact of his insolvency had been proved independently.4
- (iv) Collateral facts. In addition to evidence of contemporaneous manifestations of the given condition, collateral facts are admitted to show the existence of a particular state of mind. Acts unconnected with the act in question are frequently to prove psychological facts such as intent.5
- (v) Similar acts. In order to show this, similar acts done by the party are relevant, but similar acts are not relevant to prove the existence of the particular fact in issue, being inadmissible for this purpose under the rule by which similar but unconnected acts are excluded.6
- (c) Admissibility of evidence to prove knowledge or intention or other state of mind. It is the admissibility of evidence under the third heading, to

23. See Wright v. Tatham, (1834) 7 A. & E. 313.

24. Aveson v. Kinnaird, (1805) 6
East. 188; R. v. Nicholas, (1846) 2
C. & K. 246; R. v. Gloster, 16
Gox. 471, Illus. (1) (m).
25. R. v. Johnson, (1895) 2 C. & K.

1. Kakar v. R., (1924) 25 Cr. L. J.

Vacher v. Cocks, (1829) M. & M. 145; Lewis v. Rogers, (1834) 1 Cr. M. & R. 48; Whart., s. 254.
 Phipson. Ev., 11th Ed., 100; see Taylor, Ev., ss. 580-586.

4. ib., 105; Thomas v. Connell, (1838) 4 M. & W. 267; Vacher v. Cocks, (1829) M. & M. 145; Cotton v. James, (1830) 1 B. & Ad. 128. 5. Best, Ev., 255.

 See notes to S. 8, ante; "When there is a question whether a per-son said or did something, the fact that he said or did something of the same sort on a different occasion may be proved if it shows the existence on the occasion in ques-tion of any intention, knowledge, good or bad faith, malice or other state of mind, or any state of body or bodily feeling, the existence of which is in issue or is deemed to be relevant to the issue; but such acts or words may not be proved merely in order to show that the person so acting or speaking was likely on the occasion in question to act in a similar manner." Steph. Dig., Art. 11 and see note vi, ib. prove knowledge, that has to be considered here. It is settled law, that neither under this section nor under Section 15 can the evidence of facts similar to but not part of the same transaction as the main fact be received for the purpose of proving the occurrence of the main fact, which must be established by evidence directly bearing on it. But when the existence of that fact has been so established and a question arises as to the state of mind of the person who did it, or whether the act in question was done accidentally or with a particular knowledge or intention that evidence of similar acts may, under certain conditions, be admitted.7 The Section applies only to cases where a particular act is more or less criminal or culpable according to the state of mind or feeling of the person who does it, not to cases where the question of guilt or innocence depends upon actual facts, as it does at a trial for the offence of arson.8 Evidence of a collateral offence cannot be received as substantive evidence of the offence on trial, though under this section evidence may be given of intention and like matters where the factum of such intention or like matters was relevant.9 Evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment is not admissible, unless upon the issue whether the acts charged against the accused were designed or accidental, or unless to rebut a defence otherwise open to him.10 Thus, when a man is on his trial for a specific crime, such as uttering a forged note or coin, or receiving an article of stolen property, the issue is whether he is guilty of that specific act. To admit, therefore, as evidence against him other instances of a similar nature clearly is to introduce collateral matter. This cannot be with the object of inducing the Court to infer that because the accused has committed a crime of a similar description on other occasions, he is guilty on the present; but to establish the criminal intent and to anticipate the defence that he acted innocently and without any guilty knowledge or that he had no intention or motive to commit the act and generally to interpret acts, which without the admission of such collateral evidence, are ambiguous.11 In other words, the existence of the fact in issue must be always independently established and for this purpose evidence of similar and unconnected acts is inadmissible; but when once the fact in issue is so established, such similar acts may be given in evidence to prove the state of mind of the party by whom it was done.12 Thus, in a trial for forgery, proof of similar transactions which are not the subject of the charge is admissible as evidence of intention but

M. L. Pritchard v. Emperor, 1928 Lah. 382 at p. 387; 112 I. C. 850; 30 Cr. L. J. 18.
 A. H. Gandhi v. King, 1941 R. 324; relying on Emperor v. Abdul Wahid Khan, I. L. R. 34 All. 93; 12 I. C. 987; 8 A. L. J. 1269.
 Goma Rama v. Emperor, 1945 Bom., 152; I. L. R. 1945 Bom. 278; 219 I.C. 250.

Bom., 152: I. L. R. 1945 Bom. 278: 219 I.C. 250.

10. Ram Sumiran Pandey v. Emperor, 1942 Pat. 291: 198 I.C. 662: 43 Cr. L. J. 413; see also Emperor v. Yakub Ali, 1917 All. 251: I. L. R. 39 All. 273: 39 I. C. 673; Pane v. Emperor, 1921 Sind 57: 83 I. C. 889: 26 Cr. L. J. 185.

11. Baharuddin v. Emperor, 1914 Cal. 589 (2): 22 I. C. 187: Norton, Ev.

^{131;} R. v. Cole, (1810) 1 Phillips Arr. Ev., (10th Ed.) 508; R. v. Richardson, (1860) 2 F. & F. 343; Blake v. Albion Life Assurance Society, (1878) 4 C. P. D. 94 (fraud); R. v. Balls, (1836) I Moo. C. C. 470, and cases cited, post. "There is no principle of law which pre-vents that being put in evidence which might otherwise be so, merely because it discloses other indictable offences" per Williams, J., in R. v. Richardson, (1860) 2 F. & F. 343; Makin v. Attorney-General for New South Wales, (1894) App. Cas. 57.

12. R. v. Parbhudas, (1874) 11 B. H.
C. R., 90; R. v. Vajiram Moodiar, (1892) 16 B. 414; R. v. Vyapoury, (1881) 6 G. 655.

not of the forgery,18 and, in a trial for cheating, evidence of a similar trick (a suggestion that a certain person would lend money) in another case was admitted to prove the state of mind of the accused.14 Where a medical practitioner is tried for causing death of a patient by administering a lethal dose of dhatura and the prosecution shows that even a man of no education is aware of the extremely poisonous nature of dhatura, but the defence is that there are cases in which the drug has been successfully administered for curing a certain disease, it is open to the prosecution to show that the previous experiment carried out by the accused himself, in exactly similar circumstances, had shown him that, far from being a cure, the drug was a certain killer.15

When several offences are so connected that proof of one can be arrived at through evidence going to prove the others, the evidence is not on that account excluded.18

"Sodomy is a crime in a special category because", as Lord Sumner said,17

"persons who commit the offences now under consideration seek the habitual gratification of a peculiar perverted lust, which not only takes them out of the class of ordinary men gone wrong, but stamps them with the hall-mark of a specialised and extraordinary class as much as if they carried on their bodies some physical peculiarity. On this account, in regard to this crime, we think that the repetition of the acts is itself a specific feature connecting the accused with the crime and that evidence of this kind is admissible to show the nature of the act done by the accused. The interests of justice require that on each case the evidence on the others should be considered, and even apart from the defence raised by him, the evidence would be admissible."18

Offences against young girls are "on the same footing as unnatural offences with men or boys."19 In the Full Bench case of Shivkali Goswami v. Emperor20 where the accused was charged with taking a bribe, Dar, J., held that evidence of a previous bribe was not admissible under this section as there was no controversy in the case about the existence of any state of mind, intention, knowledge or good faith of the accused with regard to the currency notes he received and the evidence was not relevant directly to contradict the defence of the accused. Iqbal Ahmad, C. J. and Allsop, J., were inclined to hold that the evidence was admissible under this section, but they based their decisions on other admissible evidence. In a prosecution based on a speech, a previous

^{13.} Krishna v. R., 1917 Cal. 676: 43 C.

^{783: 33} I. C. 306: 17 Cr. L. J. 130: 20 G. W. N. 262. R. v. Yakub, 1917 All. 251: 39 A. 273: 39 I. C. 673; and see Amrita v. R., 1916 Cal. 188: I. L. R. 42 C. 957: 29 I. C. 513; Baharuddin v. R., (1913) 18 G. L. J. 578; Giri-dhari v. R., (1909) 11 Cr. L. J.

Juggan Khan v. State, A. I. R. 1963 M. P. 102: 1963 M. P. L. J.

^{16.} R. v. Parbhudas, (1874) 11 Bom.

H. C. R. 90; R. v. Ellis, (1826) 6 B. & C. 145; cited in R. v. Parbhudas, supra; See also R. v.,

Vajiram, (1892) 16 B. 414.

17. R. v. Thompson, (1918) A.C. 221 at p. 235.

^{18.} R. v. Sims, (1946) 1 K. B. 531: (1946) 1 All E. R. 697: 62 T. L. R. 431: 175 L. T. 72: 31 Cr. App.

^{19.} Ibid.

¹⁹⁴⁴ All. 257: 216 I. C. 100: 1944 20. A. L. J. 419 (F.B.).

speech, though made six months before, is admissible as evidence of the intention of the speaker, if both the speeches form part of a series of speeches on the same topic.21

Evidence of previous thefts is not admissible in a trial on a charge of dacoity, as tendency to commit thefts cannot be deemed to throw any light on the existence of an intention to commit a dacoity.22 Evidence of a succession of incidents may be relevant to prove identity, guilty knowledge or in rebuttal but affords no relevance to determine whether a particular occasion for an incident ever occurred at all.23 Thus, evidence relating to specific dacoities by individual members may be relevant to prove evidence of association that the gang operated for committing dacoity.24

(d) Previous and subsequent events. Both previous and subsequent events may be relevant under this section as showing the state of mind,25 but as subsequent events can merely show the reflections of what a man's mind may have been, previous events are of more importance as showing the influences which have worked upon the man's mind to bring it into the condition that it was at the moment under investigation.1 Illustration (e) refers to "previous publication" and illustration (j) refers to threatening letters "previously sent", but in illustration '(m) the test is merely proximity of time, not priority. In a case in which the accused was tried on a charge under Section 124A of the Indian Penal Code, it was held, "Primarily, anything he has written is, if it comes within the general words of Section 14, relevant and admissible." At the same time, of course, the writing should be within a reasonable time of the particular occurrence, i.e., the particular article or other document in respect of which he is being charged.2 But the question of proximity of times goes rather to the weight to be given to the evidentiary facts than to their admissibility. It is, however, plain from all the decisions that the acts of which evidence is tendered must be of the same specific kind as that in question.3

In R. v. Armstrong,4 where the accused was charged with the murder of his wife by administering arsenic, evidence, that the accused had attempted to poison another person with arsenic on a subsequent occasion was held to have been rightly admitted to rebut the defence that the wife had committed suicide and that the arsenic was kept by the accused for an innocent purpose, viz., killing weeds. So also, in R. v. Mortimer,5 where the charge was one of murder

N. L. J. 31. 22. Emperor v. Wahiuddin, 1930 Bom. 157; I. L. R. 54 Bom. 524; 127 I. C. 189.

Regina v. Chandor, (1959) 2 W. L.

N. N. Burjorjee v. Emperor, 193! Rang. 456: 159 I.C. 1065. Emperor v. Philips S. Pratt, 192! 1.

^{21.} Om Prakash v. Emperor, 1930 Lah. 867; 127 I. C. 209; 31 Gr. L. J. 1182; Jagannath Prasad v. Emperor, 1940 Nag. 134: 189 I. C. 74: 1940

^{23.} Regina v. Chandor, (1959) 2 W. L.
R. 522; (1959) 1 Q.B. 545; (1959)
1 All E. R. 702.
24. Lalchand v. State, I. L. R. 38 Pat,
1251; A. I. R. 1961 Patna 260;
(1961) 1 Cr. L. J. 841.
25. Srinivasmal Bairoliya v. Emperor,
1947 P. C. 135; I. L. R. 26 Pat,
46C; 49 Bom. L. R. 688; See also
Ganesh v. Emperor, 1931 Pat. 52;

¹³⁰ I. G. 269; Raghunath v. Emperor, 1919 Cal. 1084; 46 I. C. 696; Bechai v. Emperor, 1922 All. 244 69 I. G. 159.

Bom. 78: 108 I. C. 30; 29 Cr. L. J 320; 30 Bom. L. R. 315; see als Amrita Lal Hazra v. Emperor, 191 Cal. 188; I. L. R. 42 Cal. 957 29 I, C. 513.

^{3.} A. H. Gandhi v. The King, A. R. 1941 Rang. 324.
4. (1922) 2 K. B. 555; 91 L. J. K. I. 904; 19 Cr. App. R. 149; 127 L. 7 221; 88 J. P. 209.
5. (1936) 25 Cr. App. R. 150,

by deliberately running down a woman bicyclist with a motor car, evidence was admitted of similar attacks on other women, immediately before or after the offence charged. In Srinivasmal v. Emperor,⁶ one of the two accused was tried on charges of contravening a Price Control Order by selling salt to dealers at a price higher than that fixed, and the other accused was tried on charges of abetting the first accused. A number of dealers were called to speak of transactions, not the subject of any charge, which they had had with the accused during or shortly before or after the period covered by the dates of the offences charged. This evidence, if accepted, proved beyond doubt that the second accused knew of the first accused's illegal exactions and connived at them. It was held, that the evidence was relevant, not only to the principal charge but also to the charge of abetting, because it showed an intention to aid the commission of the offence and was thus admissible to prove intention under the section

4. Scope of the section. In R. v. Vyapoory Moodaliar,7 Garth, C. J., said:

"Section 14 seems to me to apply to that class of cases which is discussed in Taylor on Evidence, 6th Edition, Sections 318-322-that is to say, cases where a particular act is more or less criminal or culpable, according to the state of mind or feeling of the person who does it; as, for instance, in actions of slander or false imprisonment, or malicious prosecution, where malice is one of the main ingredients in the wrong which is charged, evidence is admissible to show that the defendant was actuated by spite or enmity against the plaintiff; or, again, on a charge of uttering coin, evidence is admissible to show that the prisoner knew the coin to be counterfeit, because he had other similar coins in his possession, or had passed such coin before or after the particular occasion which formed the subject of the charge. The illustrations to Section 14 as well as the authorities cited in Taylor's, show with sufficient clearness the sort of cases in which this evidence is receivable. But I think we must be very careful not to extend the operation of the section to other cases, where the question of guilt or innocence depends upon actual facts, and not upon the state of a man's mind or feeling. We have no right to prove that a man committed theft or any other crime on one occasion by showing that he committed similar crimes on other occasions: Thus the possession, by an accused person, of a number of documents suspected to be forged, was held to be no evidence to prove that he had forged the particular documents with the forgery of which he was charged."8

In R. v. Parbhudas,9 West, J. said:

"The possession by an accused of several other articles deposed to have been stolen, would no doubt, have some probative force on the issue

^{6.} A.I.R. 1947 P.C. 135.

 ^{(1881) 6} C. 655, 659.
 R v Parbhudas, (1874)

R. v. Parbhudas, (1874) 11 Bom. H. C.R. 90; R. v. Nur Mohomed, (1883)
 B. 223, 225, in which the former case was distinguished and in which it was held that evidence of the possession and attempted disposal of coins of an unusual kind is relevant

on a charge of uttering such coins soon afterwards when the factum of uttering is denied.

^{9. (1874) 11} Bom. H. C. R. 90, 91.
"A fully argued case where Mr. Justice West gives a full and lucid exposition of S. 14 of the Indian Evidence Act," per Jardine J., in R. v. Fakirapa, (1890) 15 B. 502.

of whether he had received the particular articles which he was charged with having dishonestly received, and the receipt or possession of which he denied altogether, yet in the first illustration to Section 14 it is set forth as preliminary to the admission of testimony as to other articles 'that it is proved that he was in possession of the particular stolen article.' The receipt and possession are not allowed to be proved by other apparently similar instances but only the guilty knowledge illustration (o) to the same section makes a previous attempt by the accused to shoot the person murdered, evidence of the accused's intention, but not of the act that caused the death, yet it is certain that in the issue of whether A actually shot B or not, the fact that he had previously shot at him, would have some probative force; so, too, would proof of a general malignity of disposition by evidence that 'A was in the habit of shooting at people, with intent to murder them,' yet this evidence is excluded, even as proof of A's intention either as too remotely connected with the particular intention in issue, or as raising collateral question which could not properly be resolved in the cases."10

In the same case Melville, J., said:11 "It appears to me that the Indian Evidence Act does not go beyond the English Law." As to the latter, Lord Herschell said:12

"The mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental or to rebut a defence which would otherwise be open to the accused,"

In R. v. Bond,13 it was held that where the defence to a criminal charge is that the acts alleged to constitute the crime were done by the accused for an innocent purpose, evidence that the accused did the same act for an improper purpose on another occasion, is admissible as evidence negativing the defence, although it is evidence which proves the commission of another offence by the accused. In this case, a person who was qualified to be and had acted as a surgeon was indicted for procuring a miscarriage. The evidence was that he had used certain instruments and the defence was that he was performing a lawful operation. It was proved, that he had ceased to practise as a surgeon; and evidence was tendered by the prosecution that he had on a previous occasion used the same instruments in the same manner on another person with the avowed intention of procuring a miscarriage. This evidence was held admissible by the Court of Crown Cases, Lord Alverstone, C. J., and Redley, J., dissenting on the grounds that prima facie there was no necessary connection between the act charged on the indictment and the other act alleged in the evidence and that evidence of prior acts of a similar kind is not admissible when the only question is the purpose for which an act was done.

^{10.} R. v. Parbhudas. (1874) 11. Bom.

H.C.R. 90, 91. 11. Ibid. at p. 97. 12. Makin v. Attorney-General, (1894)

A.C. 57: cited in R. v. Wyat., (1904) 1 K. B. 188.

^{13. (1906) 21} Cox. 252.

In a case in the Allahabad High Court, where the accused was charged with cheating, it was held that evidence of his having cheated others not named in the charge was inadmissible because this section only applies to cases where a particular act is more or less culpable according to the state of mind of the accused. And in the Calcutta High Court, it has been held that where evidence was tendered of false representations of the same character as the one charged and made to persons similarly situated, such evidence was admissible to prove dishonest intent in reference to the particular transaction charged, on the ground that Sec. 15 is an application of the general rule laid down in this section and that the words of this section and of illustrations (o) to this section and to Sec. 15 show that it is not necessary that all the acts should form part of a series of similar occurrences. 15

The illustrations (e) (i) and (j) are on the point of intention; ¹⁶ (a), (b), (c) and (d) of knowledge; (f), (g) and (h) of good faith; (n) of negligence and knowledge; (k), (l) and (m) of mental and bodily feeling; (n), (o) and (p) illustrate the explanation. ¹⁷

- 5. Overlapping of Secs. 14 and 15. In their application to offences Sec. 14, no doubt, overlaps Sec. 15 in so far as it covers either by itself, or in conjunction with other sections such as Secs. 9 and 11, not only those cases where the state of mind of the accused is properly an element in proving the commission by the accused of the physical act charged, or in proving by way of his intention or state of mind that it was the accused who committed such act, but also those cases where the physical act charged may be neutral in its character and may depend for its innocence or guilt on the state of mind of the accused at the time. Cases of the latter description, where there is conduct indicating system, fall more particularly, however, under Sec. 15. 21-22
- 6. Intention. (a) General. The question of intention is sufficiently illustrated by the illustrations (e), (i) and (j) to the present section, by the cases illustrating guilty knowledge; and by the next section; and is further considered in the notes to the last-mentioned section and in the preceding and succeeding paragraphs.
- (b) Mens rea in Indian Penal Code and other statutory offences. The fundamental principle of English Criminal Jurisprudence to use a maxim which has been familiar to English lawyers for nearly 800 years is actus non facit reum, nisi mens sit rea. An act does not make a man guilty without a guilty intention

17. See Norton, Ev., 131

19. Illustrations (o) and (p), S. 14. 20. Illustrations (a), (b) and (i) to

21-22 Raghunath v. Emperor, 1919 Cal. 1084; 46 I. C. 696; 19 Cr. L. J. 781; 22 C. W. N. 494.

22. See cases cited in first paragraph of

Commentary, ante.

R. v. Abdul, \$4 A. 93: 12 I. C. 987: 8 A. L. J. 1269, following R. v. Vyapoory, (1881) 6 C. 655; see also A. H. Gandhi v. The King, 1941 Rang. 324; Gokul v. Emperor, 1925 Cal. 674: 86 I.C. 970: 29 C. W. N. 483.

^{15.} R. v. Debendra, (1909) 30 C. 573; distinguishing R. v. Holt, (1860) Bell G. C. 280 and Makin v. Attorney-General, (1894) A. C. 57; R. v. Bond, (1906) 2 K. B. 389; R. v. Rhodes, (1899) 1 Q. B. 77; R. v. Ollis, (1900) 2 Q. B. 758.

As to whether an act was accidental or intentional, ib. s. 15.

Director of Public Prosecutions v. Ball, 1911 A. C. 47: 80 L. J. K. B. 689.

to do the guilty act which is made penal by the statute or common law.22 But there is generally no room for the application of this doctrine in the Indian Penal Statutes as their terms are precise and contain within themselves the precise and particular elements that go to make up the offences referred to in those statutes. The Indian Penal Code is one of the most exhaustive Codes of Penal Laws and devotes a full chapter towards the interpretation clause while an equally large part of it is devoted for the general exceptions, which withdraw acts which would otherwise be an offence from that category. Its elaborate paraphernalia has been designed, it is said, to prevent captious Judges from wilfully misunderstanding the Code and cunning criminals from escaping its provisions.

So, in Indian Penal Statutes, where the doctrine of mens rea is intended to come into operation and a guilty mind is deemed essential for the proof of an offence, the Statute itself uses words like "knowingly", "willingly", "fraudulently", "negligently", and so on.24

Blackstone's classification is based on the various conditions which in point of law negative the presence of the guilty mind, namely, the following groups of exemption, (1) where there is no will, (2) where the will is not directed to be deed, (3) where the will is overborne by compulsion, and (4) where the actus and mens combine but the mens is not rea and therefore actus is not eum, are embodied in Sections 76 to 106, I. P. C. Under group (1) sections elating to (a) infancy, (b) lunacy, (c) drunkenness, fall; under group (2) provisions relating to mistake of fact; under group (3) provisions like Section 94, and under group (4) under the head of justification or excuse, Section 94, and under group (4) under the head of justification or excuse, Section 94, and under group (5) under the head of justification or excuse, Section 94, and under group (6) under the head of justification or excuse, Section 94, and under group (7) under the head of justification or excuse, Section 94, and under group (8) under group (9) under the head of justification or excuse, Section 94, and under group (9) unde ions 76 to 79, and choice of evils Sections 81, 87, 92, 93, 95 and 96 to 106.

But now there are a large class of penal acts created under the State as well as Central Acts which are really not criminal but which are prohibited by a levy of penalty in the interests of the public. To such a category belong offences against Revenue, Adulteration Acts, Forest Laws, etc., penalties directed against public nuisances, and cases in which, though the proceedings are criminal in form, they are only summary modes of enforcing civil rights, public welfare offences; of late years, the tendency of the Courts is to attach less importance to mens rea in statutory offences.25 In such cases, as pointed out by Dr. Kenny, the prosecution need only prove the prohibited act and the defendant must then bring himself within a statutory defence.1 But, in determining whether an Act does create this absolute liability, regard must be paid to the object of the statute, the words used, the nature of the duty, the person upon whom it is imposed, the person by whom it would in ordinary cases be performed and the person on whom the penalty is impored.2

Outlines of Criminal Law, 15th Ed., p. 48.

^{23.} Allard v. Serfridge & Co., Ltd., (1925) 1 K. B. 129.

^{24.} See the observations of M. C. Setalvad, The Common Law in India,

p. 139. R. v. Wheat, (1921) 85 J. P. 203; Horton v. Gwynne, (1921) 2 K. B. 661; Cotterall v. Penn, (1936) 1 K. B. 53; R. v. Leinster, (1924) 1 K. B. 311; Harding v. Price, (1948) 1 K. B. 695. (See 88th Ed., of Stones Justices Manual (1956), p.

Mousell Brothers Ltd. v. L. N. W. Ry., (1917) 2 K. B. 836 (845); Sherras v. De Rutzen, (1895) 1 Q. B. 918; Russell on Crimes, 7th Ed., Vol. 1, p. 102; D.A. Stroud; Mens Rea (1914): Austin: Jurisprudence Lectures XVIII and XXVI; Stephen's History of Criminal Law, Vol. II, pp. 94-123. Indian cases: In re Kasi Raja, A. I. R. 1953 Mad. 156; Ravula Hariprasad Rao v. The State, A. I. R. 1951 S. C. 204: 1951 A. L. J. (S.C.) 55; 1951 M. W. N. 374: 64 M. L. W. 493; 52 Cr. L. J. 768; Sarjoo Prasad v. State

In these quasi-civil wrongs, one of the commonest phrases used is "cause or permit" in the Road Traffic Acts, and this has been the subject-matter of many irreconcilable English decisions.

Professor Edwards in his valuable monograph "Mens Rea" in "Statutory Offences" (Vol. VIII of English Studies in Criminal Science edited by L. Radzinowicz) in Chapter IV (pages 98 and following) after a survey of the statutory offences based on the word "permits", points out:

"Where the word 'knowingly' is expressly inserted in a statutory offence, no doubt has ever been cast on the necessity for establishing mens rea. Where, on the other hand, the Legislature has chosen to use the alternative expressions 'permits' or 'permitting', a careful analysis of the cases shows the inevitable cleavage of opinion among the judges as to the requirement of proof of a guilty mind. Earlier in this study several causes were tentatively suggested as underlying this constant divergence of views, and it may, perhaps, be of assistance if they are restated. First, it is suggested, there is the trend of thought which happens to be current at the time a particular case is decided; secondly, there is the individual judge's attitude or approach to the wider question of the part to be played by mens rea in criminal law; and finally, there is the conflict which is created through the unreal meaning sometimes attributed to the phrase mens rea."

So Professor Glanville L. Williams in his "Criminal Law" General Part, discussing theories of strict responsibility under which the doing of the forbidden act itself furnishes the niens rea and vicarious responsibility in that the master is held liable for even the unauthorised acts of his servant in Chapter 7 (pp. 238 and following) concludes:

"It may be said that a person may properly be punished for the crime of his subordinate because the threat of such punishment may induce him and others to exercise supervision over the subordinate. Yet if this is the reason, it would seem better to phrase the rule as duty to supervise and it should be a defence to prove that due care was taken to supervise."3

The following passages from the leading text-books in England and America and extracted in Process Chemical Laboratory v. The Drugs Inspector,4 set out the current state of the law obtaining in those countries and from which we derive out our source of materials.

England. Halsbury's Laws of England (Simond's Edition) (1955), Vol. III, at page 273, paragraph 508, has the following to say:

"A statutory crime may or may not contain an express definition of the necessary state of mind. A statute may require a specific intention, malice, knowledge, wilfulness or recklessness. On the other hand, it may be silent as

of U.P., A.I.R. 1961 S.C. 631; (1961) 1 S.C.J. 484; (1961) 1 Andh. W. R. (S.C.) 133; (1961) 1 Ker. L.R. 396; (1961) 1 Mad.L.J. (S.C.) 733; 1961 All W. R. (H.C.) 199; 1961 M. R. C. 206; 1961 B. L.

<sup>J. R. 214; State v. S. P. Bhadani and others, A. I. R. 1959 Pat. 9.
3. Extracts from Ramamoorthy v. The State, 1957 M.W.N. (Cr.) 5.
4. 1958 M.W.N. (Cr.) pp. 52-53; 1958 (2) M. L. J. 308.</sup>

to any requirement of mens rea, and in such a case in order to determine whether or not mens rea is an essential element of the offence, it is necessary to look at the objects and terms of the statute. In some cases, the courts have concluded that despite the absence of express language the intention of the Legislature was that mens rea was a necessary ingredient of the offence. In others, the statute has been interpreted as creating a strict liability irrespective of mens rea. Instances of this strict liability have arisen on the legislation concerning food and drugs, liquor licensing and many other matters."5

According to Archbold's Criminal Pleadings, Evidence and Practice in Criminal Cases 33rd Ed. (1954) at pages 23-24:

"It has always been a principle of the common law that mens rea is an essential element in the commission of any criminal offence against the common law.6 In the case of statutory offences it depends on the effect of the statute.7 There is a presumption that mens rea is an essential ingredient in a statutory offence, but this presumption is liable to be displaced either by the words of the statute creating the offence or by the subject-matter with which it deals.8 Unless a statute clearly or by implication rules out mens rea, a man should not be convicted unless he has a guilty mind.9 In finding whether mens rea is excluded, the court should consider whether the offence consists in doing prohibited acts or in failing to perform a duty which only arises if a particular state of affairs exists.10

When there is an absolute prohibition against the doing of an act, scienter forms no part of the offence and absence of it affords no defence to the accused person, the doing of the act itself supplies the mens rea."11

America. 14 American Jurisprudence, pp. 784-785 (Section 24) has the following to say:

"An evil intention or guilty knowledge, which is an essential part of crimes at common law, is, in some cases, but not in others, held to be an element of crimes created by statutes or ordinance. The view is taken in some cases that a criminal intent is not a necessary element of offences which are merely malum prohibitum, or of prohibitive statutes which cover misdemeanours in aid of the police power, where no provision is made as to intention. This is especially important in that if a criminal intent is not an essential element of a statutory crime, it need not be proved in order to justify a conviction. In other words, it is immaterial that the defendant acted in good faith or did not know that he

7. Cundy v. Lecocq., (1884) 13 Q. B. D. 207.

8. Sherras v. de Rutzen, (1895) 1 Q.B. 918 at p. 921 Wright, J. 9. Brend v. Wood, (1946) 175 L. T.

306.

10. Harding v. Price, (1948) 1 K. B.

695 at p. 701. 11. See Kat. v. Diment, (1951) 1 K.B.

R. v. Wheat, (1921) 85 J.P. 203;
 Horton v. Gwynne, 1921 2 K. B. 661; Cotterell v. Penn, (1936) K. B. 53; R. v. Leinster, (1924) 1 K. B. 311; Harding v. Price, (1948) 1 K. B. 695; Reynolds v. Austin, (1951) 1 All E. R. 606; Quality Diaries (York) Ltd. v. Pedley. Diaries (York) Ltd. v. Pedley, (1952) 1 K. B. 275; Lamb v. Sunderland, (1951) 1 All E. R. 925; Watson v. Coupland, (1945) 1 All E.R. 217; Taylor's case, (1951) 2 T. L. R. 284.

6 Chisholm v. Doultan, 22 Q. B. D.

^{736;} R. v. Twose, (1879) 14 Cox. 327; Reynolds v. Austin, (G.H.) & Sons, (1951) 2 K. B. 135.

"As general rule where an act is prohibited and made punishable by statute only, the statute is to be construed in the light of the common law and the existence of a criminal intent is to be regarded as essential, even when not in terms required. The Legislature may, however, forbid the doing of an act and make its commission criminal without regard to the intent or knowledge of the doer, and if such legislative intention appears the courts must give it effect, although the intent of the doer may have been innocent. This rule has been generally, although not quite universally, applied in the enforcement of statutes passed in aid of the police power of the State, where the word knowingly' or other apt words are not employed to indicate that knowledge is an essential element of the crime charged. The doing of the inhibited act constitutes the crime and the moral turpitude or purity of the motive by which it was prompted, and knowledge or ignorance of its criminal character, are immaterial circumstances on the question of guilt. Whether or not in a given case, a statute is to be so construed is to be determined by the court by considering the subject-matter of the prohibition as well as the language of the statute, and thus ascertaining the intention of the Legislature....."13

So far as the Indian Penal Code is concerned, every offence under it virtually imports the idea of criminal intent or mens rea. Intent denotes all those states of mind which the statute creating the offence in question regards as necessary that an accused must have in order to fix the guilt in him. But no question of mens rea arises where the Legislature has omitted to prescribe a particular mental condition as an ingredient of an offence, because the presumption is that the omission is intentional." [Extracted from Process Chemical Laboratory v. The Drugs Inspector.¹⁵]

(c) Conclusion. Though the doctrine of strict liability in criminal law has been justified on the ground of the comparative unimportance of the offence involved with a monetary penalty attached and that it would be difficult to procure adequate proof of guilty knowledge and that it is of paramount importance to take into account the social purpose behind the statute which should be incorporated in such a way as to give effect to the intention of the Legislature and that these petty offences are merely mala prohibita and not mala in se and do not require any mens rea, it has been severely criticised by eminent jurists. Prof. Sayre points out that when the law begins to permit convictions of serious offences of men who are mostly innocent and free from

Srinivasa Mall v. Emperor. A.I.R.
 1947 P. C. 185; 1947 (2) M. L. J.
 328; Isak v. Emperor, I. L. R.
 1948 Bom. 329; A. I. R.
 1948

15. 1958 M. W. N. (Cr.) pp. 52-53:
 (1958) 2 M. L. J. 308.

^{12. 16} Cropus Juris at pp. 76-77 (S.

<sup>42).

13.</sup> See United States v. Belint, 258
U. S. 250 & 66 L. Ed., 604; Shevlin Carpenter Co. v. Minnesota, 218
U.S. 557; Armour Packing Co. v.
U. S. 153 Fed. 1; Peo v. Roby, 52
Mich., 577-50: Am. Rep. 270;
India Peo v. Werner, 174 Ny. 132;
Peo v. West. 106 Ny. 293-60; Am.
R. 452 extracted in footnotes.

B. 364; Legal Remembrancer v. Ambikacharan, (1946) 2 Cal. 127; Ismail v. Emperor, 1947 Lah.. 220: 231 I. G. 150; R. v. Ramachandra, I. L. R. 1938 B. 114; A. I. R. 1938 B. 87; Ravula Hariprasada Rao v. The State, A. I. R. 1951 S.C. 204: 1951 S.C.J. 296: 1951 S.C.R. 322: 1951 A.L.J. (S.C.) 55: 1951 M.W.N. 374; 52 Cr. L. J. 768; State v. Sheo Prasad, 1956 All. 610.

fault and who may even be respected as useful members of the community, its restraining power becomes undermined. Once it becomes respectable to be convicted, the vitality of the criminal law has been sapped. Therefore, it is now widely suggested that public welfare offences should be separated from traditional crimes and enforced through administrative agencies and that negligence should be accepted as a sufficient degree of mens rea in statutory offences and that the onus of proof should be transferred to the accused to show that he acted with due care. In fact, the New York Legislature has declared that traffic infractions are not crimes. In the American Model Penal Code an attempt has been made to distinguish the whole field of administrative penalties from that of criminal law. A new category of violations is to be created. "An offence defined by this Code or by any other statute of this State constitutes a violation if it is so designated or if no other sentence than a fine or fine and forfeiture or other civil penalty is authorised upon conviction. A violation does not constitute a crime and a conviction of a violation shall not give rise to any disability or legal disadvantage based on conviction of a criminal offence."

(d) Proof of intention. When a person does an act with some intention other than that which the character and circumstances of the act suggest the burden of proving that intention is upon him. 16 Whether a man has or has not a particular intention is a matter of fact to be inferred from the surrounding circumstances and from the acts of the person concerned.17

The question of intention is to be inferred from legal evidence of facts, and not from antecedent declarations by the accused himself, upon occasions distinct from and antecedent to the transaction.18 In a case in the Madras High Court it was said that a man must be held to intend the natural and ordinary consequences of his acts, irrespective of his object in doing such acts, if at the time he knew what the natural and ordinary consequences would be; and that if he does an act which is prima facie illegal, the fact that he did it with some other object, will not make it legal unless that object would, in the circumstances, make it legal.19 In this case it was held, that where a man with the object of establishing a fraudulent title to a house, broke into it in its owner's absence and took forcible possession, he was rightly convicted irrespective of that object. And in a case in the Allahabad High Court where accused had been found in complainant's house at 2 a.m., and had proffered no explanation at the time, but had afterwards stated (without being able to prove that he had gone there to have illicit intercourse with a widow), it was held that his presence there at such an hour raised a presumption of guilty intent.20 But, in a subsequent and similar case in the same High Court where accused was able to prove his intercourse with a widow, it was held that he was guilty of no offence.21

R. v. Petcherini, (1856) 7 Cox, 79,
 per Greene, B. As to declara-

S. 106, post, illust. (a); R. v. Kanhai, (1912) 35 A. 329; R. v.

Hanuman, (1912) 35 A. 329; K. V. Hanuman, (1913) 35 A. 560.

17. Ramzan v. Emperor, 1935 Sind 203: 159 I. C. 466: 37 Cr. L. J. 106; Khetramani v. Emperor, 1922 Cal. 539: 71 I.C. 232: 24 Cr.L.J. 104: 35 C. L. J. 451.

tions accompanying an act v. ib. and S. 8 ante, and notes thereto,

^{19.} Sellamuthu v. Pallamuthu, (1912) 35 M. 186; per Benson, C. J. (San-karan Nair, J., diss.). 20. Mulla v. Emperor, 1915 All. 178: 37 A. 395; 29 I. C. 67. 21. Gaya v. R., 1916 All. 152: 38 A. 517: 35 I. C. 979: 14 A. L. J. 719.

The political views of a person are relevant as a guide to his conduct and intention,22 In a prosecution for cheating, by entering into a contract to purchase goods with no intention of paying, the question whether there was an intention to deceive must be answered as at the date when the contract was made.23

Evidence which clearly shows facts and proves the dishonest intention of a person in doing a certain act, is relevant and admissible in evidence. So, for instance, a previous judgment in a criminal case, whereby the accused was convicted for an offence is relevant and admissible to prove dishonest intention of the same accused who is being tried for the same offence.21

The previous conduct of a person is also in evidence in determining his intention. Where the intention of the person is directly in issue and is relevant, any fact showing such an intention is admissible in evidence.25

Evidence of preparation for the commission of an offence is admissible under Section 8 ante. And as it exposes the state of mind and intention on the part of the accused to commit an offence (murder in the instant case), it is admissible under this section.1

In finding out the intention of a corporate body, the Court has to look to the resolutions passed or acts done by it. Different members may have been influenced by different considerations, but the Court is concerned with the intention of the body as a whole.2

7. Knowledge. (a) General. Facts which go to prove guilty knowledge may be proved. In R. v. Whiley,3 Lord Ellenborough, in deciding that to prove the guilty knowledge of an utterer of a forged bank note, evidence may be given of his having previously uttered other forged notes knowing them to be forged, observed, that "without the reception of other evidence than that which the mere circumstances of the transaction itself could furnish, it would be impossible to ascertain whether they uttered it with a guilty knowledge of its having been forged or whether it was uttered under circumstances which showed their minds to be free from guilt." In the case of R. v. Tattersall,4 mentioned by Lord Ellenborough in R. v. Whiley,5 the question reserved by Chambre, J., was "whether the prisoner had not furnished perjured evidence, and whether the jury, from his conduct on one occasion, might not infer his knowledge in another?" The opinion of the Judges was that the jury were at liberty to make such an inference. "The cases in which this has been acted

^{22.} Manabendra Nath v. Emperor, 1933 All. 498.

^{23.} Mohsinbhai Fateali v. Emperor, 1932 Bom. 273: I. L. R. 56 Bom. 204: 137 I. C. 142: 33 Cr. L. J. 401: 34 Bom. L. R. 313. 24. Mohan Singh v. Golak Singh, A. I. R. 1961 Manipur 43.

^{25.} Mahesh Chandra v. State, A. I. R. 1964 A. 572: 1964 A. L. J. 581.

Ayyanar Padayachi, In re, 1970 M.
 L. W. (Cr.) 239; Appu v. State, 1971 Cr. L. J. 615; A. I. R. 1971

Mad. 194.

2. Guru Murthappa v. Bangalore Corporation, A. I. R. 1962 Mys. 92.

3. (1804) 1 B. & P. (N.R.) 92.

4. (1801) 6 Leach. 984.

^{5, (1804) 1} B, & P, (N.R.) 92.

on are mostly common cases of uttering forged documents or base coins but they are not confined to those cases."6

(b) Knowledge may be inferred or presumed. Passing from the case of guilty knowledge, knowledge may be inferred from the fact that a party had reasonable means of knowledge, i.e., possession of or access to, documents containing the information, especially if he has answered, or otherwise acted upon them; or from the fact that such documents, properly addressed, have been delivered at, or posted to, his residence.7 So execution of a document, e.g., of a deed or a will, in the absence of evidence to the contrary, implies knowledge of its contents,8 though mere attestation necessarily does not.9 Access to documents may also sometimes raise a presumption of knowledge.10 But there is no presumption of law that a director knows the contents of the books of a company.11 And shareholders are not as between themselves and their directors, supposed to know all that is in the company's books.12 The publication of a fact in a Gazette or newspaper is receivable to fix party with notice, though

7. Phipson, Ev., 11th Ed., 175; Lloyds Bank v. Dalton, 1942 Ch. 466; Bates v. Hewill, (1867) 15 L. T. \$66; R. v. Wicks, (1936) 1 All E. R. 384 at 387; Vacher v. Cocks, (1829) 1 M. & M. 353; Cotton v. James, (1830) 1 B. & A. D. 128, as to documents found after the arrest of a prisoner v. S. 8 ante. or interof a prisoner v. S. 8 ante, or inter-cepted in the post; R. v. Cooper, (1875) 1 Q. B. D. 19 (when a letter is put in course of transmission the Postmaster-General holds it as

the agent of the receiver, ib. 22).

8. Cooper, Re. Cooper, (1882) 20 Ch. D.
611; Taylor, Ev., ss. 150, 160.

9. Harding v. Crethorn, (1793) 1
Esp. 57, 58; v. S. 8 ante; it does
not necessarily follow that a witness is aware of the contents of the ness is aware of the contents of the ness is aware of the contents of the deed of which he attests the execution, Salamat v. Budh, (1876) 1 A. 303, 307; see Rajlakhi v. Gokul, (1869) 3 B.L.R. (P.C.) 57, 63; Ramchander v. Hari, (1882) 9 C. 463, and notes to S. 115, post; Banga v. Jagat, 1916 P. C. 110: I. L. R. 44 G. 186; 43 I. A. 249; 36 I. C. 420; Lakhpati v. Rambodh, I. L. R. 37 A. 350; 29 I. C. 218; A. I. R. 1915 A. 255; but see Kandasami v. Nagalinga, (1913) 36 M. 564, practice in Madras. practice in Madras,

10. e.g., in the case of books kept between partners, master and servant etc., see S. 8, ante; Lindley, Partnership, 536; Taylor, Ev., s. 812; see Mackintosh v. Marshall, (1843) 11 M. & W. 126. (The shipping list at Lloyds stating the time of a vessel's sailing is prima facie evidence against an underwriter as to dence against an underwriter as to what it contains, as the underwriter must be presumed to have a knowledge of its contents from having access to it in the course of his business).

11. Hallmark's case, (1878) L. R. 9 Ch. D. 329; per Bramwell, J., ib. 333: "I will only add that it seems to me in general extremely objec-tionable to imply that a man had knowledge of facts contrary to the real truth. This ought only to be done where there is some duty on the part of the man to inform him-self of the facts."

Lindley: Company I aw, 6th Ed., pp. 482, 438, and cases there cited,

R. v. Francis, (1874) 12 Cox. 612,
 616, per Lord Coleridge, C. J. In this case the prisoner was indicted for endeavouring to obtain an advance from a pawn-broker upon a vance from a pawn-broker upon a ring by the false pretence that it was a diamond ring; evidence was held to have been properly admitted to show that two days before the transaction in question the prisoner had obtained an advance from a pawn-broker upon a chain which he represented to be a gold chain but which was not so; see R. v. Vajiwhich was not so; see R. v. Vajiram, 16 B 414 p. 433; R. v. Cooper, (1875) 1 Q. B. D. 19; R. v. Fosteh, (1855) Dear c.c. 456; R. v. Weeks, L. & G. 18; Taylor, Ev., S. 345; as to guilty knowledge, see Lalit v. R., (1894) 22 C. 313, 322; The Deputy Legal Remembrancer v. Karuna, (1894) 22 C. 164 169; (Pa.) Manneton (1894) 22 C. 164 169; (Pa.) Ma (1894) 22 C. 164, 169; (Re.) Meer, (1870) 13 W. R. Cr. 70, 71. (It is an error in law to consider the fact of the prisoner leaving his defence to his counsel as in any way whatever indicating any guilty knowledge); R. v. Nobokristo, (1867) 8 W. R. Gr. 87, 89; R. v. Shuruffooddin, (1870) 13 W. R. 26; R. v. Abaji, (1890) 15 B. 189; (Re) Ramjoy, (1876) 25 W. R. Cr. 10,

(unless the case is governed by statute) it is always advisable, and sometimes necessary, to furnish evidence that the party to be affected has probably read the paper. The law requires, however, that in order that a notification in a newspaper may amount to actual notice to a subscriber of the said newspaper; it must be shown that his attention was drawn to the said notification. The notoriety of a fact in a party's calling or vicinity may also in some cases support an inference of knowledge. When the existence of a state of mind is in question, all facts from which it may be properly inferred are relevant. And so when the question was whether A, at the time of making a contract with B, knew that the latter was insane, it was held that the conduct of B, both before, and after the transaction, was admissible in evidence to show that his malady was of such a character as would make itself apparent to A at the time he was dealing with him. 16

8. Notice. (a) General. "Notice" has also been made subject of substantive law and of statutory definition in the Transfer of Property and Indian Trusts Acts.¹⁷

"A person is said to have notice of a fact when he actually knows that fact, or when, but for wilful abstention from an inquiry or search which he ought to have made, or gross negligence, he would have known it".18 Notice may be either express or constructive. Notice to an agent is sometimes called imputed notice in so far as it affects the principal. Express notice or actual notice is notice whereby a person acquires actual knowledge of the fact. It must be definite information given by the person interested. A person is not bound by vague rumours or statements by strangers.19 Constructive notice is of two kinds; there is the notice through an agent, which Lord Chelmsford has called "imputed notice"; the other is that which he thought should more properly be called "constructive notice" and means that kind of notice which the Courts have raised against a person from his wilfully abstaining from making enquiries, or inspecting documents.20 In such cases, the Courts are said to

13. See notes to S. 67, post; Taylor, Ev. ss. 1665, 1666; Phipson, Ev., 11th Ed., 457; Steph. Dig. Art. 11, illust. (n). Where the question was whether A, the captain of a ship, knew that a port was blockaded; it was held that the fact that the blockade was notified in the Gazette was relevant; Marratt v. Wise, (1829) 9 B. & C. 712.

 Bhairab Chandra Sinha v. Kalidhan Roy, 1929 Cal. 736: 120 I.C.

451: 38 C.W.N. 569.

15. See illust. (f) ante and note; though mere rumour or reputation is inadmissible; R. v. Gunnel, (1886) 16 Gox, 154: Greenslade v. Dare, (1855) 20 Beav. 284 (Evidence of the general reputation of the insanity of a person in the neighbourhood in which he resided, is admissible to prove that a person was cognizant of that fact).

Beaven v. McDonnel, (1854) 10 Ex.
 184; Lovatt v. Tribe, (1862) 3 F.
 F. 9; but see also Greenslade v.

Dare, ante; see also illustrations (a),
(b), (c) and (d) to the section,
17. S. 3, Act IV of 1882, amended by
Act XX of 1929 and Act V of 1930
(Transfer of Property); S. 3, Act II
of 1882 (Indian Trusts). See cases
collected in Ray's Commentaries on
the Transfer of Property Act published by Messrs, Law Book Company,
Sardar Patel Marg, Allahabad.

the Transfer of Property Act published by Messrs, Law Book Company, Sardar Patel Marg, Allahabad.

18. S. 3 of Transfer of Property Act.

19. Ashiq Husain v. Chaturbhuj, 1928
All. 159; 50 All. 328: 108 I.C. 152,
8; relying on Barnhut v. Greenshields. (1854) 9 Moo. P. C. 18

8; relying on Barnhut v. Greenshields, (1854) 9 Moo. P. G. 18.
20. Kettlewell v. Watson, (1884) L.R.
26 Ch. D. 501, 685, 724, per Fry.,
J.: a person refusing a registered letter sent by post cannot afterwards plead ignorance of its contents; Loo!
v. Peary, (1871) 16 W.R. 223;
Kodali Bapayya v. Yaduvalli Venkataratnam, 1953 Mad. 884: I.L.R.
1953 Mar. 31: (1952) 1 M.L.J. 227;
Sailla Bala v. Atul Krishna, 1948
Cal. 63: 82 C.L.J. 9.

raise a presumption of knowledge which is not allowed to be rebutted, and whatever is sufficient to put a person of ordinary prudence on enquiry is constructive notice of all to which that enquiry would lead.21

Such presumption of knowledge arises from-

- (1) wilful abstention from an enquiry or search which ought to have been made;
- (2) gross negligence;
- (3) registration (Explanation I to the definition of notice in Section 3, T. P. Act);
- (4) actual possession (Explanation II, ib.);
- (5) notice to agent (Explanation III, ib.).
- (b) Wilful abstention. Constructive notice is established where the Court is satisfied from the evidence before it that the party charged had designedly abstained from enquiry for the very purpose of avoiding notice.22 In a case in the Calcutta High Court, it was said that whatever puts a person on enquiry amounts to notice, when such enquiry becomes a duty and would, in the exercise of ordinary intelligence, lead to a knowledge of the facts, and that constructive notice will be imputed to one who designedly refrains from enquiry for the purpose of avoiding notice.23 So notice of a deed, or a trust, is notice of its terms.24 And the acceptance of a contract in a common form without objection is constructive notice of its contents.25 So, when title-deeds were deposited by way of equitable mortgage with a Bank which omitted to investigate the title, the Bank was held to have constructive notice of a charge which they might have discovered.1 And when a share of trust-fund was assigned, and the trustees did not enquire into the title of the alleged assignee, they were held to have constructive notice of it.2 But, a company to whom a vessel is transferred cannot be fixed with constructive notice of the possible liability of the vendors for the unpaid costs of their solicitors, even though the actual vendor and the promoter of the company are one and the same person.8

B. 566 (P.C.). Macneil & Co. v. Saroda Sundari Devi, 1929 Gal. 89: 114 I.C. 142:

- 33 C.W.N. 526: 48 C.L.J. 374. 23. Radha v. Kalpataru, (1913) 17 C.L. J. 209; see also Kausalai Ammal v. Sankara Muthiah. 1941 Mad. 707: (1941) 1 M.L.J. 815: 1941 M.W.N.
- Patman v. Harland, (1881) 17 Ch. D. 353; Brett's L.C. in Eq., 260 and cases there cited; Rajaram v. Krishnasami, (1892) 16 M. 301.
 Watkins v. Rymill, (1883) 10 Q.B. D. 178.

 Bank of Bombay v. Suleman, (1908)
 Bank of Bomb Gh. D. 361.

Davis v. Hutchings, (1907) 1 Ch.
 356 following Jones v. Smith, (1841)
 1 Hare, 43; affirmed (1843) 1 Ph.

3. The Birnam Wood, (1907) P. 1: 23 T.L.R. 58.

^{21.} See Phipson Ev., 1970, 11th Ed., 177; Jones v. Smith, (1841) 1 Hare 43; as to whether registration operates as constructive notice; Shan v. as constructive notice; Shan v. Madras Bullding Co., (1891) 15 M. 268, 277; Joshua v. Alliance Bank, (1894) 22 C. 185; Brett's L. C. in Eq., 2nd Ed., 260; Chitty. Eq. Index, 4th Ed., 260; "Notice"; and as to notice to agent, trustee, counsel, partner, solicitors, v. ib, and ante. For a purchaser to be affected with constructive notice through his solicitor, the latter himself must have actual notice, Greender v. Mackin-tosh. (1879) 4 C. 897, and notice acquired only before the employment as solicitor began is not suffi-cient. Chabildas v. Dayal. (1907) 31

Where the sellers at an auction sale so conduct themselves with reference to the sale that bidders are induced to leave and the purchaser is present and had notice of these circumstances, he is affected with notice of the impropriety of the sale.4

(c) Gross negligence. What constitutes "gross negligence" is always excessively difficult to define5 but it must be something which raises a positive equity against the negligent person.6 It need not amount to fraud.7

"On question involving negligence and other qualities of conduct, when the criterion to be adopted is not clear, the acts or precautions proper to be taken under the circumstances, or even the general practice of the community on the subject, are admissible as affording a standard by which the conduct in question may be gauged."8 In a suit, in which the question was, whether the pupils at a certain school were properly treated, evidence was held to be admissible of the general treatment of boys at school of the same class, as affording a criterion of what the treatment should have been at the school in question.9

In a case in which a doctor was charged with criminal negligence, the prosecution, in order to show that a particular injection given by the doctor was too strong and to negative the suggestion that the death of a particular boy, to whom it was given, was due to an exceptional reaction to the injection, tendered evidence of the symptoms, illness and death of nine other children. The Privy Council held that such evidence was rightly received, not as that of a course of conduct showing the doctor's negligence but as tending to show from the effect produced that the injection was dangerously strong.10

- (d) Registration. Registration amounts to notice if the deed is compulsorily registrable.11
- (e) Notice to agent. The rule of imputed notice is subject to certain limitations. Notice should have been received by the agent (1) during the

^{4.} Chabildas v. Dayal, (1907) 31 B.

^{566 (}P.C.).
5. Colyer v. Finch, (1856) 5 H.L.C.
905: 26 L.J. Ch. 65.
6 Per Lord Selbourne L.C. in Dixon

v. Muckleston, (1872) 8 Ch. App. 155: 42 L.J. Ch. 210.

7. Lloyds Bank, Ltd. v. P. B. Guzdar & Co., 1930 Cal. 22: I.L.R. 56 Cal. 868: 121 I.C. 625.

8. Ib. citing Ball, Leading Cases on Tort, 224-227; East, P.D. 263, 264; Whart: Negligence s. 46 and cases.

Whart: Negligence, s. 46, and cases, post; see also Bevan, Principles of of Negligence, (1889); Roscoe N. P. Ev., 736 et. seq. and cases there cited, and Best, Ev., p. 86: "When the facts are settled the existence of negligence is a question of law though reference is thereby implied to a standard of reasonable care and common experience." rience with which the judge must often be necessarily acquainted,"

In the case of a railway accident Willes, J. said: "I go further and say that the plaintiff should also show with the reasonable certainty what particular reasonable certainty." what particular precaution should have been taken, Daniel v. Metropolitan Ry Co., (1871) L.R. 5 H.L. 45. In some cases, however, negligence will be presumed from the

mere happening of an accident: see Taylor, Ev., s. 188. 9. Boldron v. Widows, (1824) 1 C. & P. 65: but evidence is not admissible of the comparative treatment of boys at any other particular school, ib.

John Oni Akerele v. The King, 1943
 P.C. 72; 207 I.C. 107; 44 Cr. L. J.

^{569: 1943} A.L.J. 427.

11. Hirachand v. Kashi Nath, 1942
Bom. 339: 44 Bom.L.R. 727; Kenchegowda v. P. Channiya, 1953 Mys.
22: I.L.R. 1953 Mys. 152.

agency, (2) in his capacity as agent, (3) in the course of the agency business, (4) in a matter material to the agency business, and (5) should not have been fraudulently withheld from the principal. 12

9. Good and bad faith: Fraud. It is a truth confirmed by all experience that in the great majority of cases fraud is not capable of being established by positive and express proofs. It is by its very nature secret in its movements; and if those, whose duty it is to investigate questions of fraud, are to insist upon direct proof in every case, the ends of justice would be constantly, if not invariably, defeated. It is not that fraud can be established by any less proof, or by any different kind of proof, from what is required to establish any other disputed question of fact, or that circumstances of mere suspicion which lead to no certain result should be taken as sufficient proof of fraud, or that fraud should be presumed against anybody in any case; but in the generality of cases, circumstantial evidence is the only resource in dealing with questions of fraud, and if this evidence is sufficient to overcome the natural presumption of honesty and fair dealing and to satisfy a reasonable mind of the existence of fraud by raising a counter-presumption, there is no reason whatever why the Court should not act upon it.13 A party's good faith in doing an act may generally be inferred from any facts which would justify its doing.14 In such cases, the information (whether true or false) on which he acted will often be material. Where, in answer to a charge of theft,, the accused alleges a claim to the property, the Court should not convict him of theft, if the claim was made in good faith (even if it proves to be unfounded) and this should be determined by considering all the circumstances. 15 Although the opinions and acts of other parties are not generally admissible, yet when opinions and acts lead to the formation of a belief in another man, and that belief is the fact in issue, those opinions and acts acquire a legal evidentiary relation and become admissible. So, to show the bona fides of a party's belief as to any matter, it is admissible to show the state of his knowledge and that he had reasonable grounds for such belief.16 For, though it is now settled that in order, apart from statute, to maintain an action for deceit, there must be proof of fraud, a false statement made in the honest belief that it is true being not sufficient and there being no such thing as legal fraud in the absence of moral fraud, yet, a false statement made through carelessness, and without reasonable belief that it is true, though not amounting to fraud, may be evidence of it; and fraud is proved where it is shown that a false representation has been made (a) knowingly; or (b) without belief in its truth; or (c) recklessly, careless

36 I.C. 136: 20 C.W.N. 1270: A.I.R. 1917 C. 648.

^{12.} Explanation 3 and porviso to the definition of notice in S. 3, T P.

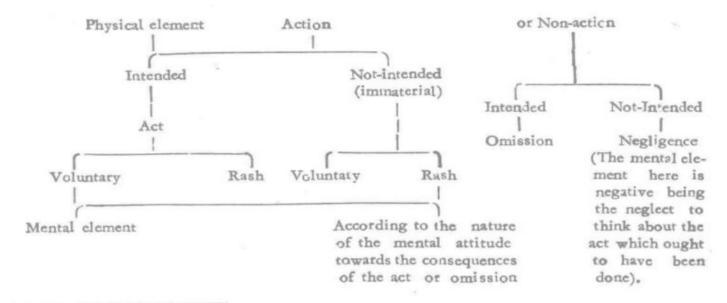
^{13.} Per Dwarkanath Mitter, J. in Mathoora v. Ram, (1869) 11 W.R. 482. 483; s.c. 3 B.L.R.R. (A.S.) 108; but fraud and dishonesty are not to be assumed upon conjecture, however probable; Imdad v. Kootby, 3 Moo. I. A. 1: secrecy as evi-dence of fraud, see Joshua v. Alliance Bank of Simla, (1894) 22 C. 185; see cases cited in notes to Ss. 102. 111 post.

Whart. s. 35, cited in Phipson, Ev.,
 11th Ed., p. 185.
 Suraj Ali v. Arphan Ali, 44 C. 66:

^{16.} Derry v. Peek, (1889) 14 App. Cas. 387: "A man's own assertion of what he believed or recollection of what he thinks he believed, at a certain time, is worth very little without some kind of confirmation from the external conditions. Obviously the best and most natural corroboration would be found in circumstances showing that the alleged belief was such as with the means of knowledge then at hand, a reasonable man might have enter-tained at the time". Pollick's Law of Fraud in India, 44, 45.

whether it be true or false; and if fraud be proved, the defendant's motive is immaterial—it matters not that there was no intention to injure the person to whom the statement was made.¹⁷ To show the bona fides of a party's belief, he may show that it was shared by the community, or even by individuals similarly situated to himself.¹⁸ The relative positions and circumstances of the parties are often material in determining their good or bad faith in a transaction, a higher standard of probity being demanded from either, when the other is, e.g., of weak intellect, intoxicated, illiterate, or acting under duress or fear, or occupies the position of child, ward, client or patient to the other.¹⁹

Allegations of mala fides against a petitioner for winding up can generally be substantiated by circumstantial evidence only.²⁰ From the delay in issue of a certificate by the Government to practise as a Notary Public, it cannot be legitimately inferred that in doing so the Government acted mala fide deliberately to deprive the Notary Public of his right to practise as such.²¹



17. Derry v. Peek, supra, 346, 356, 369 and 374: in which the distinction is made between facts which constitute fraud and those that are only evidence of it. Roscoe, N.P. Ev., 848, and cases there cited; Indian Contract Act, S. 17; Pollock's Law of Fraud in India, 432-56 as to concealment of material facts: see Smith v. Hughes, (1871) L.R. 6 Q. B. 597; Ward v. Hobbs, (1878) 4 App. Cas. 13: inadequacy of price as evidence of fraud, see Indian Contract Act., S. 26; Specific Relief Act S. 28; see generally as to fraud, Roscoe, N.P. Ev. 633- 635, 847-855: it must be properly pleaded; a case of fraud cannot be started in middle of cross-examination for the first time: Lever v. Goodwin, (1887) 36 Ch. D. 1: 36 W. R. 177.

18. Illus. (f) ante; Sheen v. Bumpstead, 2 H. & G. 193; Roscoe, N. P. Ev., 853, see note to illust. (f). In Penny v. Hanson, (1887) 18 Q. B. D. 487, the question was whether A intended to deceive B by pretending to tell his fortune by the stars; it was held that the evidence that A or others bona fide believed in his ability to tell such fortunes was inadmissible; Denman, J., remarking; "We do not live in times when any sane man believes in such a power", and see Lewis v. Fermor, 18 Q. B.D. 532, 536, per Willes, J.

19. Phipson, Ev., 11th Ed., 185; Pollock's

19. Phipson, Ev., 11th Ed., 185; Pollock's Law of Fraud in India, 65, 66, 76; 77; see notes to 8, 111, post.

20. Aluminium Corporation of India, Ltd. v. Lakshmi Ratan Cotton Mills Co. Ltd., 40 Com. Cas. 259: (1969) 2 Comp. L. J. 357: 1970 A.L.J.. 487: A.I.R. 1970 All. 452, 466.

 Kashi Prasad Saksena v. State Government of U. P., A.I.R. 1969 All, 195, 199.

10. Negligence. Crime is the general conduct of a physical and mental element, or in the words of the maxim "actus non facit rem nisi mens sit rea". The nature and degrees of these two elements may be thus expressed:

What constitutes negligence has been analysed in Halsbury's Laws of England (Simond's Ed.) Vol. 28, para 1 (pages 3 and 4), as follows:

"Negligence is a specific tort and in any given circumstances is the failure to exercise that care which the circumstances demand. What amounts to negligence depends on the facts of each particular case and the categories of negligence are never closed. It may consist in omitting to do something which ought to be done or in doing something which ought to be done either in a different manner or not at all. Where there is no duty to exercise care negligence in the popular sense has no legal consequence. Where there is a duty to exercise care reasonable care must be taken to avoid acts or omissions which can be reasonably foreseen to be likely to cause physical injury to persons or property. The degree of care required in the particular case depends upon the accompanying circumstances and may vary according to the amount of the risk to be encountered and to the magnitude of the prospective injury. The material considerations are the absence of the care which is on the part of the defendant due to the plaintiff in the circumstances of the case and damage suffered by the plaintiff together with a demonstrable relation of cause and effect between the two."32

The American and Australian concepts are the same. "Negligence", says the Re-statement of the Law of Torts published by the American Law Institute (1934), Vol. I, Section 282, "is conduct which falls below the standard established for the protection of others against unreasonable risk of harm". This standard of conduct or care has been examined with great thoroughness in an Australian Publication (1957) "The Law of Torts" by Fleming at pages 124 and following. It is stated that this standard of conduct is ordinarily measured by what the reasonable man of ordinary prudence would do under the circumstances. The behaviour of individuals is so incalculable in its variety, and the possible combination of circumstances giving rise to a negligence is so infinite, that it has been found undesirable if not impossible to formulate precise rules for all conceivable conduct, depending upon the moral qualities, knowledge, skill, physical, intellectual and emotional characteristics of age, etc., which vary from individual to individual. In order to ensure a high degree of individualisation in the handling of negligence cases the law has adopted an abstract formula, that of the reasonable man. In order to objectify the law's abstractions like "care", "reasonableness" or "foreseeability" the man of ordinary prudence is invested as a model of the standard of conduct to which all men are required to conform. The "reasonable man" has been described by Greer, L. J. as the man in the street, or the man in Clapham omnibus, or as an American author put it, "the man who takes the magazines at home, and in the evening pushes the lawn mover in his shirt sleeves."28 He is the embodi-

K.B. 205.

^{22.} See the Leading English decisions: Grant v. Australian Knitting Mills, Ltd., (1936) A.C. 85 P.C. at page 103; Vaughan v. Taff Vale Rail. Co. (1860) 5 H. & N. 679 at page 688; Fardon v. Harcourt-Rivington, (1932) All E. R. Rep. 81 H. L. at page 83; Danoghue v. Stevenson, (1932)

All E. R. Rep. 1, at page 30; Bour-hill v. Young, (1942) 2 All. E.R. 396; Blyth v. Birmingham Water Works Co., (1856), 11 Exch. 781; Glasgow Corporation v. Muir, (1943) 23. Hall v. Brooklands Club. (1933) 1

ment of all the qualities which we demand of the good citizen, a device whereby to measure the defendant's conduct by reference to community valuations.²⁴

- 11. Rashness. It is clear that a person who acts or omits to act may or may not possess a mental attitude towards the consequences of his act or omission, that is to say, he may not think about them. In the former case, his conduct is either voluntary or rash; in the latter it is heedless. In rashness, the party guilty of a rash act neither intends evil nor does he know that evil is likely nor has he reason to believe that it is likely. On the contrary, does not think that evil will ensue. He thinks of the probable consequences of his act or omission but from insufficient advertence assumes that they will not ensue.25 He does think about the consequences (although insufficiently) and it is this fact which distinguishes rashness from heedlessness, for, in heedlessness, the person acts because he does not think about the probable consequences of his conduct at all. In existing systems of law however, this distinction does not seem to be made and in the Indian Penal Code heedlessness is included in the term rashness which thus signifies an insufficient advertence or complete inadvertence on the part of the agent to the consequences of his conduct and this state of mind is contrasted with negligence, which denotes entire inadvertence to some act which ought to have been performed, and a fortiori to the consequence of its non-performance. This distinction has been brought out, by Holloway, J., in Reg. v. Nidamarti, Naga Bhushanam.1 Culpable rashness is acting with the consciousness that the mischievous and illegal consequences may follow but with the hope that they will not, and often with the belief that the actor has taken sufficient precautions to prevent their happening. The imputability arises from acting despite the consequences. Culpable negligence is acting without the consciousness that the illegal and mischievous effects' will follow but in circumstances which show that the actor has not exercised the caution incumbent upon him, and that, if he had, he would have had the consciousness.
- 12. Similar acts. Where the accused was charged under Sec. 206 of the Indian Penal Code with fraudulently transferring three properties to three different persons on a certain day in order to prevent their being seized in execution of a decree, and the prosecution tendered evidence of five other fraudulent transfers of property effected by the accused on the same day, and apparently with the same object: held that this evidence was admissible under this and the next sections, to prove either that all those transfers were parts of one entire transaction, or that the particular transfers which were specified in the charge were made with a fraudulent intent.² Evidence of similar frauds, committed on other persons by the same agent of the defendant company, in the same manner, with the knowledge and for the benefit of the company, is

^{24.} The Indian Law is the same: Reg v. Nidamarti Naga Bhushanam, (1872) 7 M.H.C.R. 119; Smith v. R. (1926) 53 Cal. 333: 91 I.C. 889: A.I.R. 1926 C. 300, 304; Emperor v. Abdul Latif, A.I.R. 1944 Lah, 163: 213 I.C. 208; Arumugham Pillai v. Gnanasoundra, (1961) 2 M.L.J.N.

R. C. 59: Parthasarthy In re, (1959) M.W.N. (Cr.) 21 at p. 25; A.I.R. 1959 Mad, 497 (Ramaswami 1).

^{25.} Ausein's Jurisprudence, Sec. 29, p. 440.

 ^{(1872) 7} M.H.C.R. 119.
 R. v. Vajiram, (1892) 16 B. 414.

admissible to prove fraud.8 In like manner, in actions for false representation, where the question turns on fraudulent intent, other misstatements besides those laid in the statement of claim will be admissible in evidence, for the purpose of showing that the defendant was actuated by dishonest motives.4 And the defendant may show representations made by him to others with the view of proving his own bona fides.5 Where A and B were charged with conspiring to defraud C by representing that A owned certain property, and B's defence was that he honestly believed the representation being himself the dupe of A, it was held that letters between A and B (not communicated to C) prior to the completion of the transaction, regarding it, were admissible in B's favour. See further, as to the question of good faith, illustrations (f), (g) and (h), ante.

- 13. Malice. Malice in doing an act has generally to be proved by the previous or subsequent conduct7 and relation of the parties, e.g., previous enmity, threats, quarrels and violence; while in rebuttal, previous expressions of goodwill and acts of kindness may be shown.8 Malice may even be implied from the manner in which an action is conducted in which it is in issue and, in case of libel, the mode of publication, or the repetition of the libel, is material to show the defendant's animus.9
- 14. State of body and bodily feeling. As to state of body and bodily feeling, see illustrations (1) and (m) ante. In a divorce case, a letter written by the wife to her paramour is good evidence under this section of her feelings towards the paramour at the time the letter was written.10
- 15. Explanations. The explanations to the section are illustrated by the illustrations (n), (o), (p) and (q) appended to it. The rejection of the general facts rest on the ground that the collateral matter is too remote, if, indeed, there is any connection with the factum probandum.11
 - Blake v. Albion Life Assurance Society, 4 C.P.D. 94. See also R. v. Wyatt, (1904) 1 K.B. 188. in which the question was whether upon an indictment for obtaining credit by means of fraud evidence could be given of similar acts committed by the accused at a period immediately preceding the offence for which the accused was being tried, and the answer given by the Judges was in the affirmative.

4. Huntingford v. Massey, (1859) 1 F.

F. 690: Taylor, Ev., N. 340.
 Shrewsbury v. Blount, (1840-41) 2 M. & G. 475.

M. & G. 475. R. v. Whitehead, (1823) 1 D. & R. N.P. 61.

7. Thus in Taylor v. Willans (1830) 2 B. & Ad, 845 the question being whether A acted maliciously in prosecuting B-an affidavit filed by the clerk to A's solicitor and used for the purpose of preventing persons from taking bail for B when he was arrested, was held admissible as showing A's malice.

8. For meaning of malice and fair comment and for tests of good faith see R. v. Abdool, (1907) 31 B. 293, 9. Phipson, Ev., 11th Ed. 188, 189: Taylor, Ev., ss. 340-347. See illus, (e) ante; as to bona fides, see R. v. Labouchere. 14 Cox. 419: Scott v. Sampson, (1882) 8 Q. B. D. 419.

10. Dr. Niranjan Das Mohan v. Mrs.

Ena Mohan, 1943 Cal. 146: I.L.R. (1943) 1 Cal. 340: 205 I.C. 597: 47 C.W.N. 251.

Norton, Ev., 139: see remarks of Willes J., in Hollingham v. Head. (1857) 27 L. J. C. P. 241. "To admit such speculative evidence would I think he fraucht with would, I think, be fraught with great danger. If such evidence were held admissible, it would be difficult to say in an action of an assault, that the plaintiff might not give evidence of former assaults committed by the defendant upon other persons of a particular class for the purpose of showing that he was a quarrelsome individual and therefore it was highly pro-bable that the particular charge of assult was well founded. The extent to which this sort of thing might be carried is inconceivable.'

(a) Explanation 1.—The meaning of the first Explanation is "that the state of mind to be proved must be not merely a general tendency or disposition, towards conduct of a similar description to that in question, but a condition of thought and feeling having distinct and immediate reference to the matter which is under enquiry. The fact that a man is generally dishonest, generally malicious, generally negligent or criminal in his proceedings does not bear with sufficient directness on his conduct on any particular occasion, or as to any particular matter, to make it safe to take it as a guide in interpreting his conduct; what is wanted is a fact which will throw light on his motives and state of mind with immediate reference to that particular occasion or matter. Illustrations (a) and (b) make this clear. A man is accused of receiving stolen goods with guilty knowledge, if he is merely shown to be generally dishonest, the probability of his having been dishonest in this particular transaction is perhaps increased, but only in a vague and indefinite way; but if, at the time he is found in possession of a number of other stolen articles, this fact throws a distinct light on his knowledge and intentions as to the articles of which he is found in possession. would be dangerous to infer that because a man was generally dishonest, he is dishonest in any single case but it is not dangerous to infer that a man, who is found in possession of 50 articles, which are shown to have been stolen from different people, came by each and all in a dishonest manner."12

Where the issue was whether a particular item of property comprised in a deed of mortgage was by a mistake wrongly described and so ought to be rectified, it was held that the fact that the mortgagor had mortgaged the same item to another mortgagee with the same description and has been compelled by that mortgagee to consent to rectification, was not relevant.13 Evidence of commission of other offences such as thefts does not show an intention to commit a different kind of offence such as dacoity and is not therefore relevant, as showing the existence of any intention to commit, or to engage in a conspiracy to commit dacoity.14

The general tendency of an accused cannot be proved as that would amount to proving his bad character (see section 54 post). The facts offered in proof must show the state of mind in reference to a particular matter in question.15

(b) Explanation 2. The Criminal Procedure Code¹⁸ contains provisions as to the procedure to be adopted in the case of previous conviction. These provisions have been made with the view of preventing the jury or assessor, from being biased against the accused by the knowledge that he is an old offender. But, notwithstanding anything in the Code, evidence of the previous conviction may be given at the trial for the subsequent offence, if the fact of the

Gunningham, Ev., 118, 119.
 Harendra Lal. v. Smt. Haridasi Debi, 1914 P.C. 67: 41 I.A. 110: I.L.R. 41 Cal. 972: 23 I.C. 637: 12 A.L.J. 774: 16 Bom. L.R. 400: 19 C.L.J. 484: 18 C.W.N. 817: 27 M.L.J. 80.

Emperor v. Wahiduddin. 1930 B.
 I. J. Bom 524; 127
 I. C. 189; 31 Cr. L.J. 1168; 32

Bom. L.R. 324: see also Emperor v. Haji Sher Mahomed, 1923 Bom. 71: I. L. R. 46 Bom. 958: 75 I.C. 67: 24 Cr. L J. 867: 25 Bom. L. R. 214.

Lakshmandas v. The State, 69 Bom.
 L. R. 808: 1968 Cr. L. J. 1584:
 A.I.R. 1968 Bom. 400, 421.
 S. 310. as substituted by Act 26 of

¹⁹⁵⁵ for the original s. 310.

previous conviction is relevant under this Act. 17 According to this section, previous convictions become relevant when the existence of any state of mind or body or bodily feeling is in issue or relevant.18 Under the present section, the previous conviction will not be relevant unless the commission of the offence for which the conviction was had is relevant within the meaning of the preceding portion of the section. The second Explanation, therefore does not extend the scope of such portion, but is merely an application of the rule contained in it, to those particular circumstances in which the acts sought to be given in evidence in proof of intention have been themselves adjudicated upon in a criminal proceeding previously taken.19 The proof must always be strict. Thus, extracts from a Gaol Register and certified copies of previous convictions are insufficient without proof of identity.20 Having regard to the character of the offence under Section 400 of the Indian Penal Code, previous convictions of dacoity are relevant under this section. Convictions previous to the time specified in the charge or previous to the framing of the charge are relevant under the second Explanation to this section, but convictions subsequent to the time specified in the charge, and to the framing of the charge itself are not so admissible.21

Evidence of a previous conviction is admissible under this section, not as evidence of character but as evidence to prove habit and association,22 and in order to prove that the person charged shared the purpose of a gang of dacoits, previous conviction for and previous commission of similar offences are relevant under this Explanation.28 The previous offences must, however, be of a cognate character so as to reasonably permit an inference as to the state of mind of the person charged.24

Where in a trial of the accused, on a charge of belonging to a gang of thieves, evidence was offered of his previous conviction for dacoity twenty-five years before, it was held that the conviction was so long ago that it was useless, except for showing that the accused was a person of criminal tendencies of theft who might be a member of the alleged gang, but that it did not go to show that he had any habit of committing theft in the period under consideration, for he might have reformed since he was released from jail.25

Where an accused person is charged with belonging to a gang of persons associated for the purpose of habitually committing dacoity, under Sec. 400 of the Indian Penal Code, evidence showing that he has been previously convicted on a charge of theft, or has been ordered to give security for good behaviour, is not admissib'e under this section.1 And it has been held that evidence of bad livelihood is admissible to prove the habit of such offences in addition to evidence of previous convictions when, under Sec. 401 of the Penal Code, association for the purpose of habitually committing theft has been proved, and that for

See S. 311 Cr. P. Code (old).
 R., v. Alloomiya, (1903) 5 Bom.
 L.R. 805; (1903) 28 B. 129.
 See illus. (b), ante.
 R. v. Abdul, 1916 Cal. 344: 45 C. 1128: 33 I.C. 825: 17 Cr. L.J. 185: 20 C.W.N. 725.

R. v. Naba, (1897) 1 C.W.N. 146 referred to in Mankura v. R., (1899) 27 C. 139, 143: 4 C.W.N. 97.
 Beni Madho v. Emperor, 1933. Oudh 355: 146 I.C. 1064: 10 O. W.N. 688; Amdumiyan v. Emperor, 1933.

¹⁹³⁷ Nag. 17: I.L.R. 1937 Nag. 315: 166 I.C. 582, 587: 38 Cr. L.

J. 237, 251 (F.B.).23. Sharaf Shah Khan v. State, I.L.R. 1962 A.P. 96: A.I.R. 1963 A.P. 314.

^{24.} Ibid.

^{25.} Moti Ram Hari v. Emperor, 1925 B. 195: 89 I.G. 627: 26 Cr. L.J. 1391: 26 Bom, L.R. 1273. 1. R. v. Sher Mahomed, 1923 Bom, 71:

I.L.R. 46 Bom, 958: 75 I.C. 67: 24 Cr. L.J. 867: 25 B.L.R. 214,

this purpose evidence of bad livelihood is of more weight than evidence of isolated thefts.² In a trial for an offence of keeping a common gaming-house under the fourth section of the Prevention of Gambling Act (IV of 1887, Bombay), evidence that the accused had been previously convicted of the same offence is admissible to show guilty knowledge or intention.³ In a case in the Calcutta High Court, it was held that evidence of association with men accused in a different trial was irrelevant under this section because it was not "in reference to the particular matter and also under the next section because it did not form part of a series of similar occurrences."

16. Sedition, charge of. In several cases, the question of evidence of intention in a charge of sedition has been discussed. Where certain speeches formed part of a series of speeches, or lectures on one topic delivered within a short period of time, it was held that any of such speeches or lectures will be admissible under this section as evidence of the intention of the speaker in respect of the speeches which formed the subject of the charge. In another case it was held that seditious articles published in the same newspaper, but not forming part of the subject of the charge on which the prisoner was then being tried, were admissible to show the intention of the persons who printed or published the articles which were the subject of the charge, since under Act XXV of 1865, Sec. 7 (which throws the onus on the accused), the printer or publisher is responsible for everything that appears in the newspaper unless he can prove absence in good faith, what appears in the newspaper unless he can prove absence in good faith, what appears in the newspaper unless he can prove absence in good faith, what appears in the newspaper unless he can prove absence in good faith, where the subject of the charge is a securious matter would be published.

In yet another case it was held that articles not forming part of the subject of the charge and appearing in other issues of the newspaper were not admissible to show the intention of the writer, in absence of proof of his identity, and it was declared that, while the printer or publisher would be amenable on proof that the article was calculated to excite feeling of hatred, disaffection or contempt towards the Government, the writer would only be amenable on proof that such feelings were actually excited by it or that he intended them to be so,⁷ and it has also been held that under the Newspapers (Incitement and Abetment) Act VII of 1908. Sec. 3, no question of intention arises.⁸

17. Illustrations. (a) Illustration (a)—According to English Law such evidence of intention in the case of indictments for receiving stolen goods, is admissible only subject to certain limitations.9 This illustration makes no

^{2.} Bhona v. R., (1911) 38 C. 408.

R. v. Alloomiya. (1903) 5 Bom. L.
 R. 805: Jacob, J., dissenting from (1903) 28 B. 129.

^{4.} Amrita v. R., 42 C. 957: 29 I.C. 513: A.I.R. 1916 C. 188.

^{513:} A.I.R. 1916 C. 188.

5. Chidambaram v. R., (1908) 32 M.
3; and see R. v. Jogendra, (1891)
19 C. 35; Apurba v. R., (1907) 35
C. 141; R. v. Bal G. Tilak, (1897)
22 B. 112; R. v. Amba Pd. (1897)
20 A. 52 (F.B.); R. v. Bond,
(1906) 2 K.B. 389; Om Prakash v.
Emperor, 1930 Lah. 867: 127 I.C.
209: 51 Cr. L.J. 1182; Chamupati
v. Emperor, 1932 Lah. 99: 142 I.C.
792: 34 Cr.L.J. 435: I.L.R. 13
Lah. 152 (S.B.); Jagannath Prasad

v. Emperor, 1940 Nag. 134; 189 I.C. 74; 41 Cr.L.J. 713; 1940 N.L.J. 31. 3. R. v. Phanendra, (1908) 35 C

R. v. Phanendra, (1908) \$5 C
 945 followed in Satyendra Nath Mazumdar v. Emperor, 1931 Cal.
 337 (2): 131 I.C. 566: 32 Cr. L.J.
 758: 53 C.L.J. 256: 34 C.W.N.
 1095, dissenting from R. v. Bal G.
 Tilak. (1897) 22 B. 112.

Tilak. (1897) 22 B. 112.

7. Manmohan v. R. (1910) 38 C. 253; R. v. Amba Pd. (1897) 20 A.

^{8.} Girija v. R., (1908) 36 C. 405.

See Steph, Dig. Arts. 11, 34 & 35
 Vict c. 112, S. 19; Roscoe, Cr. Ev., 16th Ed., 231, 886, and cases there cited.

reservation as to ownership or time, so that though the stolen property belonged to other person than the prosecutor and without reference to the lapse of time since it was stolen, evidence of its possession may under the Act be given against the accused; its weight, in each case, being left to the discretion of the Court.10 The test of a correct presumption of guilt in a prisoner, not being able to account for the property on his premises, is dependent on the fact whether the surrounding circumstances of the case really and properly raise such a presumption.11

- (b) Illustration (b). As regards the first fact in the illustration see R. v. Nur Muhamad.12 This illustration speaks only of possession; but it is only a single illustration of the "knowledge" spoken of in the section. Evidence of other utterings would be equally receivable under the section to establish guilty knowledge.13 In England, it is well settled that, evidence of uttering counterfeit coin on other occasions than that charged is evidence to show guilty knowledge,14 and that utterings after that for which the indictment is laid may be given in evidence for this purpose as well as those which take place before,15 proof of the prisoner's conduct (as for example, that he passed by different names) is clearly admissible.16 In the case of forged instruments similar evidence of possession and uttering has been constantly admitted in England (v. post). But whether evidence is admissible of uttering other forged instruments, where these are uttered subsequently to that with which the prisoner is charged, seems to some extent doubtful.17
- (c) Illustration (c). As regards this illustration see the undermentioned cases. 18 In the case of wild and naturally ferocious animals such as lions, tigers, monkeys, etc., it is not necessary to prove 'scienter', i.e., that defendant knew and was well aware that the animals were ferocious, dangerous or mischievous as the case may be; knowledge will be presumed.19 But. in the case of dogs, horses and other domestic animals, scienter must be proved in order to entitle the plaintiff to damages.20
 - (d) Illustration (d). This is the case of Gibson v. Hunter.21

10. Norton, Ev., 132; see Penal Code, S. 411, and S. 21 Illus. (d) and S. 114, illus, (a) post; R. v. Cassy, (1865), 3 W.R. Cr. 10; R. v. Narain, (1866), 5 W.R. Cr. 3; R. v.

Mote, (1866) 5 W.R. Cr. 66.

11. (Re) Meer, (1870) 13 W.R. Cr. 70, 71; R. v. Samir-uddin, (1872) 18 W.R. Cr. 25 see Wigmore, Ev., s.

12. (1883) 8 B. 223; and R. v. Vaji-

ram, (1892) 16 B. 414.

13. Norton, Ev. 134; R. v. Whiley, (1804) 2 Leach 983, cited in R. v. Vajiram (supra); Blake v. Albion Life Assurance Society, 4 C. P. D. 94; R. v. Green, (1852) 3 Car. & Ker 209.

14. Roscoe, Cr. Ev., 16th Ed., 464, 465.
15. R. v. Foster, (1855) 24 L.J.M.C.
134; see S. 15, illus, (c) post.
16. R. v. Tattershall, (1801) 2 Leach
984; R. v. Phillips, (1829) 1 Lew.

- C. C. 105; v. S. 8 antq. 17. Roscoe, Cr. Ev., 12th Ed., 82, 84 (v. post). See Penal Code, Ss. 289-241, 371, 463-477, passim, and see S. 21, illus, (e). post; R. v. Kisto, (1865) 2 W.R. Cr. 5 (counterfeit seals and forced documents). terfeit seals and forged documents):
- Wigmore, Ev., s. 309.

 18. See Thomas v. Morgan. (1835) 2
 C.M.R. 496; Judge v. Cox, (1816)
 1 Starkie 285; Hudson v. Robert, (1851) 6 Ex 697; Cox v. Burbidge, (1863) 13 C.B.N.S. 430; Roscoe N.P. Ev., 748. May v. Burdett, (1846) 9 Q.B.

19. 101.

20. The Law Relating to Dogs, by F. Lupton, 1888, pp. 4. 7; cf. also Penal Code, S. 289; Norton, Ev.

21. (1795) 2 H. Bl. 288; Roscoe, N.P. Ev., 85: Taylor Ev., s, 338.

- (e) Illustration (e). Not only is the publication of other libels evidence but the mode of their publication, to show quo animo they were published.²² As the existence of previous ill-feeling throws light upon the animus with which the libel was published, so does the absence of previous quarrel, or the fact that the accused merely repeated what he had heard, affords evidence of the absence of malicious intention. But in civil suits this will only be receivable in mitigation of damages.²³
- (f) Illustration (f). Here the gist of the action is fraud.²⁴ Bona fides may necessarily always be given in evidence for where there is bona fides, there can be no fraudulent intent.²⁵ In a case for a false representation of the solvency of A B, whereby the plaintiffs trusted him with goods, their declarations at the time, that they trusted him in consequence of the representation are admissible in evidence for them.¹ The case on which the illustration is based is Sheen v. Bumpstead.² in which Cockburn, C. J., said:

"With regard to the question put to the other witnesses respecting the general reputation of W for trustworthiness as a tradesman, I think it also admissible. It was important to ascertain the state of mind of the defendant at the time he made the representation complained of, and that could only be shown by inference. A plaintiff may not be able to bring home to the defendant by direct and positive evidence a knowledge of the falsehood of his representation; the plaintiff may, however, prove certain facts which necessarily lead to that inference. Now suppose the plaintiff had called every tradesman in the town to say not only that W was insolvent, but that his insolvency was notorious, would it not have been a fair and obvious remark to the jury that the defendant must have known what was the common knowledge of every other tradesman? On the other hand, if, after the plaintiff has established a prima facie case against the defendant, the latter calls a number of tradesmen, who have had dealing with W, and they say that at the time the defendant made the representation they believed that W was perfectly solvent, is not that strong evidence-morally at least-from which the jury may infer that what was the common opinion of tradesmen in the neighbourhood was shared by the defendant and that in making the representation he acted in good faith."3

(g) Illustration (g). This is the case of Gerish v. Chartier.⁴ The cvidence was material and was properly admitted. It intended to show that the defendant was not seeking to evade payment for goods ordered for his benefit, but that he had actually paid the person with whom alone he had contracted.

See Bond v. Douglas, (1836) 7 C.
 P. 626, where libellous handbills were carried backwards and forwards before the plaintiff's door.

24. See Pasley v. Freeman, (1789) 2

Smith L.C. 74

25. Shrewsbury v. Blount, (1840-41) 2

M. & G. 475; Roscoe N.P. Ev., 853, the illustration is an example, Norteen Fr. 186

ton, Ev. 136.

1. Fellowes v. Williamson, (1829) 1
M. & M. 306; and see Vacher v.
Cocks. (1830). 1 B & Ad. 145.

2. (1863) 2 H. & C. 193.

 See Barrow v. Hem Chunder, (1908) 35 C. 495.

4. (1845) 1 C.B. 13.

^{23.} v. ante: Norton Ev. 135, see Pearson v. Le Maitre, (1843) 5 M. & Cr. 700, and cases cited in Roscoe N.P. Ev. 864; and Cr. Ev. 16th Ed., 711: Taylor, Ev., s. 340; see Kaikhusru v. Jehangir. (1890) 14 B. 532.

It showed that the defendant conducted himself like a party who was dealing with 'C' as a principal and not as an agent."5

"A considerable body of evidence had been given by the plaintiff to show that 'C', interfered in the matter as the defendant's agent which this evidence went directly to negative."6 "In an action for goods sold and delivered a general form of defence is 'I am liable to pay another person' and in such cases the jury usually comes to the conclusion that the defendant wants to keep the goods without paying for them. Here, therefore, it was material for the defendant to show the bona fides of his defence by proving payment to such third person, and that was the effect of the evidence in question."

(h) Illustration (h).—As regards the first instance given, see Steph. Digest, Art. 11, illustration (i).8 In the instances given in the illustration the first is to negative good faith; the second to rebut the presumption of mala fides raised by the first.9

The leading case on the subject of larceny of goods found is R. v. Thurborne,10 in which the whole law on the subject is considered in the judgment of Parke, B. Though some of the reasons and dicta of this case have been occasionally impeached, the case itself has been universally followed and for the most part approved.¹¹ Another case of this branch of the law of larceny is Hibbert v. Mckiernan.¹² In this case the defendant trespassed on a golf course and removed eight golf balls which had been lost in play and (the justices found) abandoned by their owners. Property in the balls was laid in the golf club. It was held that the defendant had trespassed animus furandi and was rightly convicted of larceny.

- (i) Illustration (i).-This illustration, which is taken from the case R. v. Voke,13 is in principle like illustration (o), post: the difference between the two illustrations is that this illustration is a case of shooting with intent to kill, while illustration (o) is of murder outright. In R. v. Voke, the prisoner was indicted for maliciously shooting at the prosecutor. Evidence was given that the prisoner fired at the prosecutor twice during the day. In the course of the trial, it was objected that the prosecutor ought not to give evidence of two distinct felonies, but Burrough, J., held that it was admissible on the ground that the counsel for the prisoner, by his cross-examination of the prosecutor, had endeavoured to show that the gun might have gone off by accident, that the second firing was evidence to show that the first was wilful and to remove the doubt if any existed in the minds of the jury.14
- (j) Illustration (j) .- As regards this illustration, see R. v. Robinson, 18 in which previous letters sent by the prisoners were read in evidence as they served to explain the letter on which he was indicted.

R. 20. (1948) 2 K.B. 142; (1948) 1 All E. R. 860: (1948) L.J.R. 1521; 64 T.

13.

L.R. 256. (1823) R. & R. 531. See Roscoe, Cr. Ev. 16th Ed., 100; Norton, Ev., 137. (1746) 2 East P. C. 1010

Per Maule, J., Gerish v. Chartier, (1845), 1 C.B. 13.

^{6.} Per Gresswell, J. ib.
7. Per Erle, J., ib.
8. Se- also Norton, E Ev., 137: same evidence given that the notice of the loss was within the knowledge

^{9.} See Penal Code. S. 403, Expl. (2); Norton, Ev. 135, 137; Roscoe, Cr. Ev., 16th Ed., 686, 687. 10. (1849) 1 Den. C.C.R. 387; 18 L. J. M.C. 140; 2 C. & K. 831.

^{11. 2} Russ Cri. 12th Ed. (1964) 1011-1013 N. See also the judgment of Lord Alverstone, C. J., in R. v. Mor-timer, (1908) 72 J. P. 349: 24 T. J. R. 745: 99 L. T. 204: 1 Cr. App.

- (k) Illustration (k).—As regards this illustration see Taylor, Ev., s. 582. This and the two following illustrations relate to feeling: the first to mental feelings of "illwill" or "goodwill", the two last to "bodily feelings."36
- (1) Illustration (1) .- As regards this illustration, see the case cited in the footnote.17
- (m) Illustration (m).—As regards this illustration, see the cases cited in the footnote.18
- (n) Illustrations (n) and (o).-Illustration (n) and the two following illustrations refer to the Explanation; illustration (n) illustrates "negligence" as well, illustration (o) should be read in conjunction with illustration (i) ante, v. text.
- (o) Illustration (p).—As regards this illustration, see Emperor v. Haji Sher Mahomed.19
- 15. Facts bearing on question whether act was accidental or intentional. When there is a question whether an act was accidental or intentional, 20 [or done with a particular knowledge or intentional], the fact that such act formed part of a series of similar occurrences, in each of which the person doing the act was concerned, is relevant.

Illustrations

(a) A is accused of burning down his house in order to obtain money for which it is insured.

The facts that A lived in several houses successively each of which he insured, in each of which a fire occurred, and after each of which fires A received payment from a different insurance office, are relevant, as tending to show that the fires were not accidental.

(b) A is employed to receive money from the debtors of B. It is A's duty to make entries in a book showing the amounts received by him. He makes an entry showing that on a particular occasion he received less than he really did receive.

The question is, whether this false entry was accidental or intentional.

The facts that other entries made by A in the same book are false, and that the false entry is in each case in favour of A, are relevant.

(c) A is accused of fraudulently delivering to B a counterfeit rupee. The question is, whether the delivery of the rupee was accidental.

See Aveson v. Kinnaird, (1805) 6
 East, 188; R. v. Nicholas, (1846) 2
 C. & K. 246; 2 Cox. C.C. 136; R.

(Amendment) Act, 1891 (3 of 1891).

^{16.} v. text. 17. See R. v. Gloster, (1888) 16 Cox. 471; R. v. Johnson, (1847) 2 C. & K. 354.

v. Guttridge, (1840) 9 C, & P. 471.

19. 1923 Bom. 71: I.L.R. 46 Bom.
958: 75 I.C. 67: 25 Bom. L.R.
214: 24 Cr. L.J. 867.

20. Inserted by the Indian Evidence

The facts that, soon before or soon after the delivery to B, A delivered counterfeit rupees to C, D and E are relevant, as showing that the delivery to B was not accidental.

s. 14 (Facts relevant to show knowledge s. 3, ("Relevant"). or intention).

Steph. Dig. Art. 12; Norton, Ev. 140; Cunningham, Ev. 120; Taylor, Ev. s. 328; I Wills, Ev., 3rd Ed., 77.

SYNOPSIS

1. Principle.

2. Scope.

3. Accident or intention,

4. Accident or system.

5. Knowledge and intention.

6. Illustrations.

1. Principle. The facts are admitted as tending to show a system and therefore an intention; this section is, therefore, an application of the rule laid down in the preceding one.21 It will always be a matter of discussion, whether there is a sufficient and reasonable connection between the fact to be proved and the evidentiary fact. If there is no common link they cannot form a series, and this is the gist of the section.22

The principle on which evidence of similar acts is admissible is, not to show, because the accused has committed already some crimes, he would, therefore, be likely to commit another, but to establish the animus of the act, for which he is charged and rebut by anticipation, the defence of ignorance, accident, mistake, or innocent state of mind.28 In the above-noted case, the contention raised was that the evidence relating to false entries said to have been made by the accused in certain documents was inadmissible in evidence. It was held, that the contention overlooked the provisions contained in Section 14 and this Section, and that the evidence relating to those entries was admissible to show that the false entries and falsification of the accounts, said to have been made by the accused during the charge period, were made wilfully with an intention to defraud the State. It was observed that evidence of that character is admissible under this Section, when the acts in question formed part of a series of similar occurrences to prove the intention or knowledge of the accused. It was said that it was not sufficient for the prosecution to prove that the entries were wrong entries and that they were made by the accused; the prosecution had to go further and prove that those entries were false entries and the accused made those entries wilfully to defraud the State; and therefore the prosecution could prove similar instances to establish that the accused made the entries in question wilfully to defraud the State.

InAmrita v. Emperor,24 it was said that facts similar to, but not part of the same transaction as the main fact, are not, in general, admissible to prove either the occurrence of the main fact or the identity of its author. But evidence of similar facts, although in general inadmissible to prove the main fact or the connection of the parties therewith, is receivable, after evidence aliunde on these points has been given to show the state of mind of the parties with

See Steph. Dig. Art 12 and Cunningham, Ev., 120, and Emperor v. Debendra, I.L.R. 36 Cal. 573.
 Norton. F.v., 140.

Krishna Murthy v. Abdul Subban. A.I.R. 1965 Mys. 128.
 I.L.R. 42 C. 957; 29 I.C. 513; A.I.R. 1916 C. 188.

regard to such facts; in other words, evidence of similar facts may be received to prove a party's knowledge of the nature of the main fact or transaction, or his intent with respect thereto. To admit evidence under this head, the other acts tendered must be of the same specific kind as that in question and not of a different character, and acts tendered must also have been proximate in point of time to that in question.

2. Scope. This section is a particular application of the general rule laid down in the previous section.25 It applies to cases where there is conduct indicating a system.1

In general, whenever it is necessary to rebut, even by anticipation, the defence of accident, mistake or other innocent condition of mind, evidence may be given to prove that the accused has been concerned in a systematic course of conduct of the same specific kind as that in question may be given.2 The words of the section as well as of illustration (a) show that it is not necessary that all the acts should form part of one transaction but that such acts should form part of a series of similar occurrences.3 Under this section, the prosecution cannot use the evidence, as to the commission of other acts of a similar nature, in proof of the existence of the specific acts which form the subject-matter of the charge. But when the existence of these acts has been established by evidence aliunde and the only question which remains to be decided is whether they were done accidentally or intentionally or with a particular knowledge or intention, then and then only could the evidence of other similar acts be let in, provided: (a) it was shown that such acts were of the same specific kind, and (b) they formed part of a series of occurrences in each of which the person committing the act was concerned.4 Evidence of a single act is admissible. One evidentiary fact can form a series, within the meaning of this section, with the act to be proved. It was, no doubt, held in Amrita Lal's case,5 that the acts tendered must have been proximate in point of time to that in question, but the decision in Rex v. Rhodes,6 shows that this question of proximity relates rather to the weight to be given to the evidentiary facts than to their admissibility. It is, however, plain from all the decisions that the acts of which evidence is tendered must be of the same specific kind as that in question.7 This section must be read as subject to section 14, so far as evidence

Emperor v. Debendra Prasad, I.L.
 R. 36 Gal. 573: 9 C.L.J. 610: 13 C.W.N. 973.

Raghunath v. R., 1919 Cal. 1084;
 46 I.C. 696: 19 Cr. L.J. 781; 22
 C.W.N. 494.

^{2.} Amrita v. Emperor, 1916 Cal. 188: I. L. R. 42 Cal. 957: 29 I.C. 513 (in which it was said that R. v. Holt, (1860) Bell C.C. 280: 8 Cox. C.C. 411 is no longer of authority); R. v. Harjivan Valji, 1926 Bom. 231: I.L.R. 50 Bom. 174: 98 I.C.

Emperor v. Debendra Prasad, I.
 L.R. 36 Cal. 578 followed in Emperor v. Yakub Ali, 1971 All, 251: 89 I.C. 678: 18 Cr. L. J. 529: 15 A.L.J. 241.

^{4.} M.L. Pritchard v. Emperor, 1928

Lah. 382: 112 I.C. 850: 30 Cr.

^{5.} Amrita Lal Hazra v. Emperor, A. I.R. 1916 Cal. 188; I.L.R. 42 C. 957; 29 I.C. 513.
6. (1899) 1 Q.B. 77; 68 L.J.Q.B. 83; 79 L.T. 360; 15 T.L.R. 37;

⁴⁷ W.R. 121: 62 J.P. 774: 19 Cox. C.C. 182.

C.C. 182.

7. A.H. Gandhi v. The King, 1941 R. 324: 1941 R.L.R. 566 relying on Rex v. Bond, (1906) 2 K.B. 389: 75 L.J. K.B. 693: 95 L.T. 296: 21 Cox C.C. 252; and Rex. v. Armstrong, (1922) 2 K.B. 555: 91 L.J.K. B. 904: 16 Cr. App. R. 149: 127 L.T. 221; In Moti Lal Roy v. Panchbibi Industrial Bank, Ltd., 1946 Cal. 440: 223 I.C. 481: 50 C.W.N. 457 it has been held that C.W.N. 457 it has been held that

of knowledge and intention is concerned. The fact that a man is generally dishonest, generally malicious, generally negligent or criminal in his proceedings, does not bear with sufficient directness on his conduct on any particular occasion, or as to any particular matter, to make it a safe guide for interpreting his conduct; what is wanted is a fact which will throw light on his motives and state of mind with reference to that particular occasion or matter.8 So evidence of other incidents may be admissible to show that the administration of poison in the particular case was intentional and not accidental, if the administration of the poison by the accused is otherwise established.9 The words of Sec. 15, Evidence Act, are wide for the material word used is "concerned", but they are not so wide as to admit hearsay evidence or the evidence of facts alleged to have been discovered by the investigating Police Officer in the course of his investigation and not properly proved.10

3. Accident or intention. A distinction must be made between accident and intention. In R. v. Harrison-Owen,11 the appellant was found in a dwelling-house about 1 o'clock in the morning. At his trial for burglary, he pleaded by way of defence that he had no recollection of entering the house and must have done so in a state of automatism. The trial Judge had admitted the evidence of past convictions in view of this defence that has been raised—that there was no intention in the act from start to finish, and that his presence in the house was purely accidental.12 Lord Goddard, C. J., delivering the judgment of the Court of Criminal Appeal, described this as a confusion of intention and accident, the real defence here being, not that the act was accidental, but that it was involuntary. Lord Goddard differentiated between a defence which is in substance 'I did not do the act, but I did it involuntarily.' In the former case the issue is causation; in the latter it is state of mind. In the former case, the defence is accident; in the latter it is the absence of intention. In the former case, the defendant contends that his activities played no (or inadequate) causative part in bringing about the facts constituting the crime.

These two classes of cases should be kept completely distinct, because the reasons for which the admissibility of similar fact evidence might be justified are very different in the two cases. The basis of admissibility of such evidence on the issue of accident is the improbability of the coincidence of many identical or similar accidents. This was clearly stated in R. v. Sims, 13although there the distinction between accident and intention was, as in so many of the decided cases, blurred. The relevance of similar fact evidence on the issue of intention, on the other hand, will usually be a relevance via propensity—the propensity to have a particular state of mind. Hitherto it has

in, these cases.

8. Gunwant v. Emperor, 1916 Nag.
73: 38 I.C. 723.

[&]quot;one instance cannot constitute a series of similar occurrences in the ordinary meaning of the language" and the cases of Amrita Lal Hazra v. Emperor, A.I.R. 1916 Cal. 188 and Emperor v. Panchu Das, A. I. R. 1920 Cal. 500. were relied upon in support of the proposition. But the question decided in the Rangoon case was neither raised, nor decided

^{9.} Ramsumiran v. Emperor, 1942 Pat. 291; 198 I.C. 662; Kashiram v. Emperor, 1923 Nag. 248; 73 I.C. 262.

^{10.} Shewaram v. Emperor. 1939 Sind 209: 184 I.C. 474.
11. (1951) W. N. 483: 35 Cr. App. R. 108: (1951) 2 All E.R. 726.

R. v. Harrison-Owen, (1951)
 E.R. 726, 727.

⁽¹⁹⁴⁶⁾ K.B., 531, 537: "The most familiar example (of admissibility) is when there is an issue whether the act of the accused was designed

not been made clear that cases of this sort are not catered for by the inclusionary part of Lord Herschell's formula. R. v. Harrison-Owen would seem to be authority for at least the proposition that this particular type of propensity to evidence is sometimes inadmissible.

4. Accident or system. Where the question was whether Z murdered A (her husband) by poison in September, 1848, the facts that B, C and D (Z's three sons), had the same poison administered to them in December 1848, March, 1849, and April, 1849, and that the meals of all four were prepared by Z, were held to be relevant to show that such administration was intentional and not accidental, though Z was indicted separately for murdering A, B and C, and attempting to murder D.14 This case and the case of R. v. Garner (supra) were discussed in R. v. Neill Cream15 when Hawkins, J., admitted evidence of subsequent administrations of strychnine by the prisoner to persons other than and unconnected with the woman of whose murder the prisoner was then convicted. Where A promised to lend money to B on the security of a policy of insurance, which B agreed to effect in an Insurance Company of his (A's) choice, and B paid the first premium to the company, but A refused to lend the money except upon terms which he intended B to reject, and which B rejected accordingly, it was held that the fact that A and the Insurance Company had been engaged in similar transactions was relevant to the question, whether the receipt of the money by the company was fraudu-lent. 16 But, in Noor Mohamed v. The King, 17 where the accused was tried for the murder of a woman named Ayesha, by poisoning her, evidence was admitted to show that the accused had previously murdered another woman named Gooniah, his wife, under similar circumstances. On appeal their Lordships of the Privy Council discussed the case-law and, dissenting from the decision of the Court of Criminal Appeal in Rex v. Sims,18 held that the admission of the evidence was not justified as there was no direct evidence in either case that the accused had administered the poison. Their Lordships, however, observed: "If the appellant (the accused) were proved to have administered poison to Ayesha in circumstances consistent with accident, then proof that he had previously administered poison to Gooniah in similar circumstances might well have been admissible,'

Where a prisonen was charged with the murder of her child by poison, and the defence was that its death resulted from an accidental taking of such poison, evidence to prove that two other children of hers and a lodger in her

(c) and note. 15. Cited in Steph, Dig., p. 20 note;

L.W. 530: 1949 M.W.N. 437. 18. (1946) 1 K.B. 531: 175 L.T. 72.

or accidental or done with guilty knowledge, in which case evidence is admissible of a series of similar acts by the accused on other occasions, because a series of acts with the self-same characteristics is unlikely to be produced by accident or inadvertence,"

^{14.} R. v. Geering, (1849) 18 L.J.M.C. 215 cited in R. v. Richardson, (1860) 2 F. & F. 343; R. v. Frances, (1874) 12 Cox. C.C. 612; Blake v. Albion Life Assurance Society, L.R. 4 C.P. D. 94, 102; see R. v. Garner, (1863) 3 F. & F. 681: R. v. Cotton, (1873)

¹² Cox, 400; R. v. Heesom, (1873) 14 Gox. 40; R. v. Roden, (1874) 12 Cox. 630; see Taylor, Ev., s. 328 and note and Steph, Dig. Art, 12 Illust,

Cited in Steph, Dig., p. 20 note; (1892) 116 C.C.G. Sess. Pa. 1417.
 Blake v. Albion Life Assurance Society L.R. 4 C.P.D. 94; Steph, Dig. Art. 12 Illust. (d), See R. v. Wyatt, (1904) 1 K.B. 188 cited in notes to last section.
 1949 P.C. 161: 53 C.W.N. 736: 62 L.W. 530: 1949 M.W.N. 437

house had died previous to the present charge from the same poison was held to be admissible.19 When a boy of twelve gets drowned in a tank, there is always a possibility that there has been an accident, but previous attempt to kill the boy would be admissible to rebut a suggestion of accidental drowning.20 Upon the trial of a prisoner for the murder of her infant by suffocation in bed, it was held that evidence tendered to prove the previous death of her other children at early ages was admissible, although such evidence did not show the causes from which these children died.21 Upon the trial of an indictment for using a certain instrument with intent to procure a miscarriage, it is relevant, in order to prove the intent, to show that at other times, both before and after the offence charged, the prisoner had caused miscarriages by similar means.22 In a trial for forgery, evidence of similar transactions not included in the charge is relevant as proof of intention though not as proof of the forgery.23 Under the trial of an indictment for arson where the prisoner was charged with wilfully setting fire to her master's house, it was held that two previous and abortive attempts to set fire to different portions of the same premises were admissible, though there was no evidence to connect the prisoner with either of them.24

But, in a prosecution, on a charge of arson under Sec. 436 of the Indian Penal Code, evidence of a previous act of arson, which could not have formed the subject of a criminal charge as there was no element of fraud in it, was held to be inadmissible.²⁵ But, where successive shops of the accused, each of them being insured, were burnt down in three successive years, it was held that the successive fire indicated that they were not accidental but were designed and evidence of previous fires was, therefore, admissible.¹

Where the plaintiff in an action for negligence alleged that he had contracted an infectious disease through the negligence of the defendant, a barber, in using razors and other appliances in a dirty and insanitary condition, and, in support of his case, he tendered the evidence of two witnesses who deposed that they had contracted a similar disease in the defendant's shop; it was held that as the negligence alleged was not an isolated act or omission, but was a dangerous practice carried on by the defendant, the evidence of those witnesses was admissible. Facts to establish that A and B have "hunted in couples" and in several instances taken part in thefts from rich prostitutes

R. v. Cotton, (1873) 12 Cox. 400;
 R. v. Geering, (1849) 18 L.J.M.
 C. 215 followed.

Emperor v. Shankaraya, 1940 Bom.
 365: I.L.R. 1940 Bom. 695: 191
 I.C. 272.

21. R. v. Roden, 12 Cox C. G. 630 following R. v. Cotton, supra, it was objected by the counsel for the prisoner, that the evidence admitted in R. v. Cotton, pointed direct to prior acts of poisoning, but in this case it was not proposed to prove that the four children died from other than natural causes: per Lush. J.; "The value of the evidence cannot affect its admissibility. The principle of R. v. Cotton, applies".

not affect its admissibility. The principle of R. v. Cotton, applies".

22. R. v. Dale, (1889) 16 Cox. 703; R. v. Bond, (1906) 21 Cox. 256, in which Lord Alverstone, C. J. said:

- "If R. v. Dale is to be construed to authorize the admissibility of evidence of prior acts of a similar kind where the act is admitted and the only question is the purpose for which it was done, it goes too far.
- 23. Krishna v. R., 1917 Cal. 676; 43 C. 783; 33 I. C. 306; Kedarnath v. Emperor, 1935 All. 521; I.L.R. 1935 All. 639; 157 I.C. 557.

24. R. v. Bailey, (1847) 2 Cox. C. C. 311.

A.H. Gandhi v. The King, 1941 R.
 1941 R.L.R.
 566.

 Nural-Amin v. Emperor, 1939 Cal. 335; I.L.R. (1939) 1 Cal. 511; 182 I.C. 386.

I.C. 386.
 Hales v. Kerr, (1908) 2 K.B. 601;
 T. L. R. 779.

that is, a series of incidents from 1914 to 1918 to establish that they have lived together and had transactions together, that a system had been followed by them, that they used to go about together under different names, and had associated together with an evil motive namely, the commission of thefts from rich prostitutes, were sought to be given in evidence. Held (Chaudhuri, J., dissenting) that such evidence was not admissible either under Sec. 14 or under Sec. 15 of the Evidence Act. The gist of this section is that unless there is sufficient and reasonable connection between the fact to be proved and the evidentiary fact that is, unless there is in substance some common link, they cannot form a series. Evidence of general disposition, habit and tendencies is not relevant. Evidence of collateral offences cannot be received as substantive evidence of the offence on trial, though, under this Section, evidence may be given of intention and like matters, where the factum of such intention on like matters is relevant. The admissibility, not merely the weight of the evidence, depends upon the evidence of such conduct as would authorize a reasonable inference of a systematic pursuit of the same criminal object.3

Where, in a prosecution for misappropriation of money by defalcation of accounts, evidence of previous acts done by the accused was adduced, it was held that the evidence was admissible under this section to rebut, by anticipation, the probable plea of mistake or innocent condition of mind, the evidence being that of a system in which there was a common link between the previous and subsequent acts.4 But, where, in a prosecution of a public servant for criminal breach of trust under Sec. 409 of the Indian Penal Code, the accused pleaded that he paid the amount in dispute bona fide to wrong persons under a misapprehension, and the prosecution tendered evidence of other transactions in which they alleged that the accused appropriated sums of money out of the fund entrusted to him to his own use, it was held that the evidence was not admissible.

If the evidence is relevant under section 14 ante or this section, merely because it might show previous misconduct of the accused, it is not inadmissible by virtue of section 54 post which does not control the other sections.6

In assessing the value of medical evidence in a case, what the doctor had done in the matter of grant of a certificate in another case is irrelevant.7

5. Knowledge and intention. It is wrong to say that this section only deals with intention as opposed to accident.8 The words "or done with a particular knowledge or intention" in the section9 must not be overlooked in construing the section.10

^{3.} R. v. Panchu Das, 1920 Cal. 500: I.L. R. 47 Cal. 671: 58 I.C. 929 (F.B.)

Ram Kishan v. Emperor, 1928 Lah. 880: 11 I.C. 387: 29 Cr. L.J. 835.

C.C. Lloyd v. Emperor, 1933 Cal. 136; 142 I.C. 274; 1933 Cr. L.J.

Lakshmandas v. The State, 69 Bom L.R. 808; 1968 Cr. L.J. 1584; A. I.R. 1968 Bom, 400, 422 following Srinivas Mal v. Emperor, A. I. R.

¹⁹⁴⁷ P.C. 135. 7. Dariyao v. State, 1969 Cr. L. J. 1273

at p. 1276 (All.).

8. As was done in R. v. Alloomiya,
I.L.R. 28 Bom. 129: 5 Bom.L.R.

^{9.} Abded by S. 2 of Act, 3 of 1891.

^{10.} Per Chaudhuri, J., in R. v. Panchu Das, 1920 Cal. 500 at 511; I.L.R. 47 Cal. 671: 58 I.C. 929 (F.B.).

In State of Bihar v. Kailash Prasad, 11 it was contended that the previous instances of user of the chalans could not be taken into consideration as they formed the subject of another charge, namely, the charge of conspiracy which had to be decided in that very case. But the contention was repelled on the ground that similar facts which were subject of prior indictments can be taken into consideration as relevant under this Section, and that this applies also to separate indictments still to be tried. It was said that there was no warrant for the view that the other instances cannot be used in regard to the accused's knowledge of the nature of the main fact for which specific charges had been framed, simply because those other instances formed the subject of separate indictments, which were tried simultaneously. Reference was made to Amrita v. Emperor,12 Emperor v. Panchu Das,13 Srinivas v. Emperor,14 and it was held that the evidence that the respondents were connected with similar cases of user of forged chalans was admissible to prove their knowledge and intention in regard to the cases for which specific charges were framed against them,

6. Illustrations. Illustration (a). This illustration is founded on the case of R. v. Gray.18

Illustration (b).-This illustration is founded on R. v. Richardson. 16

Illustration (c).—This illustration is very like illustration (b) to Sec. 14. The one speaks of possessing, the other of passing, false coins. The presumption is the same.17 In a case of specific charges of user of forged document, evidence of similar is ances of user is admissible to prove knowledge and intention.18

16. Existence of course of business when relevant. When there is a question whether a particular act was done, the existence of any course of business, according to which it naturally would have been done, is a relevant fact.

Illustrations

(a) The question is, whether a particular letter was despatched.

The facts that it was the ordinary course of business for all letters put in a certain place to be carried to the post, and that that particular letter was put in that place are relevant.

- (b) The question is, whether a particular letter reached A. The facts that it was posted in due course, and was not returned through the Dead Letter Office, are relevant.
 - s. 3 ("Relevant."). s. 3 ("Relevant".).

s. 114, illust, (f) ("Presumption as to course of business").

^{11.} A.I.R. 1961 Pat. 451: 1961 B.L. J.R. 411. I.L.R. 42 C. 957.

^{13.} I.L.R. 47 C. 671: A.I.R. 1920 C.

^{500.} I.L.R. 26 Pat. 460: A.I.R. 1947

^{(1866) 4} F. & F. 1102, the authority of which is doubted in Steph, Dig.

Art. 12, note, and see Norton, Ev., 140, 141: but see contra. R. v. Vajiram. 16 B. 414. (1860) 2 F. & F. 343: Steph Dig. Art.

^{16.}

^{12.} illus. (b).
17. Norton, Ev., 140.
18. State of Bihar v. Kailash Prasad, A.J.R. 1961 Pat. 451.

Steph. Dig., Art. 13; Powell, Ev., 9th Ed., 316-323; Norton, Ev., 141; Roscoe, N. P. Ev., 43, 213, 374; Phipson, Ev., 11th Ed., 132; Taylor, Ev., ss. 176-182; Field, Ev., 6th Ed., 82; Best, Ev., s., 403; Cunningham, Ev., 121; Wigmore, Ev., s. 92.

SYNOPSIS

- Principle.
- 2. Course of business.

- 3. Postal and Telegraphic service.
- 4. Endorsement of refusal,
- 1. Principle. Evidence of the existence of the course of business is relevant, as laying a foundation for the presumption which the Court may raise from the course of business, when proved. The Court may then presume that the common course of business has been followed in the particular cases,19 and this presumption is but an application of the general maxim omnia praesumuntur rite esse acta, and proceeds the well-recognized fact that the conduct of men in official and commercial matters is to a very great extent uniform. In such cases, there is a strong presumption that the general regularity will not, in any particular instance, be departed from. Customs may, like any other facts or circumstances, be shown, when their existence will increase or diminish the probabilities of an act having been done or not done, which act is the subject of contest.20 It would seem to be axiomatic that a man is likely to do, or not to do, a thing, or to do it, or not to do it in a particular way, according as he is in the habit of doing or not doing it.21 But the course of business must be clearly made out in order to establish that connection between the facts proved and sought to be proved which is the foundation of the presumption,22
- 2. Course of business. As to the meaning of the words "course of business," see notes to the second clause of thirty-second section, post. This section relates to private as well as public offices. Illustration (a) relates to the former; illustration (b) to the latter, namely, the post office itself.23 Where it was sought to prove that a certain endorsement had been made on a (lost) licence entered at the Custom House, it was held to be relevant to show that the course of office was not to permit the entry without such endorsement.24 And where the question was whether A paid B his wages, it was held relevant that A's practice was to pay all his workmen regularly every Saturday night; that B was seen with the rest waiting to be paid and had not

- 20. Walker v. Barron, 6 Minn, 508, 512
- (Amer). 21. State v. Railroad, 52 N.H. 528, 532 (Amer) per Sargent, C.J.: see Wigmore, Ev., s. 92. 22. See Cunningham, Ev., 121.

- 23. Norton, Ev., 141.
 24. Butler v. Allnut, (1816) 1 Starkie
 222; Phipson, Ev., 9th Ed., 111; Taylor, Ev., s. 180 A; see also Van Omeron v. Dowick. (1809) 2 Campt. 42; Waddington v. Roberts, (1868) L. R. 3 Q.B. 579; Mason v. Wood, (1875) 1 C.P.D. 63.

^{19.} S. 114, illus, (f), post: the matter dealt with by this section is treated by English text-writers under the subject of presumption:—The ordinary course of business is proved and the Court is asked to presume that, on the particular occasion in question there was no departure from the ordinary and general rule; see authorities cited, supra. Dwarka v. Jankee, (1855) 6 M.I.A. 88 ("It is reasonable to presume that that which was the ordinary course was pursued in this case").

afterwards been heard to complain.25 So also where the demand was for the proceeds of milk sold daily to customers by the defendant as agent to the plaintiff, and it appeared that the course of dealing was for the defendant to pay the plaintiff, every day the money which she had received, without any written vouchers passing between them, it was ruled that it was to be presumed that the defendant had in fact accounted, and that the onus of proving the contrary lay on the plaintiff.1 Where evidence was admitted of a book-keeper's custom of handing over collateral notes to the teller as indicating that it was done in this instance. Sherwood, J., said:

"It is really immaterial whether he was able to do more than to verify his entries and prove his invariable custom. These things being proved, the presumption arises therefrom that the usual course of business was pursued in this particular instance. Every one is presumed to govern himself by the rules of right, reason and consequently that he acquits himself of his engagements and duty. Whenever it is established that one act is the usual concomitant of another, the latter being proved, the former will be presumed; for this is in accord with the experience of common life. It is simply the process of ascertaining one act from the existence of another."2

Where a bank used to keep at the end of each day its cash box in sealed condition in the Police Station, and it was stolen from the Station, the bank tendered in evidence its cash book and the detailed book of accounts to show the sum which was put into the box; it was held that the evidence was admissible and there was no difficulty in holding that the amount was in fact in the box 3

Where it is proved that an injunction was granted the presumption is that the injunction was not only issued, but, has also been duly served.4

Registration is a solemn act, to be performed in the presence of a competent official appointed to act as Registrar, whose duty it is to attend the parties during the registration and see that the proper persons are present, are competent to act, and are identified to his satisfaction; and all things done before him in his official capacity and verified by his signature will be presumed to be done duly and in order. Of course it may be shown that a deliberate fraud upon him has been successfully committed; but this can only be by very strong evidence.5 Hence the certificate endorsed on a sale-deed by a registering officer under Sec. 60 of the Indian Registration Act is a relevant piece of evidence for proving the execution of the sale-deed.6 Where there is evidence that certain land was attached, it ought, in the absence of any evidence to the contrary, to be presumed that all necessary formalities were complied

^{25.} Lucas v. Novosillieski, (1795) 1 Esp. 296; Phipson, Ev., 11th Ed., (135); Roscoe, N. P. Ev. 37; and see Sellen v. Norman, (1829) 4 C. &

Evans v. Birch. (1811) 3 Campt.
 Roscoe, N.P. Ev. 37.
 Mathias v. O'Neil, 94 M. O. 527;

⁶ S.W. 253, (Amer).

B. C. Co-op. Bank v. State. A. I.
 R. 1959 M.P. 77.
 Bhairon Prasad v. Mahant Laxmi Narayan Das. 1924 Nag. 385; 79 I.

Gangamoyi v. Troiluckhya, 33 I.A.
 I.L.R. 33 Cal. 537.

^{6.} Piara v. Fattu, 1929 Lah. 711: 116 I.C. 911.

with.7 Where the question was when a particular letter was received by the defendant and the evidence was that the letter was given by the plaintiff on a particular day to his peon to deliver it to the defendant, that the invariable practice followed by the peon was to despatch a letter either on the day on which he received it or the next day, or else to return it to the plaintiff's office, and that the entry in the peon-book showed that it was received by the defendant, but there was no date of the receipt, it was held that the Court could presume that the letter was received by the defendant either on the date when it was despatched or the next day.8

It was held by the Rajasthan High Court that a typewritten reply to plaintiff's notice received by post, purporting to be from the defendant may be presumed to be on behalf of the defendant. It is submitted that it will be a highly risky presumption unless the circumstances justify it.

3. Postal and telegraphic service. The fixed methods and systematic operation of the postal and telegraphic service is evidence of due delivery of matter placed for that purpose in the custody of the proper authority. If a letter properly directed10 is proved to have been either put into the post office or delivered to the postman,11 it is presumed, from the known course of business in that department of the public service, that it reached its destination at the regular time, and was received by the person to whom it was addressed.12 If an insurance policy is sent to a person by post at his proper address, the law presumes that it must have reached him; see Illustration (f) to section 114 post.13 The presumption would apply with still greater force to letters which the sender has taken the precaution to register, and is not rebutted but strengthened by the fact that a receipt for the letter is produced, signed on behalf of the addressee by some person other than the addressee himself.14 But see Bank of Bihar v. T. S. D. (C. S.) Cal. Ltd.,15 where it has been held that the

^{7.} See Sec. 114 post; Mohammad Akbar v. Mian Musharaf, 1934 P.C. 217: 61 I.A. 371; I.L.R. 15 Lah. 886; 115 I.C. 221: see also Dhanpati Devi v. The Corporation of Cal-cutta, 1952 Cal. 467: I.L.R. (1952) 2 Cal. 321: 55 C.W.N. 751. 8. Smt. Sailabala Dassee v. H. A. Tap-

passier, 1952 Cal. 455.

Nathuram v. Firm Bhonreylal Hıra-lal & others, 1971 Rent C. J. 220: 1970 W.L.N. 254: I.L.R. 21 Raj. 472.

See Walter v. Haynes, (1824) Ray
 M. 149; Burmester v. Barron, (1852) 17 Q.B. 828: Taylor, Ev., s. 179, no inference should be drawn from posting of a letter that it was properly addressed. Ram Das v. The Official Liquidator. (1887) 9 Å. 366, 384.

^{11.} Skilbeck v. Garbett, (1845) 7 Q.B.

^{12.} Harihar Banerji v. Ramshashi Roy, 1918 P. C. 102: 45 I.A. 222: 1. L.R. 46 Cal. 458: 48 I.C. 277: 15 A.L.J. 969: 21 Bom L.R. 522:

³⁵ M.L.J. 707: 9 L.W. 148 (F. C.): Hiralal Sahu v. Lachmi Prasad Narain Singh, 1927 Pat. 311: 102 I.G. 752: Best., Ev., s. 403: Taylor Ev., S. 179, and cases there cited; Saunderson v. Judge, (1795) 2 H.B.L. 509; Woodcock v. Houldsworth. (1846) 16 M. & W. 124
Warren v. Warren, (1834) 1 C.M.
& R. 250. "If a letter is sent by
the post it is prima facie proof
until the contrary be proved that
the party to whom it is addressed received it in due course, per Parke. B. in Warren v. Warren supra; Loolf Ali Meah v. Pearee Mohan, (1871) 16 W.R. 223; (if a letter is forwarded to a person by post duly registered it must be presumed that it was tendered to him) see also S. 14 ante; see presumption as to post letters summarised in Powell,

Ev., 94.

13. Mohan Lal v. Kumari Babbi,
Punj L.R. 578, 583.

^{14.} Harihar Banerji v. Ramshashi Roy,

evidence of a general clerk, whose duty was to make over the cover containing drafts to a peon of the office for posting, that the particular letter was brought to him in an envelope, that he had the envelope sealed in his presence and made it over to the peon for posting, is not sufficient to prove the posting of that letter, in the absence of the evidence of the peon.16

Again, if letters or notices properly directed to a gentleman be left with his servant, it is only reasonable to presume, prima facie, that they reached his hand...17 The fact, too, of sending a letter to the post office will, in general, be regarded as presumptively proved, if the letter be shown to have been handed to, or left with the clerk, whose duty it was in the ordinary course of business to carry it to the post, and if he can declare that, although he has no recollection of the particular letter, he invariably took to the post office all letters that either were delivered to him, or were deposited in a certain place for that purpose.18 Upon the settlement of the list of contributories to the asses of a company in course of liquidator, one of the persons named in the list denied that he had agreed to become a member of the company or was liable as a contributory. The District Court admitted, as evidence on behalf of the official liquidator, a press-copy of a letter addressed to the objector, for the purpose of proving that a notice of allotment of shares was duly communicated. No notice to the objector to produce the original letter appeared on the record; but, at the hearing of the appeal, it was alleged by the official liquidator, and denied by the objector that such notice had been in fact given. There was no evidence as to the posting of the original letter, or of the address which it bore; but the press-copy was contained in the press-copy letter-book of the company, and was proved to be in the handwriting of a deceased Secretary of the company whose duty it was to despatch letters after they had been copied in the letter book. The objector denied having received the letter or any notice of allotment; it was held that the Court should not draw the inference that the original letter was properly addressed or posted; that the press-copy letter-book was inadmissible in evidence; and that there was no proof of the communication of any notice of allotment.19

A notice under section 106, Transfer of Property Act, 1882 (4 of 1882), sent by registered post, returned with the endorsement of refusal (Inkari Wapas Hai) must be deemed to have been served. The circumstances in which the presumption will stand rebutted would vary from case to case and a mere denial may not be sufficient.20

See also Hulas v. Allahabad Bank, A.I.R. 1958 Cal. 644.

himself or another clerk; it was held that this was not sufficient evidence of putting into post: Hawkes v. Salter, (1830) 4 Bing. 715; see Roscoe, N. P. Ev., 574 and Toasey v. Williams, (1827) 1 M. & M. 129: Chuni Lal v. Hartford Fire Insur-

Chuni Lal v, Hartford Fire Insurance Co., A.I.R. 1958 Punj. 440.

19. Ramdas v, The Official Liquidator, (1887) 9 A. 366.

20. Budhu v. Kamala, 1968 A.L.J. 707; 1968 A.W.R. (H.C.) 507 Ganga Ram v. Phulwati, A.I.R. 1970 All. 440 (F.B.); Saeed Ahmed v. S.Q. Ali, A.I.R. 1973 All. 24: 1972 A.W. R. 628: Pakhar Singh v. Kishan R. 628; Pakhar Singh v. Kishan Singh, A.I.R. 1974 Raj. 112.

Macgregor v., Keily, (1849) 3 Ex., 794; Taylor, Ev., s. 182; Powell, Ev.

^{18.} Taylor, Ev., s. 182 and cases cited there and ante Skilbeck v. Garbett, (1885) 14 L.J.Q.B. 338; Hetherington v. Kemp, (1815) 4 Camp. 193; Trotter v., Maclean, (1875) 13 Ch. D. 580; Ward v. Londesborough Ltd. (1852) 12 C.B. 252. To prove the sending of a notice by post the plaintiff's clerk was called who stated that a letter containing the notice was sent by post on a Tues-day morning, but he had no recollection whether it was put in by

4. Endorsement of refusal. Where a registered letter is posted to a firm's correct address but is returned with the word 'refused' endorsed upon it, the presumption under this section in favour of the existence of common course of business is that the letter reached the firm's place of business and it may also be presumed that it was refused by an agent or partner of the firm.21 When a registered letter, which is properly addressed, comes back with the endorsement of refusal made by the postal peon, the ordinary presumption which arises in the case of service by registered post under Section 27 of the General Clauses Act and Sections 114 and 16 of this Act is available to the sender who can rely on the endorsement of refusal for proof of the fact that the letter had been duly delivered, but the addressee refused to accept the letter. Even if the addressee denies on oath that the letter was ever received by him or refused by him, this denial by itself does not rebut the normal presumption.22

Where a notice to quit was sent by registered letter the posting of which was proved, and which was produced in Court in the cover in which it was despatched, that cover containing the notice with an endorsement upon it purporting to be by an officer of the post office stating the refusal of the addressee to receive the letter, it was held, that this was sufficient service of notice.23 Illustration (b) to this section only means that each of the facts, namely, posting of a letter and the non-return of the original from the Dead Letter Office, is relevant. It cannot be read as indicating that, without a combination of these facts, no presumption as to receipt of the letter can arise. Indeed this section, with the illustrations thereto has nothing to do with presumptions but only with relevance.24 Where an acknowledgment due registered letter is received back by the sender with the endorsement "refused", even if the author of the endorsement is not examined as a witness, the presumption is that the postal employee duly observed the regular course of duty. The presumption is one of fact, and the Court may refuse to raise it if the material on record or the circumstances of the case raise any doubt.25

The question whether a presumption can be drawn as to the due delivery of a letter by post must depend on the particular circumstances of each case.1 In Gobinda Chandra Saha v. Dwarka Nath Patita,2 it was held that an en-

21. Louis v. Vishindas & Co., 50 I.C. 194: 12 S.L.R. 142: A.J.R. 1919 S. 66 (2); Balbhadar v. C.I.T. Punjab A.I.R. 1957 Punj. 284.

22. Sarkar Estates (Private) Ltd., v. Kusumika Iron Works (Private) Ltd. A.I.R. 1961 C. 489; Saeed Ahmed v. S.Q. Ali, A.I.R. 1973 All. 24; Pakhar Singh v. Kishan Singh, A.I.R. 1974 Raj. 112.

23. Jogendro v. Dwarka, (1888) 15 C. 681; see also Loolf Ali Meah v. Peresse Makes. (1871) 16 W. P. 202.

aree Mohan, (1871) 16 W.R. 223; Durganath v. Rajindra Narain, 17 C. 20 I. C. 263; lra v. Kishore W. N. 1073: Chandra Mohan, 1920 Cal. 287 (2): 54 I.G. 5; Hari Pada v. Joy Gopal, 39 C.W.N. 934: Nirmala Bala v. Provat Kumar, 52 C.W.N. 659, Sher Afzal v. Mohan Lal, 1926 Lah. 520:

94 I.C. 103; Bachcha Lal v. Lachman, 1938 All. 388: 176 I.C. 393: 1938 A.L.J. 511; Raunaq Ram v. Prabhu Dayal, 1980 Lah. 489: 121 I.G. 382; Loius v. Vishin Das & Co., 1919 Sind 66 (2): 50 I.C. 194.

24. Mobarik Ali Ahmed v. State of Bombay, A.I.R. 1957 S.C. 857: 1957 Cr. L.J. 1346: 1958 All. W.R. (H.C.) 112: 61 Bom. L.R. 49: 1958

N.L.J. (Cr.) 42.

25. Jogal Kishore v. Bombay Revenue Tribunal, 60 Bom. L.R. 1075: I. L.R. (1959) Bom. 123: A. I. R. 1959 Bom. 81.

1. Ma Me Shin v. R.M.R.M.N. Chettyar Firm, 1933 R. 76: 146 I.C. 422; Girish Chandra v. Kishore Mohan, 1920 Cal. 287 (2): 54 I.C. 5. 2. 1915 Cal. 313: 26 I.C. 962: 20 C.L.

J. 455; 19 C.W.N. 489.

dorsement on the cover of a letter by a postal peon, that the cover was tendered to the addressee on a certain date and was refused, was at best a record of a statement by the peon and the events recited therein must be proved by calling him as a witness, unless the statement became admissible under Sec. 32 (2), or Sec. 33, Evidence Act applied. Without such proof of the endorsement it was not admissible. Similarly, in Vaman Vithal Kulkarni v. Khanderao Ram Rao,3 it was held, that the postal endorsement of refusal of a letter was not proved as the postman who took the letter and brought it back was not called. But in Kodali Bapayya v. Yadavalli Venkataratnam,4 a bench of the Madras High Court reviewed the case-law and, dissenting from the above ruling of the Bombay High Court, held that the postal endorsement is admissible as evidence even if the postman is not examined, and that, unless rebutted, it would be sufficient service of the letter.

Where, however, the person to whom the notices were stated to have been tendered denies that they were tendered to him, the Court is competent to consider the circumstances and to hold that under the particular circumstances of a case, the denial was sufficient to rebut the presumption 5

Postmarks on letters-when capable of being deciphered-are prima facie evidence that the letters were in the post at the time and place therein specified.6 The postmark on a letter has been admitted as evidence of the date of its being sent7 but a postmark may be contradicted by oral evidence of the real date of posting.8 The presumption, in the case of the post office, that a letter properly directed and posted will be delivered in due course,9 will be extended to postal telegrams and now the inland telegrams form part of the Government postal system.10

In certain cases, special provision has been made by statute with respect to matters with which this section is concerned. Thus, in the case of documents served by post on companies, in proving service of such a document it is sufficient to prove that it was properly directed, and that it was put as a registered letter into the post office.11

5. Saila Bala Dasi v. Atul Krishna Mondal, 1948 Cal. 63: 82 C.L.J. 9.

Mondal, 1948 Cal, 63: 82 C.L.J. 9,
6. Fletcher v. Braddyall. (1821) 3
Stark R. 64: Stocken v. Collin,
(1841) 7 M. & W. 515; R. v. Johnson, (1829) 2 C. & K. 355; Taylor.
Ev., s. 179 and cases there cited:
Powell Ev., 94; Wigmore, Ev., s. 95.
7. Abbey v. Lill, (1829) 5 Bing 299;
R. v. Plumer, (1814) R. & Ry. 264;
Kent v. Lowen, (1808) 1 Camp. 177;
Roscoe, N. P. Ev., 213, 214 and
Steph. Dig. Art. 12, illus. (a): a
letter is presumed to have arrived

at its destination at the time at which it would be delivered in the ordinary course of postal business; Stocken v. Collin, 7 M. & W. 515. Powell, Ev., 95.

Stocken v. Collin, supra. Burr. Jones, Ev., s. 46.
 British and American Telegraph,

Co. v. Colson, (1871) L.R. 6 Ex. 108 per Bramwell, B.

10. Roscoe, N.P. Ev., 43; see also as to the Telegraphic messages, S. 88,

11. S. 596 of Act 1 of 1956 (Companies). If a notice given under the Negotiable Instruments Act (XXVI of 1881), s. 94 is duly directed and sent by post, and miscarries, such miscarriage does not render the notice invalid.

 ¹⁹³⁵ Bom. 247: 156 I.C. 1020; 87 Bom. L.R. 376.
 1953 Mad. 884; I.L.R. 1953 Mad. 31: (1952) 1 M.L.J. 227: 65 M.L. W. 172: Kunhabdulla v. Krishnan, A.I.R. 1957 Ker. 33.

ADMISSIONS

GENERAL

SYNOPSIS

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- 19. Weight to be given to admissions.
- 1. Principles. The following sections (i.e. Secs. 17-31), exhaustively12 deal with the subject of admissions and confessions which have been generally said to form exceptions to the rule which excludes hearsay. This is not entirely correct. Admissions are sometimes used as merely discrediting a party's statement by showing that he has on other occasions made statements inconsistent with the case afterwards set up. Their effect, in such a case, is merely destructive. It is their inconsistency with the party's present claim that gives them logical force and not their testimoney of credit. For, in such cases, the truth of the admission is not relied on, and therefore they are not obnoxious to the hearsay rule.13 In effect broadly, it may be stated, that anything said by a party may be used against him as an admission, provided it exhibits the quality of inconsistency with the facts now asserted by him in pleadings or testimony. It follows that the subject of an admission is not limited to facts against the party's interest at the time; for though the weight of credit to be given to such statements is increased where the fact stated is against the person's interest at the time, that circumstance has no bearing upon their admissibility.14 An admission, in the legal sense, is not always an admission in the popular sense, i.e., a statement which, at the time it was made, was against the real or apparent interest of the party.15 But an admission may also state facts against interest, as where it admits a claim or a fact relied on by the adversary. In such cases, the admission is used as evidence of the truth of its contents and as possessing an evidentiary force per se. It is then equivalent to affirmative testimony for the party offering it. Admissions, in such cases, have a testimonial value independent of the contradiction; and, being

in the 11th Ed.

Baz Bahadur v. Raghubir, 1927 All.
 385: I.L.R. 49 All. 707: 100 I.G. 1037: 25 A.L.J. 572.

^{13.} Wigmore, Ev., s. 1048 et. seq.

Wigmore, Ev., s. 1048, et. seq.
 Phipson, Ev. 9th Ed. 230, omitted

the statements of persons not witnesses, form exceptions to the hearsay rule. In this sense it has been said that:

"The general rule is, that every material fact must be proved by testimony on oath. There is an exception to that rule, namely, that the declarations of a party to the record, or of one identified in interest with him, are as against such party, admissible in evidence."16

The statements which are the subject of these sections are admitted, firstly, as informative of the case made, and secondly, when amounting to proof for the adversary, because in respect of the persons making them, there is some security for their accuracy which countervails the general objections to hearsay testimony. An admission is only relevant against the person who makes it or his representative in interest.17 This is only a branch of the general one that a man shall not be allowed to make evidence for himself.18 But, as universal experience testifies that, as men consult their own interest, and seek their own advantage, whatever they say or admit against their interest or advantage may, with tolerable safety be taken to be true as against them, at least until the contrary, appears. Where, in a petition, there is an advertent admission19 as to the nature of certain property, it is open to both sides to give evidence as to whether the person who made the admission was or was not acquainted with the incidents of the property when he made the statement.20

2. Definition of Admission. An admission has been defined to be a statement, oral or documentary, which suggests any inference as to any act in issue or relevant fact, and which is made by any of the persons and under the circumstances in the following sections mentioned.21 In English law the term 'admission' is usually applied to civil transactions, and to those statements of fact in criminal cases which do not amount to acknowledgments of guilt, or which do not suggest the inference of guilt; the term 'confession' being generally restricted to acknowledgments of guilt or statements which suggest the inference of guilt.22

An admission is a confession of voluntary acknowledgment made by a party or someone identified with him in legal interest of the existence of certain facts which are in issue or relevant in issue with the case. The predominant characteristic of this type of evidence consists of its binding character.

Admissions are broadly classified into two categories, (a) judicial, and (b) extra-judicial. The former are formal admissions by a party during the proceedings of the case. The former admissions are fully binding on the party making them. They constitute a waiver of proof (vide S. 58). Extra-judicial or informal admissions are also binding on the party against whom they are set up. But they are binding only partially except in cases where they ope-

^{16.} Spargo v. Brown, (1829) 9 B, & C.

^{935, 938,} per Bayley, J. 17. S. 21 and notes thereto, post; the exceptions to this rule are contained in S. 21, cls (1), (2): The admissibility of books of account under S. 34 is also an instance of statements made by person being offer-ed on his own behalf. An admission may further be proved on be-

half of a party if it is relevant otherwise than as an admission. S.

^{21.} cl. (3). 18. Best, Ev., s. 519. 19. Best, Ev., s. 519, Taylor, Ev., s. 723. Dinabandhu Nandi v. Mannu Lai Parik. 1919 Cal. 335: 52 I.C. 443.

^{21.} S. 17, post: see Wills, Ev. 2nd Ed.

^{22.} Taylor, Ev., 724.

rate as, or have the effect of, estoppel, in which cases, again, they are fully binding and constitute the foundation of the rights of the parties.23 .

- 3. "Statement". The word "statement' has been used in sections 17 to 21, 32, 39 and 145 in its primary meaning of "something that is stated" and communication is not necessary in order that it may be stated.24 The word has not been defined in the Act. Therefore, one has to go to the dictionary meaning in order to discover what it means. Assistance may also be taken from the use of the word in other parts of the Act to discover in what sense it has been used therein. The primary meaning of the word "statement" is "somthing that is stated"; "written or oral communication". Although a statement may be made to someone in the sense of a communication, yet that is not its primary meaning. The word has been used in a number of sections of the Act in its primary meaning of "something that is stated." That meaning should be given to it unless there is something that cuts down that meaning for the purposes of any section. Words are generally used in the same sense throughout in a statute unless there is something repugnant in the context.25
- 4. Admission by conduct. Besides admission, written and oral, a party may make admissions by his conduct. These are not mentioned in the seventeeth section, as they have already been dealt with in the eighth section. ante. Admissions by assumed character, conduct, silence, and the like are not exceptions to the hearsay rule; they are usually original circumstantial evidence of the facts to which they relate.1

Confessions, like admissions in civil cases, may be inferred from the conduct of the prisoner and from his silent acquiescence in the statements of others, made in his presence, respecting himself.2

Analogous to admissions by conduct is the rule which treats, as admissions by a party, statements made in his presence and not denied by him, provided the circumstances were such as to make a denial necessary or appropriate.3

Conduct is not statement and the statements mentioned in various returns filed under section 59 of the Bihar Hindu Religious Trusts Act, 1950 (Act 1 of 1951) are not such as to amount to an admission of the fact that the trust in question is a public trust.4 Mere conduct is not admission as defined in this section.8

23. See Ajodhya Prasad Bhargava v. Bhawani Shankar Bhargava, A.I.R. 1957 All, 1: I.L.R. (1956) 2 All. 399 (F.B.).

Bhogilal Chunnilal Pandya v. State of Bombay, A.I.R. 1959 S.C. 356; 1959 Cr. L.J. 389; (1959) Andh W. R. (S.C.) 101; 1959 Mad. L.J. (Cr.) 105; 1959 All. W.R. (H.C.) 156; (1959) I Mad. I. J. (S.C.) 101; 61 Bom, L.R. 746.

25. Bhogilal Chunnila Pandya v. State of Bombay, 1959 S.C. J. 240; A.I. R. 1959 S. C. 356; 1959 Cr. L. J. 389; (1959) Andh. W.R. (S.C.) 101; 1959 Mad. L. J. (Cr.) 105: 1959 All, W.

R. (H.C.) 156: (1959) 1 Mad. L. J. (S.C.) 101: 61 Bom. L.R. 746.

1. Best. Ev., American Notes, p. 488; Norton Ev., 142, As to admissions by conduct, see Powell, Ev., 277: Taylor Ev., s. 804: S. 8, ante. Taylor, Ev., s. 907.

Best, Ev., American Notes page 488; Mercantile Bank v Tahil Ram, 1914 Sind 154; 27 L.C. 309; see notes, to S. · 8, ante.
4. Bihar State Religious Trust Board

v. Mahant Jaleshwar Gir, 1968 Pat. L.J.R. 507, 514.

5. Board of Religious Trust v. A M. Amrit Das, A.I.R. 1974 Pat, 95.

5. Confessions. A confession has been defined as "an admission made at any time by a person charged with a crime, stating or suggesting the inference that he committed that crime."6 Accepting this definition as correct, it was held in several cases that mere admissions of incriminating facts, without direct acknowledgment of guilt, amounted to confessions.7 But it would not be consistent with the natural use of language to construe a confession as a statement by an accused "suggesting the inference that he committed" the crime. No statement that contains self-exculpatory matter can amount to a confession, if the exculpatory statement is of some fact which if true would negative the offence alleged to be confessed. Moreover, a confession must either admit in terms the offence, or at any rate substantially all the facts which constitute the offence. An admission of a gravely incriminating fact, even a conclusively incriminating fact, is not of itself a confession, e.g., an admission that the accused is the owner of, and was in recent possession of, the knife or revolver which caused a death with no explanation of any other man's possession.8

Where in a case of murder the accused confessed about his guilt for giving blows by a dagger on the body of the deceased, it was held that the statement of the accused amounted to a confession.9 A statement that contains self-exculpatory matter cannot amount to a confession, if the exculpatory statement is of some fact, which, if true, would negative the offence alleged to be confessed. A statement which when read as a whole is of an exculpatory character and in which the prisoner denies his guilt is not a confession and cannot be used in evidence to prove his guilt.10 A confession must be a confession properly so called. It cannot in part admit a crime and in part exonerate the accused. An admission of a gravely incriminating fact is not of itself a confession. A confession, that contains self-exculpatory matter, cannot amount to a confession, if the exculpatory statement is of some fact, which, if true, would negative the offence alleged to be confessed.11 A statement by an accused in which he does

9. Amar Singh v. State, 1956 M. B.

107.
10. Palvindar Kaur v. State of Punjab. A.I.R. 1952 S.C. 354.
11. Jasoda Haldar v. Sailendra Nath. A. I.R. 1957 Cal. 372 following Palvinder Kaur v. State of Punjab, A. I.B. 1952 S.C. 254, 1952 Cr. J. I. I.R. 1952 S.C. 354: 1953 Cr. L.J. 154: 1953 All. L.J. 18: 1953 Mad. W.N. 418: I.L.R. 1953 Punj. 107:

Steph. Dig., Art. 21: the Act contains no definition of a "confession,"
 R. v. Babulal, 6 All. 509 (F. B.)
 R. v. Nana, 14 Bom. 260 (F.B.):
 R. v. Shivabhai, 1926 Bom. 513; I
 L.R. 50 Bom. 683; 97 I.C. 660: 27 Cr. L.J. 1140; 28 Bom. L.R. 1013; Cr. L. J. 1140; 28 Bom. L.R. 1013; R. v. Anardrao. 1925 Bom. 529; I.L.R. 49 Bom. 642; 89 I.C. 1046; 26 Cr.L. J. 1478; Mohammed Yusfu v. Emperor, 1930 Sind 225; 126 1. C. 449; 31 Gr.L. J. 1026; Emperor v. Kangal Mali, 1915 Cal. 256; I.L. R. 41 Gal. 601; 26 I. C. 161; 15 Cr. L. J. 713; Karam Din v. Emperor, 1929 Lah. 338; 115 I.C. 1; 30 Cr. L. J. 385; In re Manicka 30 Cr. L. J. 385; In re Manicka Padayachi, 1921 Mad. 490; 72 I.C. 497; 14 L.W. 474; 24 Cr. L.J. 385. Pakala Narayan Smami v. Emperor,

Pakala Narayan Smami v. Emperor, 1939 P.C. 47: 66 I.A. 66: I.L.R. 18 Pat. 234: 180 I.C. 1: 40 Cr. L. J. 364: 1939 A.L.J. 298: 41 Bom. L. R. 428: 69 C.L.J. 273: 43 C. W. N. 473: (1939) 1 M.L.J. 756; Palvinder Kaur v. State of Punjab, A.I.R. 1952 S. C. 354: 1953 Cr.

^{107: 1} B. L. J. 30: 1953 A.W.R. (Sup.) 19, see also Anwarul Hasan v. State, 1953 All. 142: 1954 Cr. L. J. 385: Ambar Ali v. Emperor, 1929 Cal. 539: Mohammad Baksh v. Emperor, 1941 S. 129: I.L.R. 1941 Kar. 257: 195 I.C. 458: 42 Cr. L. J. 741, in R. v. Jagrup. 7 All. 646: (1885) 5 A.W.N. 131, Straight J., was of opinion that the word "confession" cannot be construed as including a mere inculpatory admission which falls short of an admission of guilt, but he also added that sion of guilt, but he also added that he did not find anything in Mr. Stephen's definition at variance with the view he took.

not implicate himself, is not a confession and is inadmissible against him.12 A. confession is not exculpatory and does not cease to be a confession though it brings out some mitigating circumstances.18 Where a statement comprises both confessional and non-confessional parts, and the confessional part of the statement is severable from the non-confessional part, the non-confessional part of the statement is admissible in evidence as an admission but not the confessional part except in defined cases.14

The proposition that a statement which contains an admission or confession must be considered as a whole and the court is not free to accept one part while rejecting the other, is too widely stated and cannot be accepted.15 The authorities establish that (a) where there is other evidence, a portion of the confession may, in the light of that evidence, be rejected, while acting on the remainder with the other evidence, and (b) where there is no other evidence and the exculpatory element is not inherently incredible, the court cannot accept the inculpatory element and reject the exculpatory element.¹⁶ In the aforesaid observations in Balmukund v. R.,17 the Supreme Court fully concurred.18 Distinguishing previous decisions19 as cases in which there was no other evidence to reject the exculpatory part of the confession, the Supreme Court held in Nishi Kant Jha v. State of Bihar, supra, that where the exculpatory part of the confession is not only inherently improbable but is contradicted by other evidence enough to reject that part, the court acts rightly in accepting the inculpatory part and piecing the same with the other evidence to come to the conclusion that the accused was the person responsible for the crime. This view has been followed in the undernoted case.20

In other words, the Court cannot start with the confession; it must begin with the other evidence adduced by the prosecution and after it has formed

^{12.} Harbans Singh v. State, A. I. R. 1960 Cal. 722.

^{13.} Anand v. States 62 Punj. L. R.

^{14.} Lachhuman v. The State of Bihar,

Lachhuman v. The State of Bihar, A.I.R. 1964 Pat. 210.
 Nishi Kant Jha v. State of Bihar, (1969) 2 S.C.R. 1033; (1969) 1 S. G. C. 347; (1969) 1 S.C.J. 844; 1969 U.J. (S.C.) 537; I.L.R. 48 Pat. 9; 1969 A.L.J. 638; 1969 B.L. J.R. 731; 1969 Cr. L.J. 671; 1969 M.P.W.R. 590; A.I.R. 1969 S.C. 422, referring to Taylor, 11th Edn. Article 725 at p. 502 with regard Article 725 at p. 502 with regard to the general law of admissions; Roscoe on Criminal Evidence, 16th Edn. p. 52 citing R. v. Clewes, (1830) 4 Cr. P. 221 and Archbold's Criminal Pleadings Evidence and Practice, 36th Edn p. 423: principle reiterated in H.H. Advani v. State of Maharashtra, (1970) 1 S.C.R. 821: (1970) 2 S.C.A. 10: (1970) 2 S.C. J. 192: 1970 M.L.J. (Cr.) 490: A. I.R. 1971 S.C. 44.

16. Balmukund v. R., I.L.R. 52 All.

^{1011:} A.I.R. 1931 All. 1 (F. B.): Kamalashanker v. State of Gujarat. A. I. R. 1963 Guj. 312; see also Budu v. State. 31 Cut. L.T. 401: A.I.R. 1965 Orissa 170.

Supra. Supra.
 Palvinder Kaur v. State of Punjab, 1953 S.C.R. 94: 1952 S.C.J. 545: 1953 A.L.J. 18: 1953 A.W.R. (Sup.) 19: 1953 Cr.L.J. 154: 1953 M.W.N. 418: I.L.R. 1953 Punj. 107: A.I.R. 1952 S.C. 354.
 Hanumant v. State of Madhya Pradesh, 1952 S.C.R. 109: 1952 S.C.J. 509: (1952) 2 M.L.J. 653: 1953 Cr.L.J. 129: A.I.R. 1952 S.C. 343; Palvinder Kaur v. State of Punjab, supra; see also Narain v.

Punjab, supra; see also Narain v. State of Punjab, (4959) Supp. (1) S.C.R. 724: 1959 S.C.J. 447: 1959 A.W.R. (H.C.) 292: 1959 Cr.L.J. 537: 1959 M.L.J. (Cr.) 285: 61 Punj.L.R. 509: I.L.R. 1959 Punj. 778: A.I.R. 1959 S.C. 484 778; A.I.R. 1959 S.C. 484. 20. Nathoo v. State, 1971 All. Cr. R. 543.

¹⁹⁷¹ A.W.R. (H.C.) 757.

its opinion with regard to the quality and effect of that evidence, then it may return to the confession to receive assurance in support of its conclusion.21

A statement by an accused under section 164, Cr. P. C:, which is exculpatory but admits his presence at the place of occurrence, does not amount to a confession but it can be treated as an admission about his presence on the spot.22

6. Distinction between confessions and admissions. There is a distinction between admissions and confessions in the Act,23 which, however, as it does not contain a definition of the word, "confession", does not itself declare in what that distinction exists. The nature of this distinction has, however, been the subject of judicial consideration.24 In the first place, as Secs. 17-31 deal with admissions generally, and include Secs. 24-30 which treat of confessions as distinguished from admissions, it would appear that confessions are a species of which an admission is the genus.25 All admissions are not confess.ons but all confessions are admissions.1 Thus a statement amounting under Secs. 24-30 to a confession in a criminal proceeding may be an admission under the twenty-first section in a civil proceeding. So statements made to the police by accused persons as to the ownership of property which is the subject-matter of the proceedings against them, although inadmissible as evidence against them at the trial for the offence with which they are charged, are admissible as evidence with regard to the ownership of the property in an enquiry under Sec. 523 (old), 457 (new), of the Criminal Procedure Code.2

Sections 18 to 21 are not confined in their application to civil cases only. Incriminating statements not hit by Sec. 162, Cr. P. C., may be admissible as admissions against interest even in criminal cases.3

The present portion of the Act adopts the term "admission" as the generic term for both civil and criminal proceedings, and uses the particular term

21. Kashmira v. State, A.I.R. 1952 S.C. 159: 1952 Cr.L.J. 839: 1952 M.W. N. 402: 1952 All.W.R. (Sup.) 64: 1952 Bh. L.R. (S.C.) 193; Hari Charan v. State, A.I.R. 1964 S.C. 1184: 1964 Cur, L.J. (S.C.) 208: (1964) 2 Cr. L.J. 344: 1964 M.L.J. (Cr.) 535: 1964 B.L.J.R. 510.

22. Chintamani Das v. State, 36 Cut. L.T. 823: 1970 Cr. L.J. 906: A.I.R. 1970 Orissa 100, 104.

R. v. Macdonald. (1872) 10 B.L. R. (App.) 2 Per Phear, J., R. v.
 Dabee Pershad, (1881) 6 C. 530; R.
 v. Meher Ali, (1888) 15 C. 589, 593; R. v. Nilmadhub, (1888) 15 C. 595, per Petheram. C. J.:—"If the contents of the document did not amount to a confession, the document itself would be relevant as an admission under S. 21." ib., 607. None, however of the above cases the difference indicates "admissions" and "confessions", see as to this; R. v. Babu Lal, (1884) 6 A. 509 (F.B.), 539; R. v. Jagrup, (1885) 7 A. 646; R. v. Pandharinath, (1881) 6 B. 34; R. v. Nana. (1889) 14 B. 260 (F.B.) 263; Azimaddy v. R. 1927 Cal. 17: 54 C. 237: 99 I.C. 227: 28 Cr.L.J. 99: 44 C.L. 253.

24. Ram Singh v. State, A.I.R. 1959 All. 518: 1959 Cr.L.J. 940.

 Sidheshwar Nath v. Emperor. 1934
 All. 351; I.L.R. 56 All. 730; 152 I.C. 174: 36 Cr.L.J. 45: 1934 A.

 I. J. 178.
 Netai Chandra Jana v. Emperor, 1937 Cal. 433 at p. 445: 170 I.C. 201: 38 Cr.L.J. 852 (S.B.); Beo-paria v. State of Ajmer, 1955 Ajmer 10 (every confession is essentially an admission).

2. R. v. Tribhovan, (1884) 9 B. 131,

134.

 Akal Sahu v. Emperor, 1948 Pat.
 1 1 1 26 Pat. 49: 230 I.C. 167: 48 Cr.L.J. 565; Muhammad Baksh v. Emperor, 1941 Sind 129: I.L.R. 1941 Kar. 257: 195 I.C. 458: 42 Cr.L.J. 741; Pakala Narayana Swami v. Emperor, 1939 P.C. 47: 180 J.C.

"confession" for admissions (a) in criminal proceedings, (b) made by a particular person, viz., an accused person4 of the particular character denoted in the definition given above.5

A "confession" is a statement which it is proposed to prove against a person accused of an offence to establish that offence,6 while under the term "admission" are comprised all other statements amounting to admissions within the meaning of the seventeenth and eighteenth sections. Evidence may be given of a confession provided it be not expressly excluded, whether made to a private person or Magistrate otherwise than in the course of judicial enquiry. If proved, it must be so proved like any other fact.7

The distinction between a confession and an admission may also be expressed thus: If the statement by itself is sufficient to prove the guilt of the maker, it is a confession. If, on the other hand, the statement falls short of it, it amounts to an admission. Where there is a direct admission of guilt, it is not possible to treat the statement as an admission. There is a distinction between making a statement giving rise to an inference of guilt and a statement which directly admits guilt. When the admission extends only to the acceptance of a circumstance from which an inference of guilt can be drawn, but which is not conclusive to prove the guilt, it can be treated as an admission. Where conviction can be based on the statement alone, the statement is a confession, but where something more is needed to justify a conviction, then the statement is an admission. No statement, which contains self-exculpatory matter, can amount to a confession, if the exculpatory statement is of some fact which, if true, would negative the guilt.8 A confession is an admission by an accused in a criminal case and if he does not incriminate himself, the statement cannot be said to be a confession.9

7. Proof of confessions. A judicial confession is recorded by the Magistrate and it proves itself by virtue of Sec. 80 of the Act. Extra-judicial confessions are those which are made by a party elsewhere than before a Magistrate. They are proved by witnesses who heard the speaker's words constituting the confession. When the fact of the confession is proved, that itself becomes evidence which serves as a means to the ascertainment of the fact in issue.10 The proof of an extra-judicial confession should be very convincing particularly when it is not reduced to writing.11 Oral evidence of an extra-

648 (c). 5. Pakala Narayan Swami v. Emperor,

8. See Ram Singh v. State, 1959 A. 518: 1958 A.L.J. 660, case

law referred.

9. Sobar Singh v. State of Bihar, 1966

B.L.J.R. 861: 1961 Cr.L.J. 1469:

A.I.R. 1966 Pat. 448, 451.

A.I.R. 1966 Pat. 448, 451.

10. Mst. Sumitra v. Emperor, 1940 Nag. 287; 190 I.C. 273; 41 Cr.L.J. 886; 1940 N.L.J. 343.

11. Pharha Shahwali v. Emperor, 1932 Sind 201; 141 I.C. 392; see also R. v. Mst. Jagia, 1938 Pat. 308; I.L.R. 17 Pat. 369; 174 I.C. 524.

R. v. Tribhovan, (1884) 9 B. 131, 134; R. v. Jagrup, (1885) 7 A. 646,

¹⁹³⁹ P.C. 47: 180 I.C. 1. G. R. v. Tribhovan. (1884) 9 B. 131, 134, it is "an admission of a criminating circumstance on which the prosecution mainly relies R. v. prosecution mainly relies' R. v. v. Pandharinath, (1881) 14 B. 34, 37; R. v. Nana, (1889) 14 B. 260 (F. B.). 263.

^{7.} R v. Viran. (1886) 9 M. 224, 240; T. P. Obigadu v. P. Pedda, 1922 Mad, 40; I.L.R. 45 Mad, 230: 69 I.C. 264: 23 Cr. L.J. 680: 42 M.L. J. 37: 1921 M.W.N. 779; as to proof; see Nur Ali v. R. 1924 Lah.

^{498;} I.L.R. 5 Lah. 140; 81 I.C. 530: 25 Cr. L.J. 914. As to admissibility of confessions see notes under S. 21 post. The substance of it is enough, ib.

judicial confession, though original evidence, is no proof of the fact stated, the existence of which must be established independently. At best it can only be corroborative evidence.12 Where a person is convicted of a murder on the basis of his confession the judgment convicting him is no evidence to prove the truth of the confession regarding the murder. The judgment proves nothing beyond the fact that he was found guilty of that murder. Whether he committed that murder or not is another question.18

8. Admissibility of confessions under Sec. 8. Statements by way of confession which are excluded by Secs. 24-30 are inadmissible under the eighth section, ante. This latter section, therefore, in so far as it admits a statement as included in the word "conduct", must be read in connection with the twentyfifth and twenty-sixth sections, and cannot admit a statement as evidence which would be shut out by these sections.14 As in the case of admission in civil suits, the principle upon which the reception of confessions depends is the presumption that a rational being will not make admissions prejudicial to his interest and safety, except when urged by the promptings of truth and conscience.15 In such cases, the maxim is habemus optimum testem, confitentem reum.16 If prisoners really voluntarily confess, their confessions are the best possible evidence against them, and a verdict based on voluntary confession is just as good as a verdict based on the testimony of credible witnesses.17

But self-harming evidence is not always receivable in criminal cases as it is in civil. There is this condition precedent to its admissibility that the party againts whom it is adduced must have supplied it voluntarily or at least freely.18 Section 24, post, requires a confession to be made spontaneously, and without inducement, threat or promise, and voluntarily, only in that sense.19

In order to support a conviction, the admission by the prisoner must be an admission of guilt. So, where some prisoners during a preliminary investigation stated that the crime was committed by other persons and that any share they had in it was under compulsion, it was pointed out that, though such a statement contained an important admission, it was not an admission of guilt, and that upon such a statement alone no person ought to be convicted.20

9. Judicial and extra-judicial confessions. (a) General. Confessions have been divided by English text-writers into two classes, namely,

A.C. 545 at 553.

13. Birey Singh v. State, 1953 All. 785; 1953 Cr.L.J. 1817.

14. R. v. Nana, (1889) 14 B. 260; see

17. R. v. Wuzir, (1876) 25 W.R. Cr.

25, 26.

Best Ev., s. 551.

18. 19. Khetan v. Emperor, 1923 All. 352:
 I.L.R. 45 All. 300: 73 I.C. 62.
 R. v. Kisto, (1867) 7 W.R.Cr. 8.

^{12.} Karam Singh v. State. 1951 Himachal Pradesh 19: 1952 Cr. L.J. 242, relying on R. v. Christie,

also R. v. Jora, (1874) 11 Bom.H. C.R. 242; see notes under Sec. 8

Taylor, Ev., s. 865; Best Ev., s. 524; Phillips and Arnold, Ev., 401 R. v. Yella Reddi, 6 Bom.L.R. 773; in which also the question of the importance to be attached to variation in confessional statements is discussed.

^{16.} In Criminal cases a deliberate confession carries with it a greater probability of truth than an ad nission in civil cases, the consequences being more serious and penal. Phillips and Arnold, Ev., 402. In R. v. Baldry C. C. 2 Den 430 at p. 454, Erle, J. said: "I am of opinion that when a confession is well proved it is the best evidence that can be procured."

judicial and extra-judicial. Judicial confessions are those, which are made before a Magistrate, or in Court, in the due course of legal proceedings. Either of these is sufficient to support a conviction, though followed by a sentence of death-they both being deliberately and solemnly made under the protecting caution and oversight of the Judge.21 Extra-judicial confessions are those which are made by the party elsewhere than before a Magistrate, or in Court.

(b) Corroboration. A prisoner may be convicted on his own uncorroborated confession.²² The weight to be attached to an extra-judicial confession depends entirely upon the circumstances. It depends on the person to whom it is made and the conditions under which it comes to be made. When such a confession is made spontaneously by the accused to a Magistrate, who was totally in the dark about either the investigation or of the identity of the accused, there would be good reason to presume its voluntariness; and hence it would be admissible both as an admission and as a first information report.23

It has been said in England that the Court is usually reluctant to accept and record a confession of guilt on indictments for grave crimes, and will generally advise the prisoner to retract it and plead not guilty.24 But where the prisoner refuses to withdraw his confession, there is no alternative but to accept it, even in the case of murder, of which instances have occurred.25 No such exception is made in Indian law or even in American law. "A free and voluntary consession of guilt by a prisoner, whether under examination before Magistrates or otherwise, if it is direct and positive, and is duly made and satisfactorily proved, is sufficient to warrant a conviction without any corroborative evidence."1

Judicial confessions are "sufficient to found a conviction even if to be followed by a sentence of death, they being deliberately made, under the deepest solemnities, the advice of counsel, and the protecting caution and oversight of the Judge."2 It may be doubted whether a conviction can be based solely upon an extra-judicial confession, but there is no reason for hesitating to base conviction on a judicial confession. The evidence of verbal confessions of guilt may have to be received with great caution, as advised by Greenleaf in para, 214. But many of the reasons which necessitate great caution do not operate in the case of judicial confession. Again, a case, where there is no proof of corpus delicti, must be distinguished from another where that is proved; in the absence of proof of corpus delicti, a confession alone may not suffice to justify conviction.3 A confession, particularly a judicial con-

23. Ramachandran, In rc. I.L.R. 1960

24. 2 Hale 255; see also Phipson, Ev.,
9th Ed., p. 266.
25. Archbold's Criminal Pleadings, Evi-

Ibid.

2. Greenleaf on Evidence, 7th Ed., Vol. I. para, 216.

3. See Wills on Circumstantial Evi-

dence, page 120.

^{21.} Taylor, Ev., s. 866; v. ante; R. v. Bhuttun, (1869) 12 W.R. Cr. 49; as to the effect of judicial confessions and as to retracted confessions, see

S. 24, post. 22. R. v. Runjeet, (1866) 6 W.R.Cr. 73; R. v. Hyder, (1866) 6 W.R. 83 (Cr.) or on his own admission coupled with the evidence; R. v. Kallychurn, (1867) 7 W.R.Cr. 59, as to the effect of extra-judicial confession v. post.

Mad. 224; A.I.R. 1960 Mad. 191; sce also Chinnasami, In re A.I.R. 1960 Mad. 462: 1960 Cr.L.J. 1344

dence and Practice, 3rd Ed. s. 691.

fession, is not a tainted piece of evidence and if it is made freely and without inducement or compulsion, does not suffer from any infirmity such as exists in the testimony of an approver.4

As regards extra-judicial confession, a Bench of the Madras High Court referring to the views of various text-writers and the case-law on the subject

"Though we cannot lay down as an inflexible rule of law that in no case an extra-judicial confession will afford the sole basis for conviction, we are of the opinion that in that case of homicide and such other similar grave offences it would not be safe to convict a person on the confession alone unless corroborated by other evidence. This is a rule of prudence rather than of law. The nature and the quality of corroborative evidence must again necessarily depend upon the facts of each case."5

The words actually used by an accused, who is said to have confessed, ought to be ascertained. And, if a statement by an accused is the only evidence against him, it must be taken as a whole, and nothing not actually included by it can be read into it.6 The Court should not accept merely the conclusion at which the witnesses, deposing to a confession, themselves arrived, from the answers which the accused gave to questions put by them." The view of the Patna High Court, however, is that the exact words of an extrajudicial confession need not be proved in every case, because, in most cases, laymen to whom it is made, do not note down the words as they are uttered by the accused. Therefore, the Court could take the substance of the statement into consideration.8 As regards the value to be attached to such a confession, it could be presumed that while there is the fact that it is made in the presence of a person in authority (which imports in consequence a necessity for the Court to scrutinise the evidence and the circumstances carefully in order to ascertain whether the confession had been voluntarily made), nevertheless it cannot be said that on the basis of that circumstance alone, the confession had not been freely made.9

In regard to the value and appreciation of the extra-judicial confessions, the following may be borne in mind. Taylor says that evidence of oral confession of guilt ought to be received with great caution. That eminent author gives the following reasons:

"Not only does considerable danger of mistake arise from the misapprehension and malice of witnesses, the misuse of words, the failure of the party to express his own meaning, the infirmity of memory but the zeal which generally prevails to detect offenders, especially in cases of aggravated guilt, and the

Birey Singh v. State, 1953 All. 785: 1953 Cr. L. J. 1817: see also Jangir Singh v. State, 1952 Pepsu, 19: Emperor v. Lal Bakhsh, 1945 Lah, 43: 220 J.C. 325: 46 Cr. L. J. 736.
 (In re) Venkavalapati Kotaiah, 1951 Mad, 350: J. L. R. 1951 Mad, 535: 63 J. W. 785.; see also the authorities and cases cited therein: see however Ramachaudran. In research control of the see however Ramachaudran.

see however Ramachandran. In re,

I.L.R. 1960 Mad. 224, A.I.R. 1960 Mad. 191.

^{6.} Pika v. R. (1912) 39 C. 855.
7. R. v. Soobjan, (1873) 10 B.L.R. 332, 335; R. v. Mohan, (1881) 4 A. 46, 49; Ramayee, In rc. A.I.R. 1960 Mad, 187; 1960 Cr.L.J. 491.
8. Krishna v. The State. A I.R. 1958 Pat, 166; 195 B.L.J.R. 6.

^{9. 1}bid.

strong disposition which is often displayed by persons engaged in pursuit of evidence to magnify slight grounds of suspicion into sufficient proof together with the character of witnesses who are sometimes necessarily called in cases of secret, and atrocious crime, all tend to impair the value of this kind of evidence...."

To these sources of distrust may well be added the following remarks of Macaulay in his "History of England":

"Words may easily be misunderstood by an honest man. They may easily be misconstrued by a knave. What was spoken metaphorically may be apprehended literally. What was spoken ludicrously may be apprehended seriously. A participle, a tense, a mood, an emphasis, may make the whole difference between guilt and innocence."

Hasty confessions made to persons having no authority to examine are the weakest and most suspicious of all evidence. Words are often misreported through ignorance, intention or malice, and they are extremely liable to misconstruction. Moreover, this evidence is not, in the usual course of things, to be disproved by that sort of negative evidence by which proof of plain facts may be, and often is, confronted (Foster, J.).

Such confessions are spoken to by persons who will generally be found to have a motive to implicate the accused person. Their Lordships of the Judicial Committee have remarked in Harold White v. The King10 that it would be dangerous in the extreme to act on a confession put into the mouth of the accused by a witness who had a strong motive for implicating someone else in the murder and uncorroborated from any other source.

But it does not follow that extra-judicial confessions are always to be rejected. They may be made in such circumstances as to leave no reasonable doubt as to their truth. In fact, extra-judicial confessions should be accepted when the evidence is clear, consistent and convincing. As pointed out in Emperor v. Badal11 the evidence of an admission of guilt to villagers may be as strong evidence against the accused person as a confession before a magistrate. It requires no corroboration. But the court has to decide whether the persons before whom the admission is said to have been made are trustworthy witnesses. 12 Thus, an extra-judicial confession is of great importance. but it must be a true extra-judicial confession and not one fabricated in order to provide additional evidence for what rightly or wrongly the investigating officer considers to be a weak case.18 The same principles govern the acceptance of judicial and extra-judicial confessions,14

A.I.R. 1945 P.C. 181: 1945 A.L.J. 511: 58 M, L.W. 523.

^{11.} A.I.R. 1928 Oudh 393: 112 I.C.

^{12.} Munnu v. Emperor, A.I.R. 1931

Oudh 415: 134 I.C. 1018.

Taule v. Emperor. A.I.R.

Oudh 272: 117 I.C. 737. 1929

^{14.} Om Prakash v. The State, A.I.R.

L. E. 75

¹⁹⁵⁷ All. 388; Gaya Prasad v. The State, A.I.R. 1957 All, 459; (In re) Chinnaswami, A.I.R. 1960 Mad, 462; (In re) Ramayce, A.I.R. 1960 M. 187; (In re) Muthukarunga Konar, (1959) M.W.N. (Cri.) 49 at p. 52; A.I.R. 1959 Mad. 175. Ramaswami, J.

In two cases their Lordships of the Supreme Court have laid down the following principles:

An extra-judicial confession, if voluntary, can be relied upon by the Court along with other evidence in convicting the accused. The confession will have to be proved just like any other fact. The value of the evidence as to the confession, just like any other evidence, depends upon the veracity of the witness to whom it is made. It is true that the Court requires the witness to give the actual words used by the accused as nearly as possible, but it is not an invariable rule that the Court should not accept the evidence if not the actual words but the substance were given. If the rule is inflexible that the Courts should insist only on the exact words, more often than not, this kind of evidence, sometimes most reliable and useful, will have to be excluded, for, except perhaps in the case of a person of good memory, many witnesses cannot repeat the exact words of the accused. It is for the Court having regard to the credibility of the witness, his capacity to understand the language in which the accused made the confession, to accept the evidence or not. In the case cited below, the confession made by the appellant was not a complicated one and the witnesses stated without any conflict practically the exact words used by the appellant and also how they understood the words. In the circumstances, if the evidence of the witnesses is acceptable, there is no reason why the extra-judicial confession made by the accused could not be acted upon. There may be some confusion in the mind of the witnesses in this case as to the actual words used by the appellant but there seems to be no confusion in their mind with reference to the statement that he had admitted that he had stabbed the deceased. The circumstantial evidence and the extra-juicial confession leave no reason for doubt that the appellant had stabbed the deceased and was, therefore, rightly convicted under section 302, I.P.C., for murder.15

Usually and as a matter of caution, Courts require some material corroboration to an extra-judicial confessional statement, corroboration which connects the accused person with the crime in question.16

As to retracted confessions see note to Sec. 24 post.

10. Persons by whom admissions may be made. Admissions may be made by (a) a party to the proceeding,17 and a party to the proceeding may be affected by the admissions of the following persons, (b) an agent to such party duly authorized,18 (c) a person who has a proprietary or pecuniary interest in the subject-matter of the suit,19 (d) a predecessor-intitle or a person from whom the party to the suit has derived his interest,20 (e) a person whose position it is necessary to prove in a suit when the statement would be relevant in a suit brought by or against himself,21 (f) a referee or a person to whom a party to the suit has expressly referred for information.22 Where several persons are jointly interested in the subject-

Mulk Raj v. State of U. P., A.I.R. 1959 S.C. 902: 1960 All. W.R. (H.C.) 18: 1959 Cr.L.J. 1219.
 Ratan Gond v. State of Bihar, A. (.R. 1959 S.C. 18: 1959 Cr.L.J. 108: 1959 B.L.J.R. 1: 1959 All. L.J. 35: 1959 M.P.C. 46: 1959 M.P.C. 46: 1959 M.P.C. 46: 1959 Mad.L.J. (Cr.) 109: 1959 All.W.R.

⁽H.C.) 108; I.L.R. 37 Pat. 1409-17. S. 18, post.

ib.

^{19.} ib, 20. ib.

^{21.} S. 19, post,

^{22.} S. 20, post; also notes to ss. 18-20

matter of a suit, the general rule is that the admissions of any one of these persons are receivable against himself and his fellows, whether they be all jointly suing or sued, provided that the admissions relate to the subjectmatter in dispute and were made by the declarant in his character of a person jointly interested with the party against whom the evidence is tendered.23 The requirement of the identity in the legal interest between the joint owners is of fundamental importance. The admission of one co-plaintiff or codefendant is not receivable against another merely by virtue of his position as a co-party in the litigation. If the rule were otherwise, it would, in practice, permit a litigant to discredit an opponent's claim merely by joining any person as the opponent's co-party, and then employing that person's statements as admissions. Consequently, it is not by virtue of the person's relation to the litigation that the admission of one can be used against the other; it must be because of some privity of title or of obligation.24 In Nagendra v. Lawrence Jute Co.,25 guardians of the person of an infant were said to be not competent to bind the ward by an admission as to his proprietary rights. An admission by a Court of Ward cannot bind or prejudice the infant proprietor.1 An admission made by a landlord is not binding on his tenant, and, this being so, a compromise entered into between the proprietors of a certain land and others whereby the parties to the compromise become joint proprietors of the land has no binding effect upon the tenants of the land.2 In a criminal trial, if it is intended to bind a master by the statement of his servant, the relationship of master and servant must be strictly proved.3 Generally, with respect to the persons whose admissions may be received, the doctrine is, that the declarations of a party to the record or of one identified in interest with him are as against such party receivable in evidence.4 But, if they proceed from a stranger they are in general inadmissible.5 The Act has rendered such admissions receivable in the two cases mentioned in the nineteenth and twentieth sections, post.6

Subject to the provision; of the thirtieth section relating to confessions by persons who are being tried jointly for the same offence, the general rule is that an accused person can only be affected by the admissions or confessions of himself, and not by those of agents, accomplices or strangers7 unless made in his presence and assented to by him.8 Nor, of course, can such confessions

 Dileshwar v. Nohar, 48 I.C. 193:
 A.I.R. 1918 N. 19. 41.
 Ambar v. Lutfe Ali, 1918 Cal. 971:
 I.L.R. 45 C. 159: 41 I.C. 116: 25
 C.L.J. 619: 21 C.W.N. 996.
 1921 Cal. 197: 61 I.C. 544: 25 C.
 W.N. 89, it was held that the deposition of K in the previous suit was sition of K in the previous suit was not admissible as admission against the plaintiff.

1. Banwari v. Dwarka. 29 C.L.J. 577: 52 I.C. 825; A.I.R. 1918 C. 34.

2. Purgan v. Dhanpat, 1919 Pat. 309:

52 I.C. 739.

Ritbaran v. R. 19 Cr. L. J. 789; (1916) 4 Pat. L.W. 120; 46 I.C.

Taylor, Ev., s. 740; Spargo v. Brown, (1829) 9 B. & C. 935.
 Ib. Barough v. White. (1825) 4 B.

& C. 325.

7. Taylor, Ev. ss. 904-906: 3 Russ. Cr. 485-491; Roscoe, Cr. Ev., 16th Ed., 53-54; see as to admissions by agents Sec. 18 Note 4 post; and as to admissions by co-proprietors v.

10 ante.

 R. v. Cox, (1859) 1 F. & F. 90; R. v. Mallory, (1884) 15 Cox. 456, 458; Taylor Ev., s. 907.

^{6.} As to when admissions proceeding from strangers are admissible; see Taylor, Ev., ss. 759. 765, v. post; the admissibility however, of the evidence in the case of referees may be said to be grounded on the principle of agency; the party referring to another makes that other his agent for the purpose of making the particular admission; Wills Ev., 112.

be used in his favour As to admi sions by prosecutors v. post, see notes to Secs. 17-20.

11. Time when admissions may be made. (a) General. When a party sues, or is sued personally, an admission made by him on any former occasion may be given in evidence against him. Such admissions may have been made by him while a minor. For though a minor, as he cannot appoint an agent,9 cannot be bound by the admission of an agent purporting to act for him, yet admission; made by the minor himself may be proved in an action brought against him after attaining his majority.10

A statement in a previous suit by a person that his status was of a tenant can be used as his admission of his possession being permissive. 11 A statement in a prior proceeding is relevant as admission in a subsequent similar proceeding.12

A primary use and effect of an admission is to discredit a party's claim by exhibiting his inconsistent utterances. It is therefore immaterial whether these other utterances would have been independently receivable as the testimony of a qualified witness. It is their inconsistency with the party's present claim that gives them logical force. 13 An admission which ought not to bind a minor is an admission suggesting an inference which prejudices the case of the minors in the proceeding in which the admission is made. But if the admission was in his interest in that proceeding, it would be admissible against him in the subsequent proceeding.14

When a party sues, or is sued, personally, an admission made by him on a former occasion, while sustaining a representative character, may also be given in evidence against him. Thus, where a person, when defending a suit as guardian for a minor, made an affidavit of certain facts, this affidavit was held to be evidence against that person of the facts sworn to in a subsequent action against him personally.15 That the party making the statement, that the consideration under the document in question was paid by a certain person, was a child at the date of the document, is not a ground referred to in Sec. 17 which will hinder the statement from being regarded as an 'admission' under law, by supposing that because of his childhood at that time he could not be expected to speak out of personal knowledge.16 Admissions made by infants before the proceedings are commenced are accepted by Courts in the normal course of events and they are given whatever weight the Court may consider it proper to attribute to them.17 But admissions by a person sued or suing in a representative character are not admissions, unless they were made while the party making them held that character; 18 such persons therefore cannot affect the party represented by their admissions made before sustaining, or after they have ceased to sustain their representative character. 19

9. Act IX of 1872. Contract Act s. 183

and see s. 11 ib, v. post.

10. O Neil v. Read. (1914) 5 Ir, L. R.
434 (evidence of necessaries supplied to an infant during his infancy),
See Dharamaji v. Gurrav, (1873)
10 Bom. H.C.R. 311.

11. Madho v. Yeshwant. 1973 Mah.
L. J. 771: 1. L. R. 1974

Born. 752: A. J. R. 1974 Born.

L. J. 771: 1. L. R. 1974 Bom. 752: A. I. R. 1974 Bom.

12. Eliammal v. Veeraswami. 1975 Ct. L.J. 28 (Mad.) 13. Wigmore, S. 1058.

 Kesho Prasad Singh v. Parmeshri Prasad Singh, 1923 Pat, 276; I.L.R. 2 Pat. 414: 71 I.C. 902: 4 P.L.T.

 Beasley v. Magrath, (1804) 2 Sch.
 Lef. 31, 34; Taylor, Ev. s. 755;
 Stanton v. Percival, (1854) 5 H. L.C. 257.

Raghavan v. Soumini Amma, A.I. R. 1957 Ker. 178.

Alderman v. Alderman and Dunn. (1958) 1 W.L.R. 177 (2).
 S. 18, post; Wills Ev., 3rd Ed., 171.
 See Steph, Dig. Art. 16.

An admission made by a person in a written statement filed in a prior litigation in the character of a legal representative of a deceased defendant as a legatee under his will is not binding on him in a subsequent suit filed by him as the reversioner to the estate of the deceased, because the subsequent suit is brought by him not only on his behalf but on behalf of all the reversioners.20

Further, statements by a party interested in the subject-matter, or by a person from whom interest is derived, must have been made during the continuance of the interest,21 and statements by the persons mentioned in the nineteenth section must have been made whilst the person making them occupied the position, or was subject to the liability, in the section mentioned.22

The effect of admission made during the conduct of suit may be taken into consideration,28

(b) Admission by insolvent. Answers given by an insolvent in former proceedings are admissions, even if his examination in such proceedings was not authorised.24

The admissions of a debtor made before his adjudication as insolvent are receivable to prove the petitioning creditor's debt.25 Statements made by an insolvent in the course of his public examination under Sec. 27 of the Presidency Town Insolvency Act,1 may be admissible against himself, but not against another insolvent or against the official assignee.2 Answers given by a witness at his private examination are not merely evidence against him in any insolvency proceeding but also the evidence against him in any civil proceeding, whether in insolvency or in a civil suit.³ An acknowledgment of a debt in an insolvency petition by a partner binds himself but not his co-partners.4

12. To whom admissions may be made? So far as its admissibility in evidence is concerned, it is, in general, immaterial to whom an admission is made.⁵ Thus, an admission made to a stranger is as receivable as one made to an opponent. "It has indeed been held that in order to render an account stated binding on a party, the admission of liability must be made to the opposite-party or his agent; 6 but this only refers to the effect of the admission, not to its admissibility." Even an admission made in confidence to a legal adviser or a wife is receivable, if proved by a third person.8 But a solicitor's

22. S. 19, post.
23. Jwala Singh v. Prem Singh, A.I.R.
1972 Delhi 221.

7. Best, Ev., s. 528.

^{20.} S. T. Chendikamba v. K. I. Vishwanathamayya, 1939 Mad, 446: (1939) 1 M.L.J. 227: 1939 M.W.N. 275: 49 L.W. 273. 21. S. 18, post.

^{24.} Joseph Perry v. Official Assignee, 1920 Cal. 941: I.L.R. 47 C. 254: 56 I.C. 778: 21 Cr. L.J. 522: 24 C.W.N. 425.

Coole v. Braham. (1848) 3 Ex. 183.
 III of 1909.
 Luchiram v. Radha Charan. 1922
 Cal. 267: I.L.R. 49 Cal. 93: 66 I.C. 15; 34 C.L.J. 107, relying on

In re Brunner, (1887) 19 Q.B.D.

^{3.} Jnanendra Bala Debi v. Official Assignee of Calcutta, 1926 Cal. 597: 93

I.C. 834: 30 C.W.N. 346.
 Kissendoss v. K. M. Spinning and Weaving Co., Ltd., 1917 Mad. 518: 36 I.C. 389.

Best. Ev., s. 528.
 Breckon v. Smith. (1834) 1 A. & E. 488; Hughes v. Thorpe, (1839)
 M. & W. 667; Bates v. Townley, (1884) 2 Exch. 152, Taylor, Ev., s. 799.

^{8.} Taylor, Ev., s. 881 (see ss. 122, 126 -129, post).

admission in order to bind his client must have been made to the opposite party,9 and an admission to support an account stated must have been made to the creditor or his agent.10 So, private memoranda never communicated to the opposite side or to third persons are evidence against a party,11 as are admissions made to himself in mere soliloquy.12 But what a person has been heard to say while talking in his sleep seems not to be legal evidence against him, however valuable it may be as indicative evidence; for, here, the suspension of the faculty of judgment may fairly be presumed complete.13

So, with regard to voluntary confessions, subject to the provisions of the twenty-fifth and twenty-sixth sections, post (relating to confessions made to, and whilst in the custody of, a police officer) it is in general immaterial to whom they have been made. So, what the accused has been overheard muttering to himself or saying to his wife or any other person in confidence will be receivable in evidence, provided that, in the latter case, it is proved by some person other than the wife, counsel, or solicitor.14 An admission of crime, when fairly made after due warning, is not inadmissible simply because, at the time it was made no formal accusation had been made against the party making it.15

"Accused person". The words "accused person" include any person who subsequently becomes accused.16 So, a confession made to a police officer by a person before he is accused of any offence was held to be inadmissible against him when he was accused of the offence.17

13. Nature and form of admission. In respect of the nature of admissions, no difference exists, in regard to their admissibility, between direct admissions and those which are incidental or made in some other connection, or involved in the admission of some other fact.18 So far, at least as its admissibility is concerned, the form of an admission is in general immaterial.¹⁹ Thus admissions are receivable which are made parol, or are contained in books of account or letters,20 documents (e.g. a map) filed as correct in former procee-

9. Wilson v. Turner, (1808) 1 Taunt

10. Shaw v. Shaw, (1935) 2 K. B. 113 at pp. 135-6: 104 L.J.K.B. 549: 153 L.T. 245. 11. Bruce v. Garden, (1869) 17 W.R. (Engl.) 990: Whart, Ev., s. 1123.

12. R. v. Simons, (1834) 6 C. & P. 540; Best, Ev., s. 521.

13. Best, Ev., s. 529: R. v. Elizabeth

Sippets, Kent. Summ. Ass. 1839, cited, ib., Gore v. Gibson, (1845) 13 M. & K. 623, 627.

14. See Taylor. Ev., s. 881. and cases cited ante, see ss. 25, 26, post; see R. v. Sageena, (1887) 7 W.R.Cr.

15. R. v. Ram, (1865) 4 W.R.Cr. 10.
16. Emperor v. Bhagwan Dass. 1941
Bom. 50: I.L.R. (1941) Bom. 27:
192 I.C. 671: 42 Bom.L.R. 938;
see also Pakala Narayanaswami v.
Emperor. 1939 P.C. 47: 66 I.A. 66:
I.L.R. 18 Pat. 234: 40 Cr.L.J. 364:
180 I.C. 1: 1939 A.L.J. 298: 41
Bom.L.R. 428: 43 C.W.N. 473:
(1939) 1 M.L.I. 756: Abdul Ghani (1939) 1 M.L.J. 756; Abdul Ghani

v. Emperor, 1931 Lah. 763: 133 I.

C. 55: 32 Cr.L.J. 985.
San Pan Aung v. R., (1911) 15 I.
C. 305: 13 Cr.L.J. 465.
Taylor, Ev., s. 800.
Emperor v. E.C.D. Wheeler, 1929
Sind 15: 112 I.C. 50: 29 Cr.L.J. 962; Wills, Ev., 3rd Ed., 155; Phip-

son, Ev., 9th Ed., 236, Best. Ev., s. 521; as to admissions "without prejudice," see s. 23, post.

20. Rai Srikishen v. Rai Hurikishen, (1853) 5 M.I.A. 432, 443; R. v. Hanmanta, (1877) 1 B. 610, 617, v. post;, a letter containing an admission does not require a stamp be-forq it can be admitted in evidence Situl v. Monohar, (1875) 23 W.R. 325; see also Narain v. Ram, (1880) 5 C. 864; where an entry, showing the extent of the holding and the amount of the rent made in a book belonging to the lessor and signed by the lessee, was held relevant as an admission, though neither stamped nor registered, and Galstaun v. Hutchinson, (1912) 39 C. 789.

dings; 21 rough draft of a plaint previously filed, 22 depositions, 23 verified plaint,24 or verified petitions,25 or written statements or answers to interrogatories, affidavits, and the like, in former suits,1 for a statement made by a party in another suit may clearly be used as an admission within the meaning of the eighteenth section.2 Entries in books of account, though proved not to have been regularly kept, may yet be relevant as admission.8 Admissions may be also contained in recitals and descriptions in deeds,4 horoscopes,5 receipts, or mere acknowledgments given for goods or money, whether on separate papers, or endorsed on deeds. or on negotiable securities; banker's pass-books; accounts rendered, such as a solicitors' bill; sworn inventories and declarations by executors which operate as an admission of assets,6 and survey maps,7 "but not in a passport, which is not conclusive evidence."8 A statement made by a firm in support of income-tax returns where the suit item is shown as a debt owing by the firm to the plaintiff, constitutes an admission of liability of the firm to the plaintiff in respect of the amount mentioned therein.9 The omission of a claim by an insolvent in a schedule of the debts due to him given on oath is an admission that it is not due. 10 A statement in a bill of sale is evidence against those who are parties to it, the seller and the purchaser and the person who purchased from such last-mentioned purchaser.11

Statements recorded in a rent-suit under Act X of 1859, which do not conform to the requirement of the sixtieth section, cannot be relied on as admissions.12 An instrument which is not duly stamped cannot operate as an admission as to a collateral matter, except in criminal cases. 13

Admission of a signature of a person on a document is not tantamount to admission of execution of the document by that person for the two things are different and have different legal implications.14 Statement that a person

21. Huronath v. Preonath, (1867) 7 W.R. 249.

22. Byathamma v. Avulla, (1891) 15 M. 19.

Obhoy v. Beejoy, (1869) 9 W.R. 162; Soojan Bibee v. Achmut Ali, (1874) 14 B.L.R. App. 3: (1874) 21 W.R. 414; Emperor v. E.C.D. Wheeler, 1929 Sind 15: 112 I.C. 50: 29 Cr.L.J. 962, v. post and see cases cited post, passim.

24. Girish v. Shama, (1871) 15 W.R.

25. Ib. Gour Lall v. Mohesh, (1871) 14 W.R. 484; and see post: Mohun v. Chutto, (1874) 21 W.R. 34, as to statements filed in Court in name of pardanashin, see Asmutoonissa v. Alla Hafiz, (1867) 8 W.R. 468. 1. Hurish Chunder v. Prosunno Coomar,

Hurish Chunder v. Prosunno Coomar, (1874) 22 W.R. 303; Bhugmunt v. Lall, (1862) Marshall, 48; Governor of Bengal v. Motilal, A.I.R. 1914 Cal. 69: I.L.R. 41 C. 173: 20 I. C. 81: 14 Cr.L.J. 321: 18 C.L.J. 452: 17 C.W.N. 1253 (S.B.) affidavits in answer to motion.

 Hurish Chunder v. Prosunno Coo-mar, (1874) 22 W. R. 303; as to pleadings in the same proceedings. v. post. As to the same admissibility

in England of pleadings in other actions, see Phipson, Ev., 9th Ed.,

3. R. v. Hanmanta, (1877) 1 B. 610, 617. v. post.

4. Taylor, Ev., 91–100, 858; Roscoe, N. P. Ev., 76; Powell, Ev., 9th Ed., 465, 466; v. post; Konwur Doorganath v. Ram Chunder, (1876) 4 I. A. 52: 2 C. 341 (P.C.); (1973) 3 Sim. L. J. 24 (H. P.).

5. Raja Gouzdan v. Raja Goundan. (1893) 17 M 134.

Taylor, Ev., ss. 859, 860.

7. See notes to s, 36, post and cases there cited.

Yakub Molla v. Union of India, 62 C.W.N. 589.

Somanna v. Subba Rao, A.I.R. 1958 Andh, Pra. 200.

10. Taylor Ev., s. 804; Nicholls v. Downes, (1811) M. & Rob. 13; Hart v. Newman, 3 Camp. 13.

11. Soojan Bibee v. Achmut Ali, (1874) 21 W.R. 414.

12. Pogha Mahtoon v. Gooroo Baboo, (1875) 24 W.R. 114.

13. Act II of 1899 (Stamp), s. 35.

 Gitabai v. Dayaram Shankar, 72
 Bom. L. R. 32: 1969 Mah. L. R. 838. A.I.R. 1970 Bom. 160, 162.

signed on blank paper does not amount to admission of execution of docu-

In matrimonial cases the admissions of parties can be acted upon provided there is no collusion between them.16

A return made to a collector by an occupant of land, stating the amount of the rent, is an admission as to the amount of the rent and is binding upon the occupant and all who claim under him.17 As to admissions in dowl felirist or in notices to enhance rent; see cases noted below.18

A judgment generally irrelevant, as between strangers may be relevant as between strangers if it is an admission.¹⁹ Thus, where A sued B, a carrier for goods delivered by A to B, a judgment recovered by B against a person to whom he had delivered the goods, was held to be relevant as an admission by B that he had them.20 "It is true that a record is sometimes admitted in evidence, in favour of a stranger against one of the parties, as containing a solemn admission by such party in a judicial proceeding with respect to a certain fact. But this is no real exception to the rule requiring mutuality, because the record is admitted in this case as a judgment conclusively establishing the fact, but as the deliberate declaration or admission of the party himself that the fact was so. It is, therefore, to be treated according to the principles governing admissions, to which class of evidence it properly belongs."21 Though a judgment of a Criminal Court or verdict of conviction cannot be considered in evidence in a civil case22 a plea of guilty in the Criminal Court may be so considered as evidence of an admission.23 A confession may be held proved where the evidence gives only the substance though not the actual words.24 As to admissions made in pleadings, see notes to the fifty-eighth section, post.

14. Hearsay and opinion. Personal knowledge is not required. "An admission is receivable, although its weight may be slight, as when it is founded on hearsay,25 or, consists merely of the declarant's opinion or belief,1 but

15. Ethirajulu Naidu v. K.R.C. Chettiar, 88 M. L. W. 265: (1975) 1 M.L.J. 5: A.I.R. 1975 Mad. 333; Birbal Singh v. Harphool Khan, A.I.R. 1976 All, 23.

16. See Mahendra Nanilal Napavati v. Sushila Nanavati, (1964) 7 S.C.R. 267: 1965 S.C.D. 95; (1965) 1 S. G.J. 788: 66 Bom, L. R. 681: 1975 M. P. L. J. 509: 1965 Mah.L.J. 365: A.I.R. 1965 S.C. 364: Ahilyahai y Sitaram Bainai 1060 364; Ahilyabai v. Sitaram Bajpai, 1969

J.L.J. 70. 17. Avadh Bihari v. Ram Raj, (1872) 18 W.R. 105.

18. Ganga Prasad v. Gogun Singh, (1877) 3 C. 322; see also Narain Coomary v. Ram Krishna, (1880) 5 C. 864; Judonath v. Rajah Buroda, (1874) 22 W.R. 220.

19. Steph. Dig., Art. 44; see also Krishnasami v. Rajagopala, (1894) 18 M.

20. Tiley v. Cowling, (1701) 1 Ld. Ry. 73, 77, 78.

744: s.c. B.N.P. 243; Steph. Dig. Art. 44: illus, (e); Taylor, Ev., s. 1694.

Taylor, Ev., s. 1694.

22. See notes to 43 (post) to establish the truth of the fatcs upon which it was rendered.

28. Shumboo v. Modhoo, (1868) 10 W.

24. Nur Ali v. Emperor, 1924 Lah. 498: I.L.R. 5 L. 140: 81 I.C. 530:

25 Cr. L. J. 914.
25. Wigmore, Ev., s. 1053; (Re) Perton, 53 L. T. 707- (1885). (Statement of a person as to his illegitiment of a person as to his illegitiment. macy); see also R. v. Walker, (1884) 1 Gox. 99; in Taylor, Ev., s. 737 the point is treated as doubt-ful: as to statements by an agent containing hearsay or opinions, see (The) Actaeon, (1853) 1 Spinks E. & A. 176; (The) Solway, (1885) 10 P.D. 137. 1. Doe v. Steel. (1811) 3 Camp. 115.

where the admission is an inference from facts not personally known to the declarant, the Court may disregard the inference and look to the facts,2 and a bare statement that a party "is informed, without the addition of his belief in the information, does not amount to an admission."3 The ground appears to be, that, even if a party has no personal knowledge, the admission would ordinarily not be made except on evidence which satisfies the party who is making it that it is true.4

15. Effect and circumstances of admissions. (a) General. What is admitted by a party to be true must be presumed to be true unless the contrary is shown,5 but an admission, merely as an admission, is not conclusive against the person who makes it.6 The latter may show that he was mistaken, or was not telling the truth; he may diminish the importance to be attached to it in any way he can; he is not precluded from contradicting it. So far as the admission is merely an admission, the person making it may induce the Court to disbelieve or disregard it if he can.7 An admission is the best evidence that an opposing party can rely on and though not conclusive, is decisive of the matter unless successfully withdrawn or proved to be erroneous by adducing necessary evidence for the purpose,8 so long as the person to whom it is made has not acted upon it to his detriment when it might become conclusive by way of estoppel.9 Where there is a concurrent finding that an admission in a previous suit was erroneous and it was successfully withdrawn in the later suit, no foundation can be built on such an admission by the defendants to defeat the plaintiffs' suits.¹⁰ The burden to prove that the admission is wrong is on the maker for the admission is presumed to be true until the contrary is proved, till then it has evidentiary value.11

^{2.} Bulley v. Bulley, (1875) L.R. 9 Ch. 739, 747.

Phipson, Ev., 11th Ed., 310; Wills, Ev., 3rd., Ed., 162; 1 Daniel's Ch. Pr. 6th Ed., 575; Taylor, Ev., s. 737; Trimblestown Ltd v. Kemmis, (1843) 9 C. & F. 763–786; Roe v. Ferrars, (1801) 2 B. & P. 548. in which case it was held that if the defendant gives in evidence an answer in Chancery of the plaintiff it will not entitle the plaintiff to avail himself of any matters contained in such answer which are only stated as hearsay; but see Taylor, Ev., s. 787; as to admissions which operate by

way of estoppel see S. 115, post,
4. Kitchen v. Robbins, 29 Ga, 713,
716 (Amer.) cited in Wigmore, Ev., s. 1053.

Nathoolal v. Durga Prasad, 1954 S.
 C. 355: 1954 S.C.J. 557: 67 M.
 L.W. 641.
 S. 31, post.

See Cunningham. Ev., 23. 24: Basant Singh v. Janki Singh. (1967) I. S. C.R. 1: 1967 S.C.D. 399: (1967) 1 S.C.J. 476: (1967) 1 S.C.W.R. 125: 1967 B.L.J.R. 27: 9 Law Rep. 106: I.L.R. 46 Pat. 175: A.I.R. 1967 S.G. 341 at p. 343 (admission by party in plaint signed and verified

by him); Phipson. Ev, 11th Edn. para. 742, p. 335.

Narayan v. Gopal, (1960) 1 S.C.R. 773: (1960) 2 S.C.A. 153: 1960 S.C.J. 263: A.I.R. 1960 S. C. 100, 105; Rao Saheb v. Ranganath Gopalrao Kawathekar, (1971) 2 S. C. D. 366, 373; Duano Maliko v. Bhagat Biso, I.L.R. 1967 Gut. 106: 33 Cut.L.T. 688: 1967 Cr. L.J. 1030: A.I.R. 1967 Orissa 110, 111; Rulhu Ram v. Than Singh, 68 Punj.L.R. 866: A.I.R. 1967 Punj. 328, 329; Bihar State Board of Religious Trust v. Harkishun Das A.I.R. 1971 Pat. 363.

A.I.R. 1971 Pat. 363.

Nagubai Ammal v. B. Shama Rao, 1956 S.C.R. 451: 1956 S.C.A. 959: 1956 S.C.C. 321: 1956 S.C.J. 655: I.L.R. 1956 Mys. 152: 1956 Andh. L.T. 1029: A.I.R. 1956 S.C. 593, 599; see also Srinivasan v. Union of India, 1958 S.C.R. 1295: 1958 S.G.A. 544: 1958 S.C.J. 777: A.I. R. 1958 S.C. 419, 427.

Rulhu Ram v. Than Singh, supra Mst. Gulkandi v. Prahlad, I.L.R. (1966) 16 Raj. 1047: 1967 Raj. L. W. 63: A.I.R. 1968 Raj. 51, 58;

W. 63; A.I.R. 1968 Raj. 51, 58; Arjun Singh v. Virendra Nath, A. I.R. 1971 All. 29 (Failure to explain gives rise to adverse inference).

A gratuitous admission may be withdrawn at any time, unless there is some obligation not to withdraw it.12 So also, an erroneous admission can be retracted.18 But a court is not free to ignore, or get over, definite and clear statements of admission made by parties in the box by ascribing them to inadvertence or mistake, specially when there is not even a suggestion made in the re-examination to that effect.14 At the same time, since every admission is capable of being explained or withdrawn, it cannot be used against the party making it, unless an opportunity has been afforded to him to explain or withdraw it.16 Where an admission of a plaintiff is sought to be used against him, it is incumbent on the defendant to plead the fact of the admission in his

If a contract has come into existence, the rights and liabilities are governed by the document but if for incurring certain liabilities, a party has mentioned other facts, the other party cannot be bound by the narration. The admissions of the other facts are admissions of the executant of the document but not of the other party who has not signed it.17

Mere withdrawal of a suit does not destroy the effect of an admission made therein so long as such admission is not rebutted or the maker is confronted with under section 145, post.18

If a specific averment has been made in the paragraph of a plaint and that paragraph has been denied in the written statement, the averment cannot be treated as an admission because the denial was not specific.10

An admission is not conclusive unless it amounts to an estoppel.20

(b) Effect of Sec. 145. The question, whether an admission made by a party to a suit can be utilised against him without its being put to him in the witness-box was referred to a Full Bench of the Lahore High Court in Firm

- 12. Muhammad Imam Ali Khan v. Husain Khan, 25 1.A. 161; I.L.R. 26 Cal. 81 (P.C.): 2 C.W.N. 737; Mst. Izhar Fatima Bibi v. Mst. Mst. Izhar Fatima Bibi v. Mst. Ansar Fatima Bibi, 1939 All. 348; 182 I.C. 801; 1939 A.L.J. 642; Madho Singh v. Kalloo Singh, 1933 Oudh 28; 140 I.C. 580; Budhu Ram v. Uttamchand, 1928 Lah. 726; 109 I.C. 26; Muhammad Umar v. Kripal Singh, 78 P.R. 1904; see also Latafat Husain v. Hidayat Husain 1936 A 573; I.L.R. 58 Husain, 1936 A. 573: I.L.R. 58 All. 834: 161 I.C. 851: 1936 A.L.J. 342.
- Mangru Rai v. Shivanand Lal, 1923
 All. 575: 77 I.C. 875; Sita Ram v.
 Pur Bakhsh, 1931 Lah. 6: 130 I.C. 406: 32 P.L.R. 413; Ram Bharosey v. Ram Bahadur Singh, 1948 Oudh 125: I.L.R. 28 Luck. 58: 1947 A. W.R. (C.C.) 278: 1947 O.W.N. (C.C.) 558.
 Narayanan Neelakutty v. Krishnan
- Venki, 1955 . T.C. 199.

- 15. Bombay Agarwal Co. v. Ramchand Diwanchand, 1953 Nag 154: I.L.R. 1952 N. 700.
- Bombay Agarwal Co. v. Ramchand Diwanchand, 1953 Nag. 154: I.L.R.
- 1952 Nag. 700. 17. Panchoolal v. Tara Chand. 1966 Raj. L.W. 498, 500, distinguishing Babu Ram v. Inam Ullah, A.I.R. 1935 All, 411, 415.
- 18. Mohammad Seraj v. Adibar Rehman Sheikh, 72 C.W.N. 867; A.I.R. 1968 Cal. 550, 553; the correctness of the decision not the contrary in Joy Chandra Ghakrabarty v. Aswind Kumar Dutt, 9 G.W.N. 147 (notes) has been doubted in Chandra Kant
- Goswami, A.I.R. 1956 Cal. 577.

 19. Bharat Fire and General Insurance Ltd., v. P. P. Gupta, A.I.R. 1968 Delhi 68, 73.

 20. Ghasiram Majhl v. Onkar Singh, I.L.R. 1968 Cut. 87: 34 Cut.L.T. 328: A.I.R. 1968 Orissa 99, 102,

Malik Des Raj v. Firm Piara Las Aya Ram,21 and, after an exhaustive review of the case-law, the question was answered in the following terms:

- (1) A party's previous admission is relevant under Sec. 21 and can be used as evidence against him if that party has not appeared in the witness-box at all. The value of that admission as a piece of evidence depends on the circumstances of each, but ordinarily an admission is a valuable piece of evidence.
- (2) An admission is a relevant piece of evidence and can be used as legal evidence against a party even in cases where the party appears in the witnessbox, but makes no statement inconsistent or contradictory to that admission, and a denial of the admission is not involved in the statement made by the party in the witness-box by considering the statement as a whole.
- (3) A previous admission of a party who has gone into the witness-box on the point in issue and in the witness-box has made a statement inconsistent with the admission, or the statement made in the witness-box is such that it involves a denial of the previous admission or runs counter to that admission, then the previous admission cannot be used as legal evidence in the case against that party unless the attention of the witness during cross-examination was drawn to that statement and he was confronted with specific portions of that statement which were sought to be used as admissions. Without complying with the procedure laid down in Sec. 145, the admission contained in the previous statement cannot be used as legal evidence against that party.

The Patna High Court also has held that "Where a defendant does not give evidence, a previous statement which he had made in earlier proceedings can be put in evidence as an admission made by him and would be admissible against him".22 In an earlier case, the same court held that it is only when a document becomes relevant only by reason of Sec. 145, that, before a statement made in it can be used to contradict the evidence of the party, his attention must be drawn specially to the statements which are to be so used. Where however an admission goes to the root of the case and is relevant under Sec. 21 and its relevancy is not affected by the question of whether the party may or may not have given evidence consistent with the statement contained in it, it is not necessary to observe strictly the provisions of Sec. 145.23 In a case the same High Court has held that procedure prescribed by section 145 does not apply to admissions in view of sections 17 and 21.24 The same view has been taken by Cuttack and Mysore High Courts in the undernoted cases.25 The legal position under the provisions of Sec. 145 no doubt is that evidence in a previous suit does not prove anything and it ought to be put to the witness, but is not so in the case of admissions where the party making the admission is required to explain and rebut the same, and unless and until that is satisfactorily done the fact admitted must be taken to be established. Evidently it is for the

^{21. 1946} Lah. 65; 223 I.C. 579: 47 P.L.R. 391 (F.B.).

Mst. Bibi Kaniz Ayesha v. Mojibul Hassan Khan, 1942 Pat. 230: I.L.R. 20 Pat. 855: 200 I.C. 546: 8 B. R.

^{23.} Ramkeshwar Das v. Baldeo Singh. 1936 Pat. 588; 165 I.C. 805; 17 P.L.T. 621; 1936 P.W.N. 635.

Arjun Mahton v. Monda Mahton, A.I.R. 1971 Pat, 215.
 (1972) 38 Cut.L.T. 161: (1972) 2 Cut.W.R. 1842: 38 Cut.L.T. 1323; Veerbasavaradhya v. Devotees of Lingadagudi, A.I.R. 1973 Mys. 280: [A.I.R. 1957 All, 1 (F.B.) relied on; A.I.R. 1946 Lah. 65 (F.B.) dissented from].

maker of the admission to come into the witness box where the objection is taken at the very early stages and explain as to what led him to make the admission. In the absence of any such explanations, the value of the admission is rather enhanced. The effect of Secs. 21 and 31 is that when an admission is proved against a party, a presumption arises that the matters to which the admission relates are true, and the burden of proving that they are not true lies upon the person who made the admission. The fact that the admission was gratuitous does not affect this rule, and all that can be said is that, if it is proved to be erroneous, it can be withdrawn by the person who makes it, and will not operate as estoppel.1 According to the Calcutta High Court, an alleged admission contained in a deposition made in a previous probate case by the defendant cannot be used against the defendant when it is not put to her and no opportunity is afforded to her to explain it. It is no answer to say, that the plaintiff had no opportunity to confront the defendant with the statement as her deposition on the point in the probate case was given after her deposition in the suit. If her deposition in the probate case be allowed to be put in evidence against her in subsequent suit in order to contradict her without giving her an opportunity to tender her explanation or to clear up the particular point of ambiguity or dispute, it will be acting contrary to general principles of law.2 But in Mst. Ulfat v. Zubaida Khatoon,3 where the party sought to be bound by an admission contained in a statement made by her in a previous case came into the witness-box and denied having made the statement, but made no attempt to explain the admission, a Bench of the Allahabad High Court expressly dissented from the view taken in the above Lahore case and held that the admission could be used against the party who made it even though the statement containing the admission was not put to her while she was in the witness-box. This view has since been affirmed in a Full Bench decision of the same Court in Ajodhya Prasad v. Bhawani4-Bhargava, I., dissenting. After an exhaustive review of the case-law the learned Judges have held that if, in a civil suit, a party produces documents containing admissions by his opponent and they are admitted by the counsel for the opponent, it would not be obligatory on the party producing those documents to draw in cross-examination the attention of his opponent (when he enters the witness-box) to the said admission before he could be permitted to use them for contradicting his opponent, provided the admissions are clear and un-ambiguous. Reliance was placed upon the decision of their Lordships of the Privy Council in Rani Chandra Kunwar v. Narpat Singhs that what a party himself admits to be true may reasonably be presumed to be so, though, "the party making the admission may give evidence to rebut the presumption, but unless and until that is satisfactorily done, the fact admitted must be taken to be satisfactorily established. 6 In the case of Bharat Singh v. Bhagnathi,7 the Supreme Court held that admissions have to be clear if they are to be used against the person making them. The admissions duly proved are admissible evidence irrespective of whether the party making them appeared in the witness-box or not and whether that party when appearing as witness was confronted with it or not. The purpose of contradicting the witness

Lal Singh v. Guru Granth Sahib, 1951 Pepsu 101.

^{2.} Smt. Charan Dasi Debi v. Kanai Lal Moitra, 1955 Cal. 206: 58 C.W.N. 980.

^{3. 1955} All. 361.

^{4.} A.I.R. 1957 All, 1; I.L.R. (1956)

² All, 399,

 ³⁴ I.A. 27: 29 A. 184 P.C.
 Sce also Nathoo Lal v. Durga Prasad, 1954 S.C. 355: 1954 S.C.J. 557: 67 M.L.W. 641: 1954 S.C.A. 921: 1955 S.C.R. 51. 7. A.I.R. 1966 S.C. 405.

under section 145 of the Evidence Act is very much different from the purpose of proving the admission. Admission is substantive evidence of the fact admitted while a previous statement used to contradict a witness does not become substantive evidence and merely serves the purpose of throwing doubt on the veracity of the witness. This view was followed in the case of Biswa Nath Prasad v. Dwarka Prasad8 wherein it was pointed out that if a party to the case is the author of previous statement there is no necessary requirement of the statement containing the admission having to be put to the party because it is evidence proprio vigore. In the case of Sita Ram Bhan Patel v. Ram Chandra Wago Patil9 the admission was not clear and unambiguous and it was not proved till the time the respondent who was said to have made it examined himself and he was not confronted with it under Section 145. In these circumstances the Supreme Court distinguished the decision in Bharat Singh v. Bhagirathi,9-1 and held that the admission could not be used against the respondent for want of compliance with the provisions of section 145. The Supreme Court further observed that mere proof of admission, after the person whose admission it is alleged to be, has concluded his evidence will be of no avail and cannot be utilised against him. The circumstances under which an admission was made may always, therefore, be proved to impeach, or (since the weight of an admission depends on these circumstances' to enhance its credibility.10 The Court has to consider the evidential value of the admission along with the other evidence in the case.11

An admission may operate as an estoppel, in which case the person who made it is not permitted to deny it.12 But the circumstances must be such as to raise an estoppel. Thus, a recital of receipt in a deed, though an admission, does not operate as an estoppel.13 Recital in a document admitting title of executant's brother and alienation by him to third person can be used as admission of executant; but it does not amount to an estoppel.14 As to the effect of admissions as dispensing with proof, see the fifty-eighth section, post.

According to English law, admissions obtained under compulsion are evidence against a party if the compulsion was legal, e.g., evidence in the action, answers to interrogatories, and the like, but not if it was illegal.15 Under this Act, the fact if compulsion would affect the weight of the evidence only. As to admission made "without prejudice," see the twenty-third section, post. With regard to the effect of confessions both judicial and extra-judicial, v. ante. Introductory note to Secs. 17-19.

Confessions are irrelevant in criminal proceedings, if made under the circumstances mentioned in the twenty-fourth section, post, unless they come

^{8. (1973) 2} S.C.W.R. 637: (1973) U. J. (S.C.) 900: (1974) 1 S.C.C. 78: 1974 S.C.D. 134: (1974) 1 S.C.J. 564: 1974 Pat. L.J.R. 437: (1974) 2 S.C.R. 124: A.I.R. 1974 S.C.

^{9. (1977) 2} S.C.C. 49: A.I.R. 1977 S.C. 1712: 1977 Cr.L.J. 985: 1977 S.C.C. (Cr.) 333.

^{9-1.} A. I. R. 1966 S.C. 405. 10. See notes to S. 31. post; "Admissions depend much upon the circumstances under which they are made". R. v. Simmonsto. (1843) 1 C. & K. 164, per Wightman, J.

^{11.} Dolatsinghji v. Khachar Mansur Rukhad, 1936 P.C. 150: 63 I.A. 248 : I.L.R. 60 Bom, 634 : 162 I.

C. 17: 38 Bom, L. R. 690: 64 C. L.J. 21: 71 M.L.J. 691. 12. Ss. 31, 115—117, post. 13. Baz Bahadur v. Raghubir, 1927 All. 385: I.L.R. 49 All, 707: 100 I.C. 1037: 25 A.L.J. 572.

Dattatraya v. Rangnath, 1971 S.C.D.
 366: 1972 Mah.L.J. 264: (1971) 1
 Civ. A.P.J. 328 (S.C.): 1972 M.P.
 L.J. 336: A.I.R. 1971 S.C. 2548.

^{15.} Taylor. Ev., ss. 798-799 : Roscoe, N. P. Ev., 63.

within the provisions of the twenty-eighth section, post. But, if no inducement (within the meaning of the twenty-fourth section, post) has been held out relating to the charge, it matters not, as far as admissibility is concerned, in what way a confession has been obtained, though the manner in which it has been procured may affect its weight.16

Before using a statement (oral or written) as an admission, the facts which . made it an admission must be proved.17

- 16. Matters provable by admission. (a) Under English law. Under the English law "Admissions" are receivable to prove matters of law, or mixed law and fact, though (unless amounting to estoppels) these are generally of little weight, being necessarily founded on mere opinion. Thus, a defendant's admission that his trade was a nuisance has been received.18 So, a defendant's admission of a former valid marriage is some, though not sufficient, evidence to support a conviction for bigamy.19 Matters of fact simply may always be proved in this manner. Thus, a wife's admission of adultery, though uncorroborated, has on more than one occasion been held sufficient evidence, where considered trustworthy, upon which to grant a divorce,20 though, if corroboration is available,21 it must be produced.22
- (b) Under Indian law. But, in India, an admission by a party on a pure question of law is not binding on him,23 and he is not precluded from asserting the contrary, in order to obtain the relief to which, upon a true construction of the law, he may appear to be entitled.24 An admission on a point of law in not an admission of a "thing", so as to make the admission a matter

Robinson v. Robinson, (1858) 1 S.
 T. 362; Williams v. Williams, 1866
 L. R. 1 P. & D. 29; Getty v. Getty, (1907) P. 334: 76 L. J. P. 158; 98

White v. White, (1890) 62 L.T. 663,
 Phipson, Ev., 11th Ed., p. 310; in re-

gard to admissions involving matters of law it is said in Phillips, Ev. p. 344, 10th Ed., "Where admissions involve matters of law, as well as matters of fact, they are obviously in many instances entitled to very little weight, and in some cases, they have been altogether rejected". Thus it has been held, that the discharge of a defendant by a Court of Quarter Sessions, under the Deb-tors Act could not be established by proof of an acknowledgment of the discharge by the plaintiff himself, for the discharge might have been irregular and void, or might have been mistaken by the plaintiff: Scott, v. Clare, (1812) 3 Campt. 236; Summersett v. Adamsan, (1882) I Bing 73; Morris v. Millen, (1767) 4 Bur, 2057.

23. Ram Bharosey v. Ram Bahadur Singh. 1948 Oudh 125; I.L.R. 23 Luck, 58; 1947 O.W.N. (C. C.) 558; Gulab Ghand v. Bhaiya Lal, 1929 Nag. 343; 119 I.C. 698; Banarsi Das v. Kanshi Ram, A.I.R. 1963 S

C. 1165: 1963 S.C.D. 758.
 24. Jatendramohan Tagore v. Ganendramohan Tagore, 18 W.R. 359 at 367; (1872) I.A. Supp. Vol. 47.

^{16.} See Taylor, Ev., s. 881, S. 29, post and notes thereto.

^{17.} Barindra v. R., (1909) 37 C. 467.

18. R. v. Nevile, (1791) Peake, N.P.C.

9. See also as to the case R. v. Fairie, (1857) 8 E. & B. 486.

19. R. v. Savage, (1876) 13 Cox., 178; [sic., sed q. Whether reference intended on not P. v. Flaborty, (1847) tended or not R. v. Flaherty, (1847) 2 C. & K. 782]; R. v. Savage, over-rules the previous decision of R. v. Newton (1843) 2 M. & Rob. 503; R. v. Simmonsto, (1843) 1 Cox C. C. 30; R. v. Lindsay, (1902) 66 J. P. 505; R. v. Naguib, (1917) 1 K. B. 359; In R. v. Phillips, (1830) 1 Moo, C. G. 264 however, a declara-tion of the person showing who were (according to his own belief), his co-partners was rejected when by reason of the invalidity of the document evidencing the transfer of their shares, their legal title to them could not be established.

of estoppel.26 Even a Counsel's admission on a point of law cannot be binding upon a court, and the court is not precluded from deciding the rights of the parties on a true view of the law.1 Counsel's admission even on a question of mixed law and fact is not binding.2 The binding nature of an admission as to the existence of a custom, which is a question of mixed law and fact, depends upon the circumstances of each case.3 In a Lahore case, it has been held that the question whether a particular custom does or does not prevail in any particular tribe is a matter on which the tribesmen themselves are in the best position to pronounce an opinion, and an admission as to the existence of the custom does not stand on the same footing as an admission on a question of law.4 On a question as to who under the law or custom is entitled to succeed, the statement of a witness as to his notion of the law or custom is not binding on the parties.5

Again, oral admissions are not receivable to prove the contents of documents, except where secondary evidence is admissible or the genuineness of a document produced is in question.6 The execution of documents (whether attested or not) which are not required by law to be attested may be proved by admission or otherwise.7 And even in the case of documents required by law to be attested, the admission of a party to an attested document of its execution by himself is sufficient proof of its execution as against him.8 But the admission of a party about the registration of a document cannot make that document a registered one unless there has been due compliance with the Registration Act, Thus, if the defendant, in a suit between the same parties, admitted that the document in suit had been duly registered, it would not be sufficient to hold that the document is duly registered in the absence of circumstances showing that the admission amounts to estoppel.9 Admissions may even sometimes be received as to matters protected by privilege, provided they are proved by a third person.10

Entries in partnership books are prima facie evidence against each of the partners and therefore also for any of them against the others.11

17. The whole admission or confession must be considered. (a) Admissions. The whole statement containing the admission must be taken to-

^{25.} Jagwant Singh v. Silan Singh, I.L. R. 21 All. 285 at 287; 19 A.W.N. 66; see also Gopeelall v. Chundrao-lee Bhuoojee, 11 B.L.R. 391 at 395; 19 W.R. 12; Surendra v. Doorga-sundari. 19 I.A. 108: 19 C. 513 P. C.; Dungaria v. Nandlal, 3 A.L.J. 534; Beni Pershad v. Dodnath Roy. I.L.R. 27 Cal, 156: 26 I.A. 216: 4

C.W.N. 274. 1. Societe Belge de Banque v. Rao Girdhari Lal Chaudhary, 1940 P.C. 90: 187 I.C. 770: 1940 Kar. (P.C.) 208: 1940 A.W.R. 86: 51 L.W. 713: 1940 O.W.N. 445: 42 P.L.R. 339: 6 B.R. 618; As to further discussion on the binding nature of admissions by Counsels, see notes post.

^{2.} Kesar v. Buta. 1945 Lah. 336; 47

^{3.} Mahadeo v. Baleshwar Prasad, 1939 All, 626; 1939 A.L.J. 708.

^{4.} Ghulam Sarwar Khan v. Abdul Majid Khan, 1928 Lah. 779: 113 I. C. 99.

Mahabir Singh, Bishan Devi v. Pirthi Singh, A.I.R. 1963 Punj. 66.

^{6.} S. 22 post; as to written admissions

see S. 65, cl. (b). post.
7. S. 72, post; see Taylor, Ev., ss. 414, 1843; Common Law Procedure Act. 1854, S. 26.

^{8.} S. 70 post; Taylor, Ev., ss. 1848-

^{9.} Sharnappa v. Pathru, A.I.R. 1963 Mys. 335.

^{10.} v. ante.

^{11.} Valliammai Achi v. Ramanathan, I. L.R. (1969) 1 Mad. 734; (1970) 2 M.L.J. 331: 83 M.L.W. 36: A.

gether12 for though some part of it may be favourable to the party, and the object is only to ascertain what he has conceded against himself, and what may, therefore, be presumed to be true, yet, unless the whole is received, the true meaning of the part which is evidence against him, cannot be ascertained.13 But though the whole of what he said at the same time, and relating to the same subject, must be given in evidence, it does not follow that all the parts of the statement should be regarded as equally deserving of credit, but the Court must consider under the circumstances how much of the entire statement they deem worthy of belief, including as well the facts asserted by the party in his own favour; as those made against him.14 The rule applies equally to written, as to verbal, admissions.15

A piece of admission in a written statement, unlike the evidence of a witness, must be taken as a whole; it cannot be disjuncted from other portions of the pleading.16 Where the plea of the defendant in his written statement is not denied by the plaintiff in his replication to the written statement and there was no change in the plea despite amendment of the plaint and of the

Taylor. Ev., s. 725: Thomson v. Austen, (1823) 2 D. & R. 361; Fletcher v. Froggat, (1827) 2 C. & P. 569; Cobbett v. Grey, (1849) 4 Ex., R. 729. See Essabhoy v. Haridas, I.L.R. 39 B. 399; A.I.R. 1915 P.C. 2; Jwala Das v. Pir Sant Das, A.I.R. 1930 P.C. 245; Hanumant v. State of M. P. A. I. R. 1952 S.C.

Taylor Ev., s. 725: and cases there cited: Nilmoney v. Ramanoograh, (1867) 7 W. R. 29 (the court is not bound to believe the whole of the statement); Sooltan v. Chand, (1868) 9 W.R. 130; Shurfuraz v. Dhunnoo, (1871) 16 W. R. 257; Stanton v. Percival, (1854) 5 H. L. C. 257; Ishan v. Haran, (1869) 11 W.R. 525; (For instance if the Judge upon the (For instance if the Judge upon the evidence really believes that the pay-ments credited in a plaintiff's book were made, although he disbelieves the entry as to the amount of debits, there is nothing inequitable in his giving the defendant the benefit of the payments. But though the Judge may believe one part and disbelieve the other, he ought not to do so without some good reason); Lallah v. Sheonath, W.R. 1864, Act X, Rul, 26.

15,

Taylor, Ev., s. 726. Fatch Chand Murlidhar v. Juggilal Kamlapat, A.1.R. 1955 Cal. 465; Calcutta National Bank, Ltd. v. Rangaroon Tea Co., Ltd. A.I.R. 1967 Cal. 294, 309.

^{12.} Taylor Ev., s. 725; Wills, Ev., 3rd Ed., 163; Jwala Das v. Pir Sant Das. 1930 P.C. 245: 127 I.C. 746: 34 C. W. N. 933; Hanmant Govind Nar-W. N. 933; Hanmant Govind Nargundkar v. State of Madhya Pradesh, 1952 S.C. 343: 1954 Cr. L.J. 129: 1952 S.C.J. 509; (1952) 2 M.L.J. 631; 1953 M.W.N. 347; Bachuram Kar v. The State, 1956 Cal. 102; Bengal Coal Co., Ltd. v. Prosanna Kumar Bhattacharjee, 1932 Cal. 39: 134 I.G. 921: 54 C. L. J. 110; Darshan Singh v. Baldeo Singh, 1934 Oudh 370 (1); Fakir Khan v. Ismail Khan, 1933 Lah, 179: I.L.R. 14 Lah, 218: 141 I. C. 264; Sookan v. Chand, (1868) 9 W. R. 130 explained in Shurfuraz v. Dhunnoo. v. Chand, (1868) 9 W. R. 130 explained in Shurfuraz v. Dhunnoo, (1871) 16 W. R. 257 (a party cannot select particular passages and read them without the context); Judhoonath v. Rajah Buroda, (1874) 22 W. R. 220 (2); Pulin v. Watson, (1868) 9 W. R. 190; explained in Bykunt Goomar v. Chandra Mohan Chowdhry, (1868) 1 B.L.R. (A.C.) 133: (1868) 10 W.R. 190; Radha v. Chandra, (1868) 9 W.R. 290; Nilmoney v. Ramanoograh, (1867) 7 W.R. 29 (2); Tarinee v. Duarkanath, (1871) 15 W.R. 451 (2) (A plain-(1871) 15 W.R. 451 (2) (A plain-tiff abandoning his own case and falling back on the admissions of the defendants, is bound to take those admissions as they stand in their entirety; by so taking them he would on his own part concede the truth of those statements contained in the admissions of the defendant other than the particular statements on which he specifically relied; Ishan v. Haran, (1869) 11 W. R. 525; Lallah v. Sheonath, W.R. 1864,

Act X, Rul. 26; Konwur v. Ram, (1876) 4 I.A. 52; 2 Cal, 341; Dharam Narain v. Kapildeo, 1971 B. L.J.R. 749: I.L.R. (1973) 52 Pat. 117.

written statement, the admission in the replication to the first written statement still binds the plaintiff and will operate as an admission.¹⁷

Admissions in pleadings are to be taken in their entirety. Any document, in order to be established as an admission, is to be introduced into evidence by tendering that piece of admission if it is in the nature of a document, for then the parties will have an opportunity to test that which is going to be used against them as an admission.¹⁸

Thus, where in a suit for rent, at an enhanced rate after notice, the plaintiff set forth that the defendant and his predecessors had been holding the tenure without any change in the rent, but alleged also that the tenure had its origin at a period long after the permanent settlement, it was held, that the defendant was not at liberty to avail himself of such portion of the admission as afforded a ground for the presumption of uniform payment from the permanent settlement without accepting the latter part of the admission which rebutted such presumption.¹⁹ It is permissible for a tribunal to accept part and reject the rest of any witness's testimony. But an admission in pleading cannot be so dissected, and if it is made subject to a condition, it must either be accepted subject to the condition or not accepted at all.²⁰

The principle upon which the rule is grounded is, that if a party makes a qualified statement, that statement cannot be used against him apart from that qualification; an unfair use is not to be made of a party's statement, by trying to convert into a particular admission by him that which he never intended to be such an admission.21 But, though it is the rule that an admission, which is qualified in its terms, must be ordinarily accepted as a whole or not taken at all as evidence against a party, yet when a party makes separate and distinct allegations without any qualification, this rule does not apply. It is by no means the case that no portion of a party's statement can, by any possibility, be given in evidence against him, without every portion of the statement from the beginning to the end being also read.22 A distinction must also be drawn between the case where an admission by one party has merely the effect of relieving the other party from giving proof of a particular fact, and the case where one party, failing to adduce independent evidence in his favour attempts to rely on the statement of the other party as an admission. In the latter case, as the party relies on the admission, he must take the whole of it together; in the former case, the one party cannot be said to use the admission of the other as evidence at all.

Under the Civil Procedure Code, "it is the duty of the Court to examine the written statements in order to see on what points the parties are at issue,

Bharat Nidhi, Ltd. v. Megh Raj Mahajan, 69 P.L.R. (D) 88: A.I.R. 1967 Delhi 22, 23.

M. G. A. Hossain v. Binani Properties 73 C.W.N. 591, 604.

Judoonath v. Raja Buroda, (1874) 22
 W.R. 220.

^{20.} Motabhoy Mulla Essebhoy v. Mulji Haridas, 1915 P.C. 2; 42 I.A. 103; I. L. R. 39 Bom. 399; 29 I. C. 223; 13 A. L. J. 529; 17 Bom. L. R. 460; 21 C.L.J. 507; 19 C.W.N.

^{713: 28} M.L.J. 589: 1915 M.W.N. 522; Sundara Rajali v. Gopala Thevan. 1934 Mad. 100: 150 I.C. 132: 39 L.W. 34.

^{21.} Bykunt Coomar v. Chunder Mohan Chowdhry, (1868) 1 B.L.R. (A.C.) 133; 10 W.R. 190; Explaining Poolin v. Watson & Co., (1868) 9 W.R. 190.

^{22.} ib. see S. 39, post; and notes there-

to lay down the issues and to receive and consider the evidence adduced on the points in dispute, but the Court will not allow the parties to waste its time by producing evidence to establish that which has never been contradicted; and when a defendant admits any one fact contained in the plaint, and thereby excludes independent evidence thereof, he is not entitled to say that the plaintiff has relied on his statement as evidence, and that he (the defendant) is, in consequence, in a position to claim that the whole of it may be read as evidence in his own favour. If a party wishes to give evidence in his own favour, it is in his power to come forward, like any other witness, and subject himself to examination and cross-examination, but until he has subjected himself to cross-examination no statement which he may volunteer can be used as any evidence in support of his own case, unless the right, so to use it, has accrued from the deliberate act of his adversary. A party cannot himself determine that his own statement shall be used as evidence in his favour.23

(b) Confessions. As in the case of admissions in civil cases admissions in criminal cases must be taken as a whole, and the general rule is that whole of a confession must be given in evidence, and read and taken together. It is settled law that an admission made by a person whether amounting to a confession or not cannot be split up and part of it used against him. An admission must be used either as a whole or not at all.24 In Palvinder Kaur v. The State of Punjab,25 their Lordships of the Supreme Court observed:

"The Court thus accepted the inculpatory part of that statement and rejected the exculpatory part. In doing so, it contravened the wellaccepted rule regarding the use of confession and admission that this must either be accepted as a whole or rejected as a whole, and that the Court is not competent to accept only the inculpatory part while rejecting the exculpatory part as inherently incredible. Reference in this connection may be made to the observations of the Full Bench of the Allahabad High Court in Balmakund v. Emperor 1 with which observations we fully concur. The confession there comprised of two elements, (a) an account of how the accused killed the woman, and (b) an account of his reasons for doing so, the former element being inculpatory and the latter exculpatory, and the question referred to the Full Bench was: Can the Court, if it is of opinion that the inculpatory part commends belief and the exculpatory part is inherently incredible, act upon the former and refuse to act upon the latter? The answer to the reference was that where there is no other evidence to show affirmatively that any portion of the exculpatory element in the confession is false, the Court must accept or reject the confession as a whole and cannot accept only the inculpatory element while rejecting the exculpatory element as inherently incredible."

^{23.} Shurfuraz v. Dhunnoo. (1871) 16

^{23.} Shurfuraz v. Dhunnoo. (1871) 10
W.R. 257, per Ainslie, J.
24. Hanumant Govind v. State of
Madhya Pradesh, 1952 S. C. 343;
(1952) S.C.J. 509: 1954 Cr. L.J.
129: (1952) 2 M.L.J. 631: 1953 M.
W.N. 217: Harold White v. The
King, 1945 P.C. 181: 224 I.C.
156: 47 Cr. L.J. 575: 1945 A.L.J.
511: Jagmal v. Emperor. 1948 All.
211: 49 Cr. L.J. 243: 1948 A.L.J. 211: 49 Cr. L.J. 243: 1948 A.L.J.

^{106;} Neelakantan Vasu v. State, 1954 Trav-Co., 282; but see Emperor v. Etwa Munda, 1938 Pat. 258: 175 I. C. 300: 39 Cr. L.J. 554; 19 P.L.T. 476 (S.B.).

^{25. 1952} S.C. 354 at 357; I.L.R. (1953) Punj. 107; 1954 Cr. L.J. 154; 1953 A.L.J. 18; 1953 M.W.N. 418. 1. 52 All. 1011 (F.B.); 129 I.C. 258;

A.I.R. 1931 A. 1.

It would therefore appear that a statement or a confession of an accused person need not be considered as true in its entirety if there is other evidence including circumstantial evidence which casts doubt upon some portion thereof, and it is open to the Court to accept a part of the admission or confession which appears to the Court to be true and reject the other part which is not in the light of such other evidence. The Court cannot start with the confession; it must begin with the other evidence adduced by the prosecution and after it has formed its opinion with regard to the quality and effect of that evidence, then it may turn to the confession to receive assurance in support of its conclusion.

"There is no doubt that, if a prosecutor uses the declaration of a prisoner, he must take the whole of it together and cannot select one part and leave another, and if there be either no other evidence in the case, or no other evidence incompatible with it the declaration so adduced in evidence must be taken as true. But if, after the whole of the statement of the prisoner is given in evidence, the prosecutor is in a situation to contradict any part of it, he is at liberty to do so, and then the statement of the prisoner and the whole of the other evidence must be left to the jury for their consideration, precisely as in any other case where one part of the evidence is contradictory to another." A confession is evidence for the prisoner as well as against him and it must be taken altogether; but still the jury may, if they think proper, believe one part of it and disbelieve another. The Court is at liberty to disregard any self-exculpatory statement contained in the confession which it disbelieves. When the prosecution relies on such a statement as the only evidence of an offence, care must be taken that nothing is read into that statement.

Koli Jera Jodha v. State, 1954 Sau. 115: 1955 Cr. L. J. 1458; Ranjit Singh v. State, 1952 Himachal Pradesh 81; Nihal Singh v. Emperor, 1940 Lah. 157: 41 Cr. L. J. 576: 188 I.C. 326; Emperor v. Jate Uraon, 1940 Pat. 541: 41 Cr. L. J. 472: 187 I. C. 586; Emperor v. Etwa Munda, 1938 Pat. 258: 175 I.C. 300: 39 Cr. L. J. 554: 19 P.L. T. 476 (S.B.); Para Kinkar v. State of Tripura, 1955 Tripura 19.

3. Kashmira v. State, A.I.R. 1952 S.C. 159: 1952 Cr. L.J. 839: 1952 M.W.N. 482: 1952 All. W.R. (Sup) 64: (1952) 1 M. L. J. 754; Hari Charan v. State, A.I.R. 1964 S.C. 1184: 1964 B.L.J.R. 510: 1964 Cur. L.J. (S.C.) 208: 1964 (2) Cri. L.J. 344: 1964 M.L.J. (Cr.) 535.

4. R. v. Chokoo, (1866) 5 W.R. Cr. 70; R. v. Boodhoo, (1867) 8 W.R. Cr. 38; R. v. Gour, (1864) 1 W.R. Cr. 17 (2) 18; R. v. Chullundee, (1856) 3 W.R. Cr. 55, 56; R. v. Beshor, (1872) 18 W. R. Cr. 29; R. v. Nityo, (1875) 24 W. R. Cr. 80, Goloke v. The Magistrate, Chittagong, (1876) 25 W.R. Cr. 15 (admission not amounting to con-

fession of guilt); R. v. Sonaoollah, (1876) 25 W. R. Cr. 23, 24; R. v. Dada, (1889) 15 B. 452, 459, 479; "If one part of a conversation is relied on as proof of a confession of the crime, the prisoner has a right to lay before the Court the whole of what was said in that conversation or at least so much as is explanatory of the part already proved, and perhaps, in favorem vitae all that was related to the subject-matter in issue." The Queen's Case, (1820) 2-Br. & Bing, 287; as to distinct or opposing statements by the accused, see R. v. Soobjan, (1873) 10 B. L. R. 322; R. v. Nityo, (1875) 24 W.R. Cr. 80, and Pika v. R., (1912) 39 C. 855.

5. R. v. Jones, (1827) 2 C. & P. 629,

per Bosanquet, J.

6. R. v. Clewes, (1830) 4 C & P. 221, 226: R. v. Dada, supra at pp. 459-479; R. v. Babaji, 17 Bom. 127; R. v. Sonaoollah, (1876) 25 W.R. Cr. 23, 24; it may be that the Court would attach very little weight to the exculpatory parts; R. v. Amrita, (1873) 10 B.H.C.R. 497, 500.

7. Pika v. R., supra.

- 18. Admission must be unambiguous and clear. Before any statement can be used as an admission, it must be shown to be unambiguous and clear on the point at issue.8 If an admission is capable of two interpretations, an interpretation unfavourable to the person making it should not be put on his admission. The requirement is that an admission must be clear, precise, not vague or ambiguous.9 Before the right of a party can be considered to have been defeated on the basis of an alleged admission by him, the implication of the statement made by him must be clear and conclusive; there must be no doubt or ambiguity about it.10
- 19. Weight to be given to admissions. As stated above, admissions must be clear, if they are to be used against the person making them. Admissions are substantive evidence by themselves, is view of this Section and Section 21 of the Act, though they are not conclusive proof of the matters admitted. Admissions duly proved are admissible in evidence, irrespective of whether a party making them appeared in the witness-box or not, and whether that party, when appearing as witness, was confronted with those statements, in case he made a statement contrary to those admissions. Admission is substantive evidence of the fact admitted while a previous satement used to contradict a witness does not become substantive evidence and merely serves the purpose of throwing doubt on the veracity of the witness.11 What weight is to be attached to an admission made by a party is a matter different from its use as admissible evidence.12

Where the plaintiff pleaded minority on a particular date but the defendant pleaded that the plaintiff was a major on that date and in appeal each wanted to rely upon such admission of the other. Thus admission against admission set the matter at large and the answer to the question would depend on other evidence in the case.18

"Evidence of oral admissions ought, however, always to be received with great caution. Such evidence is necessarily subject to much imperfection and mistake; for, either the party himself may have been misinformed, or he may

8. Paresh Nath v. Ghasi Ram, A.I.R. 1960 Pat. 407; Sita Ram v. Ram Chandra (1977) 2 S.C.C. 49; A. I.R. 1977 S.C.1712.

9. Chandra Kumar v. Narpat Singh, L. R. 34 I. A. 27; I.L.R. 29 A. L. R. 34 I. A. 27; I.L.R. 29 A. 184; Nagubai v. Shamarao, 1956 S. C. R. 451, 466: A.I.R. 1956 S.C. 593, 600: I.L.R. 1956. Mys. 152; Ramaji v. Manohar, A. I. R. 1961 B. 169: 62 Bom. L.R. 322.

10. C. Koteswara Rao v. C. Subba Rao, 1970 S.C.D. 380; (1970) 2 S.C.J. 679: (1970) 2 Andh. W.R. (S.C.) 127; (1970) 2 M.L.J. (S.C.) 127; A. I.R. 1971 S.C. 1542.

11. Bharat Singh v. Bhagirathi, (1966) 2 S. C. J. 53: 1966 S.C.D. 153: (1966) 1 S.C.W.R. 222: A.I.R. 1966 S. C. 405, 410; Makhea Kumbhar v. Fague Kumbhar, I.L.R. 1966 Cut. 483: 32 Cut.L.T. 1041 (mutation petition-admission in previous

proc edings); Ishar Das v. Arjan Singh, 1966 Cur. L.J. 537; Punjab University, Chandigarh v. Prem Chand. 1971 Cur. L.J. 20; A.I.R. 1971 Punj. 177; Ramudu Mudaliar v. Elammal, A.I.R. 1971 Pat. 215; Birabara Rout v. D. Rout, (1972) 38 Cut.L.T. 161; Veerbasavaradhya

v. Devotees of Ungadagudi Mutt, A.I.R. 1973 Mysore 280. 12. Bharat Singh v. Mst. Bhagirathi, A.I.R. 1966 S.C. 405, 410: (1966) 1 S.C.W.R. 222: 1966 S.C.D. 153: (1966) 2 S.C.J. 53; Makhea Kumbhar v. Fague Kumbhar, I.L.R. 1966 Cut. 483: 32 Cut. L.T. 1041, 1044 (admission in prior mutation pro-ce-dings); Ishar Das v. Arjan Singh, 1966 Cur. L.J. 537; Punjab University v. Prem Chand Handa, 1971 Cur. L.J. 20: A.I.R. 1971 Punj. 177 .181. 13. Hetram v. Bhader Ram 1973 W. L.

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not have clearly expressed his meaning, or the witness may have misunderstood him, or may purposely misquote the expression used. It also sometimes happens that the witness, by unintentionally altering a few words, will give an effect to the statement completely at variance with what the party actually said."14 So, where a plaintiff sued for a sum said to be due upon a settlement of account and, instead of producing and proving the account current between himself and the defendant, produced evidence to prove the admission of the debt, the Privy Council said: "They consider that it is a very dangerous thing to rest a judgment upon verbal admissions of a sum due, especially when there are other means of proving the case, if a true one."15 But where an admission is deliberately made, and precisely identified, the evidence it affords is often of the most satisfactory nature.16 Admissions depend very much upon the circumstances under which they are made,17 and possible motives for incorrect statements by interested parties should not be ignored. The nature of the facts admitted is also a material point to be considered. If the fact admitted is one within the personal knowledge of the party admitting, and there is no evidence of convincing explanation forthcoming, its value is considerable. If, on the other hand, the fact admitted is an inference from evidence and circumstances, the weight of admission may be very little. A general allegation by an interested party as to the existence or non-existence of a custom is his conclusion of a mixed question of law and fact. This is particularly so in pleadings in which a party has to make allegations both of fact and law.18

As in the case of admissions in civil proceedings, the evidence of oral confessions of guilt ought to be received with great caution.19 But a deliberate and voluntary confession of guilt, if clearly proved, is among the most effectual proofs in the law; the degree of credit due to the confession must be estimated by the Court or jury according to the particular circumstances of each case.20 In the first instance it must be clear that there is really a confession.21 To constitute a confession the person confessing should make a full and explicit admission of his guilt so clear as to have no other hypothesis tenable.22 The ordinary rule is that a confession is evidence for the prisoner as well as against him and must be taken altogether. But it is only where no other evidence is forthcoming that this can be pressed to the extent of requiring that no part be accepted as true without accepting the whole. If other evidence incompatible with a part of the confession is on record, it may be relied on in preference to that part.28 In order to determine whether statements are confessions, the whole of the statements must be taken into consideration, and where the statements are self-exculpatory they are inadmissible.24 Although a confession must be taken as a whole and considered along with the admitted facts of the case, the accused being judged by

266; 30 C.L.J. 503.

22. Smith v. R., 1918 Mad. 111: 43
I.C. 605: 19 Cr. L.J. 189.

23. Husnu v. R., 1918 Nag. 131: 20
Cr. L.J. 737: 53 I.C. 145.

24. Ah Foong v. R., 22 C.W.N. 834: 28
Cr. L.J. 105: 46 C. 411: 48 I.C.
504: A.I.R. 1919 C. 696.

^{14.} Taylor, Ev., s. 861.

Lala v. Juggernath, (1883) 10 I.A.
 74, 79: 13 C.L.R. 266, 271.

Taylor, Ev., s. 861.

^{17.} R. v. Simmonsto, (1843) 1 C. & K. 164. 166, see notes to s. 31, post.

^{18.} Mahadeo v. Baleshwar Prasad, 1939

All. 626; 1939 A.L.J. 708. Taylor Ev., s. 862. Taylor, Ev., s. 865; v. ante, Introduction. See as to the degree of credit to be given to confessions. Roscoe, Cr. Ev., 16th Ed., 39: 1

Phillips & Arn. Ex., 402, 10th Ed., R. v. Dada, (1889) 15 B. 452, at

p. 480. R. v. Pramathanath Bagchi, 1920 Cal. 78; 55 I.C. 282; 21 Cr. L.J.

his whole conduct, the Court is at liberty to disregard any statement contained in the confession which it disbelieves.25 In trials by jury, it is the duty of the judge to lay the confessions properly before the jury, pointing out the circumstances bearing for, and against, their value, but it is for the jury to form an opinion as to their weight.1 "A Judge, in fact, is hardly justified in treating a consession made by a prisoner before a Magistrate, as a mere piece of evidence which a jury may deal with in the same way as they would with the evidence of a witness of doubtful veracity. If a prisoner has confessed before a Magistrate, the attention of the jury should be drawn to the question whether there was any reason to suppose that that confession was made under any undue influence; and if there is no reason to suppose anything of the kind, the jury should be told so and advised that they may act upon it."2 The informative hypothesis affecting self-criminative evidence have been in particular dealt with in the works of Bentham and Best.3 False confessions are either the result of mistake (which may be of fact or of law) or are intentional. In the case of intentionally false confession, the field of motive must be searched for such causes as mental and bodily torture, desire to stifle further inquiry, weariness of life, vanity, desire to benefit or injure others, and motives originating in the relation of the sexes. False confessions are not confined to cases in which there has really been a crime committed. Frequently such confessions have been made, under hallucination of events which are imposible. The above causes affect more or less every species of confessional evidence. But extra-judicial statements are subject to additional informative hypothesis such as mendacity in the report, misinterpretation of the language used and incompleteness of the statement.4 Their value, except in very rare cases, is not very high. It would be unsafe to rely upon an extra-judicial confession when there is no other corroborative evidence in support of it.5

17. Admission defined. An admission is a statement, oral or documentary, which suggests any inference as to any fact in issue or relevant fact, and which is made by any of the persons, and under the circumstances, hereinafter mentioned.

s. 3 ('Document.')

documents)

s. 23 (Admission "without prejudice") s. 3 ("Fact in issue.")
s. 3 ("Relevant fact.")
s. 21 (Proof of admission.)
ss. 22, 65, cl. (b) (Admissions as to s. 31 (Effect of admissions.) ss. 24-30 (Rules with regard to admiswhich amount to confes-

Admissions generally-Steph. Dig., Arts. 15-20; Taylor. Ev., ss. 723-861; Wharton, Ev., 1075-1220; Roscoe, N.P., Ev., 62-79; Phipson, Ev., 11th Ed., 304-338; Wills, Ev., 3rd Ed., 153-181; Best, Ev., s. 518 et seq; Powell, Ev.,

^{25.} Kamoda v. R., 1918 Nag. 198 (2):

¹⁹ Cr. L.J. 785; 46 I.C. 705. 1. R. v. Dada, (1889) 15 B. 452, 461, 478; R. v. Mania, (1886) 10 B. 497.

^{2.} R. v. Shahabut, (1870) 13 W. R. Cr. 42, 43 per Norman, C.J.

^{3.} Best. Ev., ss. 554-575; Norton, Ev., 155, 161.

Best, Ev., ss. 554-575; Norton. Ev., 155, 161.

^{5.} Udhan Lohar v. Emperor, 1939 All,

^{685: 184} I.C. 390: 40 Cr. L.J. 954: 1939 All. L.J. 752; Emperor v. Kommoju, 1940 Pat. 163: I.L.R. 19 Pat. 301: 188 I.C. 57: 41 Cr. L.J. 533; Fakir Chand v. State, 1950 M.B. 76: 51 Cr. L.J. 1265 (F.B.); Kandhai v. State, 1953 V.P. 38; State v. Thingham Dhabalo Singh, 1955 Manipur 1; Mst. Bhagan v. State, 1955 Pepsu 33; Raj v. Emperor, 1928 Lah. 111 I.C. 449.

9th Ed., 420-445; Norton, Ev., 142-154; Gresle, Ev., 456; Phillips and Arn., Ev., 308-401; Greenleaf, Ev., Ch. XI; Wigmore, s. 1048, et seq.

By agents-Steph. Dig., Art. 17; Taylor Ev., ss. 602, 605; Roscoe N.P. Ev., 69-71; Best. Ev., s. 531, p. 487; Evan's Principal and Agent, 187-193, 2nd Ed.; Norton Ev., 144; Pearson's Law of Agency in British India, 426, 428; Powell Ev., 9th Ed. 299; Story on Agency, ss. 134, 135; Roscoe Cr. Ev., 16th Ed., 55; Wigmore, Ev., s. 1078.

By persons having proprietary or pecuniary interests—Steph. Dig., Arts. 16, 17; Taylor, Ev., ss. 743-754, 756, 758, 787; Roccoe, N.P. Ev., 67; Act IX of 1908, Limitation Act, 1963, S. 20).

By persons from whom interest is derived-Steph. Dig. Art. 16; Taylor, Ev., ss. 787-794, 758 190.

By strangers-Steph. Dig., Art. 18; Taylor, Ev., ss. 740, 759-765.

By referees-Steph. Dig., Art. 19; Taylor Ev., ss. 760-765.

SYNOPSIS

I. The Section.

- 2. Principle.
- 1. The Section. The Section defines "admission". According to it, an admission is-
 - (1) a statement, that is, something which is stated,
 - (2) such statement may be oral or documentary, but
 - (3) the statement must suggest any inference as to-
 - (a) any fact in issue, or
 - (b) any relevant fact, (otherwise the statement will not amount to admission.5-1)
 - (4) the statement must be made by any of the persons mentioned in the following Sections, and
 - (5) the statement must be made under the circumstances mentioned in the following Sections.
- 2. Principle. The reception of admissions, considered as exceptions to the rule against hearsay, is grounded upon the fact, that what a person says may be presumed to be true as against himself, and when not obnoxious to that rule upon the fact of inconsistency. But the very ground of this presumption excludes such an inference, when the declarations of a person are tendered as evidence in his own favour. The general rule is that an admission can only be given in evidence against the party making it, and not against any other party. To this rule there are certain exceptions which are mentioned in Secs. 18–20. When broadly stated in such a manner as to include these exceptions, the rule is that the declarations of a party to the record, or of one identified in

^{5-1.} Sivaram v. Ramchandra, A. I. R. 1977 S. C. 1712: (1977) 2 S.C.C.

Best, Ev., s. 519; Wills, Ev., 150; but see also Taylor, Ev., s. 723; v. ante

^{7. (}In re) Whiteley, (1891) L.R. 1 Ch. 558, 563, 564; Stanton v. Percival, (1854) 5 H.L. Cas 257.

interest with him, are, as against such party, receivable in evidence.8 This identity of interest which determines the relevancy of the admissions includes (a) agency, and (b) proprietary or pecuniary interest,10 which includes (i) joint interest,11 (ii) real as opposed to nominal interest,12 (iii) derivative interest.13 Statements of one person cannot be regarded as admissions of another person merely on the allegation that the two are in collusion.14 Statements by strangers are not generally relevant.15 But to this general rule also there are certain exceptions.16 In respect of the admissions of agents, the general principle applies qui facit per alium facit per se. There is a legal identity of the agent with the principal. If the principal constitutes the agent his representative in a certain transaction, whatever the latter docs in the lawful prosecution of that transaction is the act of the principal.17 Agency is the ground of reception of declarations by partners and joint contractors and referees.18 In respect of declarations by persons having a proprietary or pecuniary interest in the subject-matter, the rule in respect of the joint interest is that the admission of one party may be given in evidence against another, when the party against whom the admission is sought to be read has a joint interest with the party making the admission in the subject-matter in the thing to which the admission relates.19 Thus, where the pleader for the plaintiff deposed that the second defendant had asked him before the institution of the suit to arrange a settlement, this was held admissible against all the defendants.20 This rule depends upon the legal principle that persons seised jointly are, seised of the whole, each being seised of the whole, the admission of either is the admission of the other and may be produced in evidence against that other. That is applied from real property law to other matters.21 In the case of parties who have a real as opposed to a nominal interest, the law in regard to this source of evidence looks chiefly to the real parties in interest, and gives to their admissions the same weight as though they were parties to the record.22 Lastly, in the case of derivative interest, the party against whom the admission is sought to be used takes what he claims in the subject-matter from the person who made the admission, as where it is sought to read against the heir an admission made by the ancestor. The ground upon which admissions bind those in privity with the party making them is (as in the case of the other above-mentioned exceptions) that they are identified in interest.23 "He (the person against whom the admission is read) stands in the shoes of the party making the admission. He can only claim what he claims, because he derives title in that

S. 18, cl. (2), see post.

'S. 19.

18. See post; and Introduction, ante. (In re) Whiteley, (1891) L.R. 1 Ch. 558, 563, Chalho v. Jharo, (1911) 20. Meajan v. Alimuddin. 1917 Cal. 487: I.I.R. 44 C. 130: 34 I.C. 571: 20 C.W.N. 1217: 25 C.L.J. 42: per Sanderson, C.J., and Mookerjee, J.: sce also Yagganna Obanna Kutagulla Gangaiah; 1945 Mad. 361: (1945) 1 M.L.J. 378: 1945 M.W.N.

 In re Whiteley supra, per Kekewich,
 The declarations of partners and joint contractors are admissible both on the ground of joint interest and of agency; Taylor, Ev., ss. 598, 743; Steph. Dig., Art., 17, see post.

Taylor, Ev., s. 756, see post. ib. s. 787. See also Ha Halsbury's Laws of England, 3rd Ed., Vol. 15, p. 299.

Taylor, Ev., s, 740.
 Ss. 18, 20, sec post.
 S. 18, Cl. (1), sec post.

See ib. See post,

Mooti Ram v. Sri Lal, 1934 All, 684: 151 I.C. 261.

Steph Dig., Art. 18; Taylor, Ev., s. 740, see post. 16. Taylor, Ev., ss. 759-765, see post, and

^{17.} Taylor, Ev., s. 602; Best. Ev., s. 531. see post. As to admissions by agents see the judgments of Sir W. Grant in Fairlie v. Hasting, (1804) 10 Ves.

³⁹ C. 995.

way, and therefore it is only fair according to legal principles, that he should be bound by the admissions of him through whom he claims."24

Admissions must be unambiguous, clear and precise, not vague or ambiguous.²⁴⁻¹ If an admission is capable of two interpretations, an interpretation unfavourable to the person making it should not be put on his admission.²⁵

When an admission is proved, though it is not conclusive evidence, the facts contained in it may reasonably be presumed to be true until the admission is explained satisfactorily and the presumption is rebutted.²⁵⁻¹ The burden of proof lies on the person who has to prove a fact and it never shifts but the onus of proof shifts. Such a shifting of onus is a continuous process in the evaluation of evidence.¹

18. Admission by party to proceeding or his agent.—Statements made by a party to the proceeding, or by an agent to any such party, whom the Court regards, under the circumstances of the case, as expressly or impliedly authorised by him to make them, are admissions.

by suitor in representative character;—statements made by parties to suits, suing or sued in a representative character, are not admissions, unless they were made while the party making them held that character.

Statements made by-

- (1) by party interested in subject-matter;—persons who have any proprietary or pecuniary interest in the subject-matter of the proceeding, and who make the statement in their character of persons so interested, or
- (2) by person from whom interest derived;—persons from whom the parties to the suit have derived their interest in the subject-matter of the suit, are admissions, if they are made during the continuance of the interest of the persons making the statements.

SYNOPSIS

- 1. General:
 - (a) The Section,
 - (b) Statements made without prejudice.
- (c) Admissions must be taken as a whole.
- (d) Effect of admission in documents.
- In re Whiteley, (1891) L.R. 1 Ch. 558, 563,per Kekewich, J.
- 24-1. Sita Ram v. Ram Chandra, A.I.R. 1977 S.C. 1712: (1977) 2 S.C.C. 49.
- 25. Ramji v. Manohar, 62 Bom.L.R. 322; A.I.R. 1961 B. 169. See also Chandra v. Narpat, L.R. 34 I. A. 27; I.L.R. 29 A. 184; Nagubai v. B. Shama Rao, 1956 S.C.R. 451; A. I. R. 1956 S.C. 593; I. L. R.
- 1956 Mys. 152.
 25-1. Thiru John v. The Returning Officer, A.I.R. 1977 S.C. 1724; (1977).
 3 S.C.C. 540; S. T. Thimappa v. S. I., Prasad, A.I.R. 1978 Kant. 25,
 - 1. Gouranga Panigrahi v. Shahadeb Panigrahi, 34 Cut.L.T. 890 distinguishing Kishori Lal v. Mst. Chaltibai A.I.R. 1959 S.G. 504 not applying to cases where the initial onus rests,

- 2. "Statement".
- 3. "Party to the proceeding":

(a) General.

(b) Deposition in previous proceedings.

(c) Recital in documents.

(d) Co-defendants and co-plaintiffs.

(e) Parties in criminal cases,

(f) When an admission can be used against the party making it.
4. Statements by Agents:

(a) General,(b) Husband and wife,

- (c) Admissions by agents in criminal cases.
- (d) Admissions by attorneys, plea-ders, solicitors, counsel, etc.
- (e) Counsel's admission in criminal and income-tax cases.

(f) Admissions by guardians.

- (g) Admissions by guardians under Hindu Law.
- (h) Admissions by Government servants.
- 5. Statements by suitors in representative character.
- 6. Section 18 (1): Party interested in subject-matter.

- (a) General.

(b) Partners, etc.(c) Principal and surety.

(d) Acknowledgments by dian or manager of joint Hindu family.

(e) Guardian's power to acknowledge.

(f) Acknowledgment by joint contractors, etc.

- (g) Acknowledgment by co-heirs,
- (h) Acknowledgment by co-execu-

- (i) Acknowledgment by partners.
 (j) Acknowledgment by mortgagees.
 (k) Acknowledgment by mortgagors.
 7. Section 18 (2): Persons from whom interest is derived.
- 8. Admissions must qualify or affect

(a) General,

- (b) Sales in execution, and for arrears of revenue.
- 9. The admission must be made during the continuance of the interest.
- 10. Proof of admissions,
- 11. Miscellaneous.
- 1. General. (a) The Section. The section lays down the following propositions:
 - (1) Statements made by a party to the proceeding are admissions.
 - (2) Statements made by an agent to any such party, whom the Court regards, under the circumstances of the case, expressly or impliedly authorised by him to make them, are admissions;
 - (3) Statements made by parties to suits, suing or sued in a representative character, are not admissible,

unless such statements were made by the party making them while he held that character;

- (4) Statements made by persons-
 - (i) who have any proprietary or pecuniary interest in the subjectmatter of the proceeding, and
 - (ii) who made the statement in their character of persons so interested.

are admissions, if they were made during the continuance of the interest of the persons making the statements;

- (5) Statements made by persons from whom the parties to the suit have derived their interest in the subject-matter of the suit are admissions, if they are made during the continuance of the interest of the persons making the statements.
- (b) Statements made without prejudice. Statements made "without prejudice" should not be treated as admissions against the maker or as binding between the parties. Such statements are merely tentative.2

Kurtz & Co. v. Spence & Sons, (1887)
 L. J. Ch. 238, cited in Union

of India v. Shew Bux. A.I.R. 1965 C. 636.

- (c) Admissions must be taken as a whole. The general rule is that when a statement is to be used as admission the entire statement must be taken into consideration or not at all. It is not permissible to dissect the statement, rely on one part and ignore the other part which might explain the real import of the admission.3-8 But when an admission consists of distinct and separate matters, then an admission relating to one matter can be relied on without reference to the admission relating to other matters.9 Although the entire statement containing the admission must be put in and considered, but the Court is not bound to believe or disbelieve the statement as a whole, and, where there is other evidence in the case, it may, in the light of that evidence, believe one part of the statement and disbelieve the other, though, where there is no other evidence in the case, or the other evidence is untrusworthy, and the only material for decision is the admission, then such admission must be accepted or rejected as a whole.10
- (d) Effect of admission in documents. Admissions in documents may be placed in two categories, namely-
 - (1) those in which the admission is made by the person against whom the admission is sought to be proved; and
 - (2) those in which the admission is made by a third person.
 - In the former case, the admission of the document means admission of facts contained in the document, though the facts are not deposed to by any one and the truth of those statements is not in any way tested. But in the latter case, to admit the admission contained in the document against the party admitting the document would be prejudicial to him, and no provision of the law makes such admission admissible against a person other than the person making it, unless such person can be said to be bound by the admission.11
- 2. "Statement". The word 'statement' is not defined in the Act. Hence the dictionary meaning of the word should be looked to in order to discover what it means. Assistance may also be taken from the use of the word 'statement' in other parts of the Act to discover in what sense it has been used there-The word 'statement' has been used in a number of sections of the Act.

D. Karnail Singh v. State of Punjab,

A.I.R. 1954 S.C. 204: 1954 Cr. L.J. 580: 1954 All.L.J. 209: 1954 B.L.J.R: 179: 1954 M.W.N. 319; J. Mc Giffin v. L. I. C., A.I.R. 1978 Cal. 123.

10. See Rajah Nilmoney Singh v. Ramanugrah, 7 Suth.W.R. 29; Maung Shew Myin v. Ma Naing, A.I.R. 1923 R. 24: 4 U.B.R. 114; Shiv Ram v. Shiv Charan, A.I.R. 1964 Raj. 126: I.L.R. 1964 Raj. 26. 11. Sita Ram v. Santanu Prasad, A.I.R. 1966 S.C. 1697: (1966) 1 S.C.W. R. 974: 68 Bom, L. R. 489: 1966

M.P.L.J. 913: 1966 Mah.L.J. 881.

^{8-8.} Jwala Das v. Sant Das, A.I.R. 1930 P.C. 245: 60 M.L.J. 341; Hanumant v. State of M. P., A.I.R. 1952 S.C. 343: (1952) 2 M.L.J. 631: 1952 All.W.R. Sup. 109: 1953 Cr.L.J. 129: 1953 M.W.N. 347; Attaullah v. Attaullah, A.I.R. 1953 Cal. 530: 57 C.W.N. 778; Ishar Singh v. Gajadhar Pd., A.I.R. 1957 Pat. 174: 1956 B.L.J.R. 745; Ram Surat Devi v. Satraji Kuer, A.I.R. 1975 Pat. 168; Shiv Ram v. Shiv Charan, A.I.R. 19 I.L.R. 1964 Raj. 26. A.I.R. 1964 Raj, 126:

viz., Secs. 17 to 21, 32, 39, 145 in its primary meaning of 'something that is stated' and that meaning should be given to it under S. 157 also unless there is something that cuts down that meaning for the purpose of that section. Words are generally used in the same sense throughout in a statute unless there is something repugnant in the context. Hence a 'statement' means only something that is stated' and the element of communication to another person is not necessary before 'something that is stated' becomes a statement under S. 157 of the Act.12

3. "Party to the proceedings." (a) General. "With respect to the persons, whose admissions may be received the general doctrine is, that the declarations of a party to the record, or of one identified in interest with him, are, as against such party receivable in evidence."13 Thus, when a party to the suit makes a statement which is at variance with his pleading, it is open to the other party to treat that statement as an admission and use it against him.14 The Court is entitled to consider admissions solemnly made by a party in the course of proceedings in the same or other suits.15 Even statements made to the Police Officers can be proved as under this section, though they cannot be used as evidence of a confession.16

A party to the record is spoken of in this section as a "party to the proceeding." The "proceeding" mentioned in the section refers to the proceeding in which the matter stated by the party is in issue or is relevant to the issue and not the proceedings, if any, in which the statement has been made.17 An admission in a previous suit by a person not a party to the subsequent suit is no'l admissible against a party to the later suit. 18 As to admissions by parties (when sued or suing personally) made when a minor, or when holding a representative character, v. ante and as to nominal parties, guardians and next friends, v. post. Admissions may be made by parties at any time19 and either in a present or past20 litigation. It is not necessary that the prior litigation should have been between the same parties, and in this respect a distinction must be drawn between statements admissible under the present section, and

12. Bhogilal Chunilal v. State of Bombay, A.I.R. 1959 S.C. 356; 1959 S.C.J. 240; 1959 Cr.L.J. 389; 61 Bom. L. R. 746; (1959) 1 M. L. J. (Cr.) 105; 1959 All. W. R. (H.C.) 156; 1959 Andh. W.R. (S.

C.) 101, 13. Taylor, Ev., S. 740; citing Spargo v. Brown, (1829) 9 B, & C. 935. 14. Sampat v. Surajmal, I.L.R. 1958 B. 797; A. I. R. 1959 B. 504; 59 Bom.L.R. 1112,

Dattatraya v. Shankar. I.L.R. 1959
 B. 1144; A.I.R. 1960 B. 153; 61
 Bom.L.R. 792.

16. Biswanath v. Dhapu, A.I.R. 1960

C. 494.

17. P. D. Patel v. Emperor, 1933 Rang. 292; 116 I.C. 663; 35 Cr. L. J. 131.

18. Ahmad Khan v. Jawahar Singh, 1923 Lah. 16; 84 I.C. 257.

Unless the admission is one made by a person suing or sued in a representative character in which case it must be made whilst the person making it sustains that character, S. 18; and see Stephen's Dig., Art. 16 v. ante. Introduction.

20. Hurish v. Prosunno, (1874) 22 W. R. 303; Obhoy v. Beejoy, (1869) 9 W.R. 162; Sheo v. Ram, (1870) 14 W.R. 165; Girish v. Shama, (1871) 15 W.R. 437; Bhugwan v. Mechoo, (1872) 17 W.R. 372; Kashee v. Bama, (1875) 23 W.R. 27; Forbes v. Mir. (1870) 5 B.L.R. 529: 14 W. R. 28 (P.C.): 13 M.I.A. 438; see also cases cited ante. In a suit by A and B parties not entitled to the property of a deceased Hindu as his heirs against C and D, an admission by the person legally entitled to the property, made in a petition filed in the suit, that by her gift of relinqui-shment plaintiffs had a title to the property, was held to be evidence that such title existed anterior to the commencement of the Gour v. Mohesh, (1871) 14 W.R.

those admissible under the thirty-third second, post. And so it was held that the deposition of a person in a suit to which he was not a party was, in a subsequent suit in which he was defendant, evidence against him and those who claimed under or purchased from him, although he was alive and had not been called as a witness. Admissions are not on certain occasions conclusive proof of the matter admitted. Thus, under the Mohammadan Law marriage can be presumed from the fact of the husband acknowledging the woman as his wife; but the declaration as to the status of the woman as wife is a judicial act and could not be founded on admissions but on evidence. Therefore, if there was evidence that there had in fact been no marriage at all between the parties, the earlier admission becomes valueless.²¹

- (b) Deposition in previous proceedings. The thirty-third section (post) did not apply to such a deposition, which was admissible under the present section, although it might have been shown that the facts were different from what they were stated to be in the former case.²² And an admission by a jagirdar, in a suit brought by the Government to assess the lands, that the lands were comprised in a zamindari, is evidence of that fact in a suit by the zamindar to resume those lands.²³ Admissions by the parties in a former arbitration may be used in evidence in a subsequent suit.²⁴ Admissions made solemnly by a party in an earlier proceeding are of value in other proceedings relating to the same subject-matter.²⁵
- (c) Recital in document. As regards recital of boundaries in documents when the recital is in a document inter partes, the recital is a joint statement made by the parties to the document and, therefore, relevant against all of them as an admission. When the recital of boundaries is in a document between a party and a stranger the recital is relevant against the party as an admission but is not admissible in his favour, unless the fact recited is deposed to in Court by the executant of the document, in which case the recital will become admissible under Sec. 157, Evidence Act, to corroborate the evidence of the executant or under Sec. 155, Evidence Act, to contradict such evidence. Where a party who is an executant of a sale deed himself challenges the sale, onus to prove falsity of recitals of sale deed is on that party. Description in a mortgage-deed by the mortgagors of the land mortgaged as properties "in our sir and khas possession" may not be regarded as admissions by the mortgagees as the deeds were executed by the mortgagors; but they are certainly admissible under Sec. 13 of the Evidence Act as assertions of title, and when it is under

Razia Begum v. Anwar Begum, A.
 I. R. 1958 Andh. Pra. 195: 1957
 Andh. L. II. 844.

23 Forbes v. Mir, 5 B.L.R. 529: 14 W.R.P.C. 28,

24. Huronath v. Preonath, (1867) 7 W. R. 249; and admissions made before an arbitrator are receivable in a subsequent trial of the cause, the reference having proved ineffectual Gregory v. Howard, (1800) 3 Esp. 113; Slack v. Buchanan, (1790) Pea, R, 5.

Dattatraya v. Shankar, I.L.R. 1959
 Bom. 1144: A.I.R. 1960 Bom. 153.

1. Rangayyan v. Innasimuthu, 1956 Mad. 226, 228: (1955) 2 M.L.J. 687.

 Mania v. Deputy Director of Consolidation, A.I.R. 1971 All, 151.

Andh. L. 11, 844.

22. Soojan v. Achumut, (1874) 14 B.
L.R. App. 3: 21 W.R. 414; Ali
Mohammad Khan v. Sheikh Mohraj
Bdpai, 36 C.L.J. 186: 1921 Cal.
781; Brajaballav Ghosh v. Akhoy
Bagdi, 1926 Cal. 705: 93 I.C. 115:
30 C.W.N. 254; Bibi Kaniz Ayesha
v. Mojibul Hasan Khan, 1942 Pat.
230; I.L.R. 20 Pat. 855; 200 I.C.
546.

these documents that the mortgagees claim, their probative value as against them and as against their lessees who claim under them is high.3 The second paragraph of the eighteenth section settles a point which appears to be one of some doubt in England.4 Therefore, where parties sue or are sued in a representative character (e.g., as assignees of an insolvent,5 executors, administrators, trustees, and the like) statements made by them before they were clothed with that character will not be admissible against them so as to affect the interest of the persons they represent.6 Thus the declarations of a party suing as assignee of a bankrupt made before he became such, are not admissible against him.7 The admissions of the executor of the donor must be treated as the admissions of the donor.8

The personal conduct or admissions of a trustee cannot be allowed to prejudice the case of an institution of which he is a trustee.9 The admissions of a previous Mahant of an institution are not binding upon the present Mahant or the worshippers, where the Mahants are nothing more than the custodians or managers of the institution.10 An admission of wakf by a mutwalli does not estop him from claiming his share in the wakf property as heir, if the wakf is void.11 An admission made by a person in a written statement filed by him as the legal representative of a deceased defendant in a suit is not binding on him in a subsequent suit filed by him as the reversioner on behalf of all the reversioners.12 Where a person as a member of a community being interested in a plot of land being treated as a graveyard made an admission that it was not a graveyard, it was held that the admission was not binding on the other members of the community as it was made by the person in his individual capacity and not in a representative capacity.18

Where property has been devised by will to executors, any admission by parties other than the executors to the will, will not bind the estate of the deceased.14 The representative capacity of a person who represents a minor comes to an end by the death of that minor.15 In respect of co-representatives it seems that the admission of one executor will not bind another, at any rate, if the admission was not made in the character of executor.16 The admissions

Art 16.

Dwarkanath v. Chundee, (1865) 1

W.R. 339.

9. Balak Ram High School v. Nanumal, 1930 L. 579: I.L.R. 11 Lah. 508: 128 I.C. 532: 31 P.L.R. 509.

10. Ram Prasad v. Shiromani Gurdwara Prabandhak Committee, 1931 Lah. 161: I.L.R. 12 L. 497: 135 I.C. 657; 32 P.L.R. 910.

 Mst. Rukeya Banu v. Mst. Nazira Banu, 1928 Cal. 130: I.L.R. 55 Cal. 448: 105 I.C. 647; 32 C.W.N. 248.

W.R. 63.

15. Hulodhur v. Judoo, (1830) 14 W.R. 162.

16. Chunder v. Ramnarain, (1867) 8 W. R. 63 and see Tyllock v. Dunn. Ry. & M. 416; Scholey v. Walton, (1844) 12 M. & W. 510; Fox v. Waters, (1840) 12 A. & E. 43; Tay-lor Ev. s. 750, Act IX of 1908, S. 21 (Indian Limitation Act): Williams on Executors, 1796. 1813, 1937.

^{3.} Harihar Pd. v. Deo Narain Prasad. 1956 S.C. 305; 1956 S.C.J. 279; 1956 B.L.J.R. 306; 35 Pat. 221. 4. Taylor, Ev., s 755; Steph. Dig.,

^{5.} Merely to speak of the "plaintiffassignee" is not an admission of the plaintiff's title as assignee; Clark v. Mullick, (1839) 2 M.I.A. 263, 269,

^{6.} S. 18, ante; Legge v. Edmonds, (1855) 25 L.J. Ch. 125, 140, 141. 7. Fenwick v. Thorton, (1827) 1 M. and M. 51: see Taylor Ev., s. 755.

of an executor are not receivable against an administrator appointed during the absence of the executor.¹⁷ Where one of several trustees had admitted that he had money of the trust-estate in his hands, and it was submitted that this admission of one of them bound the rest, it was held that it would, if they were all personally liable, but not where there were only trustees.¹⁸ Under the eighteenth and twenty-first sections the admissions of a person accused in criminal proceedings will be receivable. But in England it appears to be doubtful whether in any case a prosecutor in an indictment is a party to the inquiry in such a sense as that an admission by him could be received in evidence to prove facts for the defence. Of course this does not refer to the admission of facts which would go to his reputation for credibility as a witness in the case; these may always and under all circumstances be proved by the admission of the witness himself.¹⁹

(d) Co-defendants and co-plaintiffs. The general rule is that an admission can only be given in evidence against the party making it and not against any other party.²⁰ An admission or even a confession of judgment by one of several defendants in a suit, is no evidence against another de.endant.²¹ It is a fundamental proposition that a plaintiff cannot sue for more than his own right, and that no defendant can, by an admission or consent, convey the right, or delegate the authority to one, for more than his own share in property.²² "In general the statement of defence made by one defendant cannot be read in evidence, either for or against his co-defendant; neither can the answers to interrogatories of one defendant be read in evidence, except against himself; the reason being that, as there is no issue between the defendants, no opportunity can have been afforded for cross-examination; and moreover, if such a course were allowed, the plaintiff might make one of his friends a defendant,

^{17.} Rush v. Peacock, (1838) 2 M. & R.

^{18.} Davis v. Ridge, (1802) 3 Esp. 101, and see Skaife v. Jackson, (1824) 3 B. & C. 421 (in which it is also said that a receipt for money is not like a release pleadable in bar; it is nothing more than a prima facie acknowledgment that the money has been paid). But a receipt may operate as a waiver; Kailash Chandra Nath v. Sheikh Chhenu, 1915 Cal. 513 (1): I.L.R. 42 C. 546: 20 I.C. 804.

^{19.} Roscoe Cr. Ev., 16th Ed., 55; see R. v. Arnall, (1861) 8 Cox. 439 and note in 3 Russ. Cr. 489. As to whether the admissions of an accused may be used for purely probative purpose, that is to relieve the prosecutor of the proof of facts essential to his case; see R. v. Flaherty (1847) 2 C. & K. 782, which was a bigamy case; it was held that an admission of the first marriage by the prisoner, made to a constable, was some, though not sufficient, evidence of the marriage and in R. v. Savage, (1876) 13 Cox. 178 a similar case (overruling R. v. Newton (1843) 2 M. and Rob. 503),

an admission by the prisoner was tendered to prove the first marriage, but was rejected v. ante, Introduction as to admission for the purpose of the trial, see S. 58, post.

^{20.} In re Whiteley, (1891) L.R. 1 Ch. 558; Parbhudas Girdhardas v. Lallabhai Khushal, 1932 Bom. 117; 137 I.C. 710: 34 Bom. L.R. 252; Phuljhari Devi v. Mithan Lal A.I.R. 1971 All. 494; I.L.R. (1972) 1 Delhi 717.

^{21.} Amritial v. Rajoneekant, 2 I. A.
113; 15 B.L.R. 10, 26; 23 W.R.
214; Niamutoollah v. Himmut,
(1874) 22 W.R. 519; Azizullah v
Ahmad, (1858) 7 A. 353; Kali v.
Abdul, 16 C. 627 at p. 635; Rashidud-din v. Nazir-ud-din. 1929 Lah.
721: 1 L.L.J. 404; Mst. Bibi Kaniz
Ayesha v. Mojibul Hassan Khan,
1942 Pat. 230; I.L.R. 20 Pat. 855;
200 I.C. 546; 8 B.R. 716; Taylor,
Ev. s. 754; Narainee v. Nurrohurry, (1862) Marsh 70; W.R.F.B.
23: I Ind. Jur. O.S. 9: 1 Hay. 234.
22. Azizullah v. Ahmad, supra see

^{22.} Azizullah v. Ahmad, supra see also Changa v. Chaudhrain Bhagwan Dei, 1949 All. 493; 1950 A.L. J. 21.

and thus gain a most unfair advantage. But this rule does not apply to cases where the other defendant claims through the party whose defence is offered in evidence, nor to cases where they have a joint-interest, either as partners or otherwise in the transaction. Wherever the admission of one party would be good evidence against another party, the defence of the former may a fortiori be read against the latter.23

Apart from cases which will be presently considered,24 the admission of one co-plaintiff or co-defendant is not receivable against another merely by virtue of his position as co-party in the litigation; if the rule were otherwise, it would in practice permit a litigant to discredit an opponent's claim merely by joining any person as the opponent's co-party, and then employing that person's statements as admissions. Consequently, it is not by virtue of the person's relation to the litigation that the admission of one can be used against the other; it must be, because of some privity of title or of obligation.25 An admission made by one defendant is not binding upon the others who were not represented by him and had independent rights of their own. Similarly, the admissions or confessions of a respondent are not admissible in evidence against a co-respondent,2 nor a fortiori against the petitioner.3 Nor are those of parties engaged in a point tort, or joint crime, receivable against each other, except to the limited extent, and under the circumstances, in the tenth section (ante), mentioned.

(e) Parties in criminal cases. In criminal cases, the accused is always a party, and his admissions are admissible against him, subject of course to the provisions of Secs. 24 to 27. Even when a fact has been admitted in the state. ment of the accused under section 342, Cr. P. C., the prosecution has to prove the fact.4

The word 'statement' in section 164, Cr. P. C., is not limited to the statement of a witness, but covers also the non-confessional statement of an accused,

24. See note 7 post under the headings "Persons from whom interest is

derived" and "Parties jointly interested in subject-matter".

25. Ambar Ali v. Lutfe Ali, 1918 Cal. 971 at p. 974; I.L.R. 45 Cal. 159: 41 I.C. 116: 25 C.L.J. 619: 21 C. W.N. 996; see also Brojaballav Ghose v. Akhoy Bagdi, 1926 Cal. 705: 93 I.C. 115.

Kishan Singh v. Lachman Das. 1930 Lah. 238: 122 I.C. 109.

3. Plumer v. Plumer and Bygrave,

(1860) 4 Sw. Tr. 257.

4. Hardevi Malkani v. State. 1968 A. L.J. 466: 1967 A.W.R. (H.C.) 789; 1967 All. Cr. R. 508; A.I.R. 1969 All. 423. A gap in the evidence of the prosecution cannot be filled by such a statement-see Mohidin Abdul Kadir v. Emperor (1904) 27 Mad. 238 following Basant Kumar Ghatak v. Q.E. (1903) 26 Cal. 49.

Taylor Ev., s. 754, and cases there cited; Harihar v. Nabalkishore, I.L.R. 1962 Cut. 422; A.I.R. 1963 Orissa 45. But as to cross-examination by defendant of co-defendant, see s. 137, post; as to admissions by co-defendants who are joint tenants or joint-contractors; see Chundreshwar v. Chuni, (1881) 9 C.L.R. 359; Kowsulliah v. Mukta, (1855) 11 C. 588; Jagabandhu v. Bhagu, (1973) 1 Cut. W.R. 809; I.L.R. (1973) Cut. 553; A. I. R. 1974 Orissa 120; Ram Pukar Singh v. Sita Ram, A.I.R. 1978 Patna 310.

^{2.} Robinson v. Robinson, (1858) 1 S. & T. 362; see also Hay v. Gordon, (1872) 10 B.L.R. 301, 307, 308 P.C.: 18 W.R. 480; as to the question of the admissibility of evidence of respondent against co-respondent, see Allen v. Allen, (1894) P. 248; Vrasapillai v. Eliatamby, 1925 P.C. 229: 52 I.A. 372 and S. 137, post.

admissions of relevant facts in which are admissible under sections 18 to 21 of the Act.5 Admission by accused, claiming the right of private defence, that the opposite party members were peaceful before the fight, would be admissible under this section.6 According to Wigmore, "in a criminal prosecution, the person to whose injury the crime was done is in no legal sense a party, and his statements are not receivable except of course, by way of self-contradiction as a witness.7 But in India, this is true only in cognizable and non-compoundable cases. In other cases instituted on a private complaint, the complainant would be deemed to be a party to the proceeding.8 The Home Minister speaks on behalf of the Government as its spokesman and his answers to questions put to him in the House as Home Minister, in relation to matters dealt by him as Home Minister, are admissible in evidence as admissions made by the Government. When Government is a party to the proceedings these admissions are relevant and admissible under the Evidence Act against the Government. The Government may, of course, show that the admissions were really not admissions, or that they were made under a mistake, or that they were not binding on Government for any other valid reason; but, unless this is shown, the admissions must be taken in evidence againt Government.9

- (f) When an admission can be used against the party making it. Before the statement of a party may be used against him as his admission, two principles should not be ignored, namely-
 - (1) the statement must be considered as a whole; 10 and
 - (2) the Court should not pick out isolated sentences torn from their contexts,11

Of course, the other essential conditions should also be satisfied.

4. Statements by agents. (a) General. He who sets another per on to do an act in his stead as agent is chargeable by such acts as are done under that authority, and so too property is affected by admissions made by the agent in the course of exercising that authority. The question, therefore, turns upon the scope of the authority. This question, frequently enough a difficult one, depends upon the doctrine of agency applied to the circumstances of the case and not upon any rule of evidence.12 The principle upon which admsisions of an agent, within the scope of his authority, are permitted to be proved is that such admissions, as well as his acts, are considered as the acts or admissions of the principal. What is said or done by an agent is said or

Pingal Khadia v. The State, I.L.R. 1969 Cut. 809; 1969 Cr. L.J. 1255;
 A.I.R. 1969 Orissa 245, 249 following Ghulam Hussain v. King, (1950) 77 Ind. App. 65 (P.C.); I.L.R. (1971) 2 Delhi 584.

Allahdia v. State, 1959 All. L.J.

Wigmore, Ev. s. 1076.
 See Ss. 256 (1) and 249 of the Criminal Procedure Code 1973.

^{9.} Shibnath Banerjee v. A. E. Porter.

¹⁹⁴³ Cal. 377: 47 C.W.N. 802 (F.C.), on appeal, Emperor v. Shibnath Banerjee, 1943 F. C. 75: (1943) 2 M.L.I. 468: 1943 M.W.N. 612: 24 P.LT. 332. 10. Indermal v. Ramprasad, 1969 Jab.

L.J. 560; 1969 M.P.L.J. 442; A.I. R. 1970 Madhya Pradesh 40, 45 (admission in written statement).

Abida Khatoon v. State of U.P., A.I.R. 1963 A. 260.

^{12.} Wigmore, Ev., s. 1078

done by the principal through him, as his mere instrument,13 A statement, therefore, by an agent, whom the Court regards under the circumstances of the case as expressly or impliedly authorized to make it, is admissible, though not on oath.14 A person called by a party as his witness is not his agent within the meaning of this Section.15 There is no rule of law that a party must be bound by the statement of his witnesses.18

Before the admissions of an agent can be received, the relation of agency must be made out in the pleading,17 and the fact of his agency must be proved.18

This can be done by proving that the agent has acquired credit by acting in that capacity, and that he has been recognized by the principal in other instances of a similar character to that in question.19 A person either may expressly constitute another his agent to make an admission: thus, if a person agrees to admit a claim, provided J.S. will make affidavit in support of it, such affidavit is a proof against him,20 or he may authorize another to represent him in a particular business, when admissions made by that other within the scope of his authority, in the ordinary course of, and with reference to, such business, will be evidence against him. When the principal constitutes the agent as his representative in the transaction of a certain business, whatever the agent does in the lawful prosecution of that business is the act of principal.21 "Where the acts of the agent will bind the principal, then his representations, declarations and admissions, respecting the subject-matter, will also bind him, if made at the same time and constituting part of the res gestae."22 The admission must be one having reference to the subjectmatter of the agency.23 So, whatever is said by an agent, either in the making

193 I.C. 186.

S. Bhattacharjee v. Sentinell Assurance Co. Ltd., 1955 Cal., 594.
 Kedarnath v. State of West Bengal, 1954 S.C., 660: 1954 Cr. L.J.

19. Roscoe, N. P. Ev., 71; Evans' Principal and Agent, 192; Watkins v. Vince, (1818) 2 Stark 368; Courteen v Touse, (1807) 1 Camp. 43; Neal v. Erving, (1793) 1 Esq. 61, see as to proof of agency Ram v. Kishori, (1869) 3 B.L.R. A.C.J.

Lloyd v. William. (1794) 1 Esp. 178;

Lloyd v. William. (1794) 1 Esp. 178; Stevens v. Thacker, (1793) Ped R. 187; Roscoe, N.P. Ev., 69; see S. 20, ante, and note on "Referees". Taylor, Ev., s. 602; and see gene-rally ib. Ss. 602-605; Wills Ev., 3rd. Ed., 166; Steph. Dig., Art. 17; Roscoe, N. P. Ev., 69-71; Powell, Ev., 290; Pearsons' Law of Agency in British India, 426-428; Evan's

Principal and Agent, 187-193; Best, Ev., p. 487; Norton, Ev., 1, 144; as to the acts, contracts and representations of the agent which original evidence, and receivable for as well as against his principal, v. ante, introduction.

Story on Agency, s. 134: res gestae here means the "business" regarding which the law identifies the principal and agent and must not be taken to import that the declarations must form a part of the res gestae in the evidentiary sense of that term; it has been said that the declarations of an agent are not receivable as to bygone transactions, See Evans, 189 supra, citing Great Western Railway Co. v. Willis, (1865) 18 C.B. (NP) 748; Fairlie v. Hastings, (1804) 10 Ves. 123; Kahl v. Jansen, (1812) 4 Taunt, 565; see also Pearson, 427 supra, but this is misleading: for so long as the representations are made concerning the principal's business, and in the ordinary course of it, it is im-material if they relate to past or present events; Phipson, Ev., 11th Ed., 328. See Pearson's Law of Agency in

British India, 427, supra and Cases

there cited.

^{13.} Franklin Bank y. Pennsylvania, D. & M.S.N. Co., 11 G. & J. 28, 33 (Amer). Govindji v. Chotalal, (1900) 2

^{14.} Govindji v. Chotalal, (1900) 2
Bom. L. R. 651.
15. Parbhudas Girdhardas v. Lallubhai
Khushal, 1932 Bom. 117: 137 I.C.
710: 34 Bom. L.R. 35.
16. Jalal Din v. Nawab. 1941 Lah. 55:

of a contract for his principal, or at the time and accompanying the performance of any act, within the scope of his authority, having relation to, and connected with, and in the course of the particular contract or transaction in which he is then engaged, is, in legal effect deemed to be said by his principal and is admissible in evidence.24 "The representation, declaration or admission of the agent does not bind the principal, if it is not made at the very time of the contract, but upon another occasion; or, if it does not concern the subjectmatter of the contract but some other matter, in no degree belonging to the res gestae."25 It does not follow that a statement made by an agent is an admission merely because, if made by the principal himself, it would have been one; for the admission of an agent cannot always be assimilated to the admission of the principal.1 "The party's own admission, whenever made, may be given in evidence against him; but the admission or declaration of his agent binds him only when it is made during the continuance of the agency in regard to a transaction then depending, et dum fervet opus. When the agent's right to interfere in the particular matter has ceased, the principal can no longer be affected by his declarations, any more than by his acts. but they will be rejected in such case as mere hearsay."2 Therefore, admis sions by an agent of his own authority, and not accompanying the making of a contract or the doing of an act on behalf of his principal, nor made a the time he is engaged in the transaction to which they refer, are not binding upon his principal; as not being part of the res gestae and are not admissible in evidence, but come within the rule excluding hearsay, being but an account or statement by an agent of what has passed or been done or omitted to be done not a part of the transaction but only statements or admissions respecting it.3 To be receivable as admissions, the statements must have been made in circumstances which show that the agent was expressly or impliedly authorized to make the admissions.4

The Court may presume agency from the circumstances in which the admission was made.⁵ The words of this section "whom the Court regards under the circumstances of the case, as expressly or impliedly authorized by him to make them," leave it open to the Courts to deal with each case that arises upon its own merits,6 having regard to the law of agency applicable and the particular facts of each case. But, it is apprehended, that the Courts will,

Per Bachanan, C.J., in Franklin Bank v. Pennsylvania D. & M.S.N. Co. 11 G. & J. 28, 33 (Amer.) See Wigmore Ev. s. 1078. 25. Story on Agency, s. 135. 1. Steph, Dig., Art, 17: Taylor, Ev., s.

^{2.} Taylor, Ev., ib., and cases there cited; the authority to make admissions is at once put an end to by the determination of the agency whether or not such determination has been

properly brought about; Kalee Churn v. Bengal Coal Co., 21 W. R. 405. 3. Franklin Bank v. Pennsylvania, supra; Narratives of, explaining or admitting, a past act are not admissible, even though the agency continues unless the agent be empowered to speak for his principal

at the time. Wharton. Cr. Ev., p. 954. For instance, an agent might be specially sent to make a state4 ment on behalf of his principal as

to what had occurred.
4. Raja Fateh Singh v. Baldeo Singh, 1928 Oudh 233: I.L.R. 3 Luck

^{416: 109} I.C. 310. 5. Raja Brajsunder Deb v. Raja Rajendra Narayan Bhanj Deo, 1941 Pat. 260: 195 I.C. 313: 22 P.L.T. 699: 7 B.R. 897.

[&]quot;The point to be regarded in this clause is not only the establish-ment of an agency as to which the Court must be satisfied but that there was authority given sufficient to cover the particular statement relied on as admission." Norton, Ev., 144.

in the application of this section, be guided by the principles laid down by the English and American cases and text-writers.⁷ The admissions are receivable in available in evidence without calling the agent himself to prove them.⁸

As an agent can only act within the scope of his authority, declarations or admissions made by him as to a particular fact are not admissible, unless they fall within the nature of his employment as such agent.9 Statements as to the specific age of a minor (apart from the fact of his being a minor) made by his agent in an application for mutation of names cannot be called admission by persons authorized to make such a statement.10 A party is not bound by a statement or admi sion made by his mukhtar-e-aam, unless it is shown to have been made within the scope of the authority conferred by the mukhuarnama.11 Account books, though proved not to have been regularly kept in the course of business, but proved to have been kept on behalf of a firm of contractors by its servant or agent appointed for that purpose, are relevant as adm'ssions against the firm. The fact, however, that the books had not been regularly kept might be a good reason for rejecting the account, if offered in evidence against any person other than the contractor, or his partners.12 It is, of course, open to the contractor or any of his partners to show that the entries have been made after such a fashion that no reliance can be placed upon them: but, if made by a clerk of the firm, they are relevant.12 An agent's reports to his principal are not, in general, receivable against the latter in favour of third persons, as admissions.14 Thus, letters of an agent to his principal, in which the former is rendering an account of the transaction he has performed for him, are not admissible against the principal.15 When, however, the principal had replied to the agent, the letters of the latter were held admissible as explanatory of the statements of the former.16

As the declarations of an agent are admissible on the ground of the legal identity of the agent with the principal, the declarations and acts of

 v. post, remarks of Tindal, C.J. in Garth v. Howard. (1832) 8 Bing. 451

9. Garth v. Howard, (1832) 8 Bing.
451: see Venkataramanna v. Chavela. (1871) 6 Mad. H.C.R. 127
an illustration of the admission and rejection of statements upon this principle); see Kirkstall Brewery Go. v. Furness Railway Co., (1874) L.R. 9 Q.B. 468: 43 L.J. Q.B. 142; Garth v. Howard,

supra.

10. Shankergir v. Chinnuji. 1923 Nag.
164: 71 I.C. 140: 6 N.L.J. 1.

 Sita Ram Tewari v. Gya Prasad, 1923 Pat. 37.

12. R. v. Hanmanta, (1877) 1 B. 610 617, see S. 34, post and notes there-

13. R. v. Hanmanta, (1877) 1 B. 610, 617.

14. Steph. Dig., Art. 17: Langhorn v. Allnutt. (1812) 4 Taunt. 511; Re Devala Co., L.R. 22 Ch. D. 593; Cooper v. Metropolitan Board of Works, (1883) 25 Ch. D. 472; Kahl v. Jansen, (1812) 4 Taunt. 565; Rayner v. Pearson, ib. 662; Swan v. Miller, [1919] 1 I.R. 151 C.A. (Ir.); Fairlie v. Hastings, (1804) 10 Ves., 123; though see contra Solway 10 P.D. 137, see Phipson Ev., 9th Ed., 249; Roscoe N.P. Ev., 70; Evans 190 supra.

Langhorn v. Allnutt. (1812) 4
 Taunt. 511.

16. Coates v. Bainbridge, (1828) 5 Bing. 58.

^{8.} Taylor Ev., s. 602; Evans, 188, 189: supra, if the statements of the agent are admissible, the statements of the agent are admissible, the statements of the agent are admissible interpreter, acting as such in the agent's presence, are admissible without calling the interpreter; and it must be assumed as against the principal that the interpreter interpreted faithfully; Reid v. Hoskins. (1856) 26 L.J. Q.B. 5: 5 E. & B. 729; admissions which consist of hearsay evidence are not receivable against the principal, Kahl v. Jansen, (1812) 4 Taunt, 565.

an agent cannot bind an infant, because the latter cannot appoint an agent.17 But evidence may be given against companies of admissions made by their directors or agents relating to matters within the scope of their authority.18 Thus, a letter written by the secretary of a company by order of the acting directors,10 stating the number of shares held by M, was admitted on behalf of his executors in proceedings against them.²⁰ But the confidential reports of directors to a meeting of the shareholders,²¹ and admissions at a board meeting of less than the requisite number of members,22 have been held not to be receivable. The manager of a banking company may make admissions against the bank as to its practice, in making loans to customers.23 As to admissions by the servant of companies see cases noted below.24 It ihas been held by the Delhi High Court that an admission made by a responsible employee of a municipal corporation (municipal commissioner in this case) would be binding on the corporation unless explained. It is, however, submitted that it is too wide a proposition that all responsible employees are not entrusted or concerned with all the affairs of the corporation. So, if an employee howsoever responsible makes an admission in respect of a matter of the corporation with which he does not deal in the usual course of his duties, it would be difficult to say that the corporation can be bound down by such admission. The admissions of a surveyor of a corporation, respecting a house belonging to the corporation, are evidence against the latter, in an action for an injury to the plaint ff's house by work done on the defendant's premises, but the report of a surveyor to the corporation, as to the value of lands about to be purchased by it is not evidence, either of the truth of the facts or to explain the resolutions or letters of the corporation as to the purchase.2 The admission of a way warden that a certain road is a highway and that the parish is liable to repair it are evidence against a highway board.8 An admission made by a Railway Administration that certain land used as a road belonged to a District Board was held to be binding on the Government.4 The admission, as to matters within the ordinary course of business (e.g., the receipt of shop-goods) of a shopman are evidence against his master, but not his admissions as to a transaction outside the usual business.8 An

18. Roscoe, N.P. Ev., 70; Lindley Company Law, 183.

19. But, unless acting under the express order of the directors the secretary of a company cannot make admissions against the company even as to the receipt of letter; Bruff v. Great N. Ry. Co., (1858) 1 F. & F. 344; see also Burnside v. Dayrell, (1849) 3 Exch. 224; Roscoe, N. P. Ev., 70, 71.

Meux Executor's Case, (1852) 2 De G. M. 522.

Re Devala Co., (1883) 22 Ch. D. 593. v. ante.

22. Ridley v. Plymouth Banking Co., (1848) 2 Exch. 711.

Simmons v. London Jo Bank, (1891) 1 Ch. 270. Joint Stock

Kirkstall Brewery Co. v. Furness Ry. Co., (1874) L.R. 9 Q.B. 468; Gt. W. Ry. Co. v. Willis, (1865)

18 C.B.N.S. 748; Mayhew v. Nelson, (1834) 6 C. & P. 58; Stiles v. Cardiff, S. Navigation Co.. (1864) 33 L.J. Q.B. 310; Agassiz v. London Tram Co., (1873) 27 L. T. 492. 25. Moti Ram v. Municipal Corpora-

tion, Delhi, (1973) 2 Serv. L. R.

7 (Delhi).
1. Peyton v. St. Thomas' Hospital, (1829) 3 M. & Ry. 625n.

Cooper v. Met. Board of Works, (1883) 25 Ch. D. 472.
 Loughborough Highway Board v. Curzon, (1886) 55 L. T. 50.
 Secretary of State v. District Board, Rangpur, 1939 Cal. 758; 185 I.C. 454; 70 C. L. J. 126.
 Garth v. Howard, (1832) 8 Bing. 451; Schumack v. Lock (1835) 10

451; Schumack v. Lock, (1825) 10 Moor 39; and see Clifford v. Burton, (1823) 1 Bing. 199; Meredith v. Footner, (1843) 11 M. & W. 202; Roscoe, N. P. Ev. 70, 72.

Taylor, Ev., s. 605, and v. ante Introduction.

admission by a person who has generally managed A's landed property, and received his rents, is not evidence against A, as to his employer's title, there being no other proof of his agency ad hoc.6 As to admissions or acknowledgments made by partners and joint-contractors, v. post.

The manager of a joint Hindu family, or karta, is the agent for the other members, and is supposed to have their authority to do all acts for their common necessity or benefit.7 He fully represents the family, and, in the absence of fraud or collusion, his acts are binding on the other members of the family.8 But he can be sued by the other members for an account, even if the parties suing were minors during the period for which the accounts are asked.9 In respect of the admission of debts, he may acknowledge, as he may create, debts on behalf of the family, but he has no power to revive a claim barred by limitation unless expressly authorised to do so.10

(b) Husband and wife.—The admissions of a wife merely as such cannot affect her husband. They will only bind him where she had express or implied authority from him to make them. Whether she had such authority or not, is a question of fact to be found by the Court, as in the other cases of agency. The cases on this subject are mostly those of implied authority, turning upon the degree in which the husband permitted the wife to parti cipate, either in the transaction of his affairs in general or in the particular matter in question.11 So, where the business is such as is usually transacted by women, a wife's admissions will be received against her husband, e g., an admission that she had agreed to pay 4s. a week for the nursing of her child.12 On the other hand, a wife's admission has been rejected to prove a slander by her husband,18

6. Ley v. Peter, (1858) 3 H. & N. 101: 27 L.J. Exch. 239; and generally as to admissions, see Roscoe, N.P. Ev. 62 et seq; as to admissions by ship's officers, see Phipson, Ev., 11th Ed., 335.

Jagan v. Mannu, 233. (1894) 16 A 231,

9. Obhoy v. Pearce, supra.

 Chinnaya v. Gurunatham, (1881)
 M. 169 (F.B.); (overruling Kumara v. Pala, (1878) 1 M. 385;

Kondappa v. Subba, (1889) 13 M. 189; Bhasker v. Vijalal, (1892) 17 B. 512; Gopal Narain v. Muddo-mutty, (1874) 14 B. L. R. 21, 49 followed in Dinkar v. Appaji, (1894) 20 B. 155. The manager of a joint Hindu family or the executor of a Hindu will has no power by acknowledgment to revive a debt barred by law of limitation except as against himself; Shobhanadri v. Sriramulu, (1893) 17 M.

11. See generally Taylor, Ev., ss. 765-771; Roscoe, N. P. Ev., 72; Powell Ev., 299; see judgment of Alderson, B., in Meredith v. Footner, (1843) 11 M. & W. 202; as to wife carrying on business, see Taylor, Ev., s. 605; and as to admissions in matrimonial causes which differ in some respects from ordinary nisi prius causes, in so far as in the former the interests of public morality are concerned; Plumer v. Plumer and Brygrave, (1860) 4 Sw. & Tr. 257.

12. Anon, (1721) 1 Stra. 527.

13. Tait v. Beggs, (1905) 2 Ir. R. 525, sec Phipson, Ev., 11th Ed., 332.

^{7.} Kota v. Bangari, (1881) 3 M. 145, 150; in which case it is also pointed out that the position of a Polygar differs from that of a manager of a Hindu family; see also as to the karta and his relations to adult and minor members; Chuckun v. Poran, (1868) 9 W.R. 483; Obhoy v. Pearce, (1870) 13 W.R. 75 (F. B.); Gopal Narain v. Muddomutty, (1874) 14 B.L.R. 21, 32 (Silence, evidence of ratification of acts of karta); Succession v. Waliday (1804) karta); Succaram v. Kalidas, (1894) 18 B. 631 (widow manager); Venkaji v. Vishnu, (1893) 18 B. 534. (The manager must be allowed a reasonable latitude in the exercise of his powers).

(c) Admissions by agents in criminal cases.-It has been already observed,14 that certain rules of admissibility are applicable in criminal cases only, but this is because the issues arise in criminal cases only, but in general, the rules of admissibility are the same for the trial of civil and criminal cases. Conformably to this general doctrine, the admissions of an agent may be equally received in a criminal charge against the principal. But it is a totally different question in the consideration of criminal justice as distinguished from civil justice as to how the person on trial may be affected by the fact when so established. It might involve him civilly and yet be not sufficient to convict him of a crime. Whether the fact thus admitted by the agent would suffice to charge the principal criminally without his personal knowledge or connivance would depend upon the particular rule of criminal law and not on the evidence involved.15 Thus, it has been said that an admission by an agent is never evidence in criminal, as it is sometimes in civil, cases in the sense in which an admission by a party himself is evidence. An admission by the party himself is, in all cases, the best evidence which can be produced, and supersedes the necessity for all further proof; and in civil cases the rule is carried still further, for the admission of an agent made in the course of his employment, and in accordance with his duty, is as binding upon the principal as an admission made by himself. But this has never been extended to criminal cases. Thus, in order to make a client criminally responsible for a letter written by. his solicitor, it is not sufficient to show that such letter was written in consequence of an interview, but it must be shown that it was written in pursuance of instructions of the client,16 Where personal knowledge and authority are shown, the admissions will be receivable. Hence, the declarations of a messenger sent to a third-party by the prisoner, if made with reference to the subject of the mission, are admissible in evidence against him, where the evidence shows that they were made by his authority.17 If, in other cases, the evidence is not admitted, it is because, in those cases, the criminal law requires evidence of personal knowledge and authority of and in respect of the particular act charged before criminal liability can be established. This, however, is a matter of substantive law which may admit of real or apparent exceptions, as in the case of a newspaper proprietor who is prima facie criminally responsible for any libel it contains, though inserted by his agent or servant without his knowledge.18 Where a party is charged with the commission of an offence through the instrumentality of an agent, then it becomes necessary to prove the acts of the agent; and in some cases as where the agent is dead, the agent's admission is the best evidence of those acts which can be produced. Thus, on the impeachment of Lord Melville by the House of Lords, 10 it was decided, that a receipt given in the regular and official form by Mr. Douglas who was proved to have been appointed by Lord Melville to be the attorney to transact the business of his office as treasurer of the navy, and to receive all necessary sums of money

^{14.} And see Wigmore, Ev., s. 4, where the learned author observes that this is more worth emphasizing because the occasional appearance in works on the law of the title "Criminal Evidence", has tendered to foster the fallacy that there are some separate groups of rules or some large number of modifications.

Wigmore, Ev., s. 1078.

R. v. Downer, (1880) 14 Cox. C.C.
 486

^{17.} Browning v. State, 33 Miss, 48

⁽Amer); Wharton, Cr. Ev., s. 695.

18. Wharton, Cr. Ev., s. 595. Lord Tenterden, however, considered this case as falling within the general rule, ib, It has been argued generally that to impute the agent's act to the principal criminal design must be brought home to the latter, see Cooper v. Slade, 6 H.L.C. 746.

19. Melville's (Lord) case 1806 (1) 29 How St. Tr. 707.

and to give receipts for the same, and who was dead, was admissible, in evidence against Lord Melville, to establish the single fact, that a person appointed by him, as his paymaster, did receive from the Exchequer a certain sum of money in the ordinary course of business. Had Douglas been alive at the time he must have been called; and of course he might have proved the receipt of the money. In allowing this receipt of Mr. Douglas to be read nothing is proved, but that this sum was issued to 'him' under the power-of-attorney from Lord Melville, but it is a totally different question in the consideration of criminal justice as distinguished from civil justice as to how 'he' may be affected by the fact when so established; the receipt by 'Douglas' would in 'itself involve him civilly, but could by no possibility convict him of a crime (per Erskin, J.).²⁰

An admission by the father of the accused is not admissible in evidence against the accured.²¹ Anything said by the accused to a police officer which leads to the discovery of incriminating articles would be admissible, but, in the absence of proof of what the accused said, the mere discovery of the articles may raise a grave suspicion against the accused, but that will not justify a conviction.²²

(d) Admissions by attorneys, pleaders, solicitors, counsel, etc. A Vakil in this country has not ordinarily any greater power to bind his client than that which is possessed by an attorney in England.²³ An attorney employed in a matter of business is not an agent to make admissions for his client, except (a) after action commenced, and (b) in matters relating to that action.²⁴ An admission made before action will, however, of course affect the client, if proof begiven that he authorised the communication.²⁵ The admission of the execution of the document by the attorney of the man who executed it is evidence to prove that the document was duly executed.¹

A statement in a case drawn up by an attorney for the opinion of a pleader is admissible in evidence, as it must be regarded as a statement of the person on whose behalf the attorney was acting, and what is said or done by the attorney in the course of his business and within the scope of his authority is said or done by the person on whose behalf he was acting.²

A pleader or solicitor has, in civil cases, implied authority to make admissions of fact against his client during the actual progress of litigation: and the client is affected by admissions of fact made by him. But a plaintiff is not bound by an admission on a point of law, nor precluded from asserting the contrary in order to obtain the relief to which, upon true construction of the

25. See footnote, ante.

Beni Madho v. A. U. John, 1947
 All. 110: I.L.R. 1947 All. 321: 1947 A.L. J. 283.

Roscoe, Cr. Ev., 16th Ed., 55.

Gulzaman Khan v. Emperor, 1985
 Pesh. 73: 158 I.C. 483: 36 Cr. L.J.
 958

Rangappa Goundan v. Emperor, 1936 Mad. 426: I.L.R. 59 Mad. 349: 161 I.C. 663: 70 M.L.J. 447: 1936 M.W.N. 110: 43 L. W. 305.

^{23.} Prem v. Pirthee, (1867) 2 Agra Rep. 222; see Pearson's Law of Agency in British India, pp. 16, 153, and as to mukhtars, pp. 17, 114, ib.

Wagstaff v. Wilson. (1832) 4 B. & Ad. 339; Ley v. Peter, (1858) 3 H.

and N. 101, 111 per Watson, Cordery: The Law relating to Solicitors, (1888) 2nd Ed., pp. 31-33.

^{2.} Chandreshwar Prasad Narain Singh v. Bisheshwar Pratab Narain Singh, 1927 Pat. 61; L.L.R. Pat. 777; 101 I.C. 289; see also Keotokey Charan Banerjee v. Surat Kumari Dabee 1917 Cal. 39; 37 I.C. 71; 20 C.W. N. 995 (F.B.).

law, he may appear to be entitled.3 A counsel's admission even on a question purely of fact is not binding on his client, if it was made under a misapprehension.4 Nor is an opinion expressed by a Vakil in the course of argument adversely to a claim which he undertook to advocate, binding on his client, when it is not in accordance with the law applicable to the case; and it is clearly not binding on the other contending defendant.5 The admissions of fact, during litigation, may be made either incidentally in reference to matters connected with the action or with a view to obviate necessity of proof. Admissions in such cases may be made in Court, or chambers, or by documents or correspondence connected with the proceedings and when made amount only to prima facie evidence; thus an undertaking (which is a step in the cause) to appear for A and B, "joint owners of the sloop" X, by the solicitor who afterwards appears for them, is prima facie evidence of the joint ownership of A and B. So, in an action on a bill, a notice, served by the defendant solicitor, to produce "all documents relating to the bill which was accepted by the said defendant," is prima facie evidence of the acceptance.8 This class of admissions made by solicitors, not indeed with the express intent of dispening with proof of certain facts, but as it were incidentally, while they are referring to other matters connected with the action (which are generally the result of carelessness) are not regarded as conclusive admissions. But they, nevertheless not infrequently raise an inference respecting the existence of facts, which the adversary would otherwise have been called upon to prove.9 Admissions, however, made by solicitor, during litigation but in mere conversation, are not evidence against his client, since the solicitor's agency only exists for the management of the action.10 Admissions made for the purpose (v. post) of a former trial, if not expressly limited

R. 1957 Raj. 267.
4. Motilal v. Sarup Chand, 1937 Bom. 81: 167 I. C. 208: 33 Bom. L. R.

 Krishnasami v. Rajagopala, (1895)
 18 M. 73, 83; Kamta Prasad v. Chait Narain, 1934 All. 531: 154 I. C. 168.

 Cordery, 82: Phipson, Ev., 11th Ed., para. 738, Taylor, Ev., S. 773. In criminal cases a solicitor has no implied authority as in civil cases to affect his client by admissions of fact incidentally made, R. v. Downer, (1880) 14 Cox, 486; v. antersec S, 58 post.

7. Marshall v. Cliff, (1815) 4 Camp.

8. Holt v. Squire, (1825) Ry & M. 282; Taylor Ev., s. 773.

Taylor, Ev. s.773.

 Petch v. Lyon, (1846) 9 Q.B. 147:
 Taylor Ev., s. 774; Cordery 82, 83, and cases there cited.

^{3.} Jotendra v. Ganendro, (1872) 18 W.R. 359, 367; Ackjoo v. Lallah, (1875) 23 W.R. 400, 401. See as to admissions by legal practitioners, cases cited under S. 58, post; Phipson Ev., 11th Ed., paras 676, 740, Taylor Ev., Ss. 772-774; Steph, Dig., Art. 17. "Barristers and solicitors are the agents of their clients for the purpose of making admissions, which engaged in the actual management of the cause, either in Court or in correspondence relating thereto; but statements made by a barrister or solicitor on other occasions are not admissions merely because they would be admissions if made by the client himself," Societe Belge de Banque v. Rao Girdhari Lal Chaudhary, 1940 P.C. Girdhari Lal Chaudhary, 1940 P.C. 90; 1940 A.W.R. 86; 187 I.C. 770; 51 L.W 713; 1940 O. W. N. 445; 6 B.R. 618; 42 P.L.R. 339; Ram Kishan v. Om Prakash, 1941 Lah. 347; 197 I. C. 481; Shiva Prasad Singh v. Maharaja Sri Chandranandi, 1943 Pat. 327; I. L. R. 22 Pat. 220; 210 I.C. 426; 10 B. R. 259; Punjabai v. Bhagwandas, 1929 Bom. 89; I. L. R. 53 Bom. 309; 117 I.C. 518; 31 Bom. L. R. 88;

see also Mst. Bashiran v. Mohammad Abrar, 1935 All. 626: 158 I. C. 97: 1935 A. L. J. 953; Muthiah Chetti v. Karuppan Chettiar, 1927 Mad. 852; 105 I.C. 5; I. L. R. 50 Mad. 786; Shankerilal v. Motilal, A. I.

may be used on a new trial of the same cause, though the solicitor has between the two trials, died and the new solicitor has sent notice that he will make no admissions.11 Evidence of solicitors of party that they were instructed to investigate the title of a property to be purchased in furtherance of an investment of a legacy, that they did so, were satisfied, and carried the purchase through, was held to be admissible.12 And a statement made in a case by a pleader on behalf of his client may be admissible in evidence against that client in another case in which he is a party.13

Admissions by a clerk or agent having the management of the cause stand on the same footing as admissions by the solicitor.14 These admissions are receivable as those of the solicitor, not only against the client15 but against the solicitor in favour of the client,16

Admissions by counsel stand upon similar though a narrower footing. A solicitor, admitted to prosecute or defend, represents his client throughout the cause, but a counsel represents his client only when speaking for him in Court.17 Therefore admissions made by counsel out of Court in conversation with the solicitor for the opposite side, are not evidence against his client. Where, therefore, pending a rule nisi the attorney served with the rule inferred, from a conversation, out of Court, with the counsel who had moved the rule, that the latter would forbear to move to make it absolute for a certain time, and the rule was made absolute by that counsel within the time mentioned, the Court refused to re-open the rule.18 But, statements made by counsel during the conduct of the case are prima facie evidence against the client.19 Besides, admissions of fact, made incidentally during litigation, may also be expressly made for the purpose of dispensing with proof at the trial, in which case, in civil suits they are generally conclusive whether made by solicitor or counsel.20

A party is not bound by the statement or admission made by his multhtearaam unless it is shown to have been made within the scope of the authority conferred by the mukhtearnamah.21 Even if an admission is made, in the plead-

Doe v. Bird, (1835) 7 C. & P. 6;
 but see also Elton v. Larkins, (1832) 5 C. & P. 385, 386.

Hari Ram v. Madan Mohan, 1929
 P. C. 77: 114 I.C. 565: 31 Bom.
 L. R. 710: 30 L. W. 835.

13. Omabuttee v. Parushnath, (1871)
15 W. R. 135; but see Blackstone
v. Wilson, (1875) 26 L. J. Ex. 229,
and remarks in Pearson's Law of
Agency in British India p. 428; and see Doe v. Ross, (1840) 7 M. & W. 102, 122.

Standage v. Creighton, (1832) 5 G.
 P. 406: Taylor v. Williams, (1830 -31) 2 P. & Ad. 845, 856: Taylor,

Ev., s. 774.

15. Taylor v. Williams, (supra).

16. Ashford v. Price, 3 Stark 185.

17. Richardson v. Peto, (1840) 1 M.

& G. 96; per Tindal, C. J. Taylor, Ev., s. 783: and in one sense coun-sel is not the representative of the client for he has the power to act without asking his client, what he

shall do: R. v. Greenwich, (1885) 15 Q. B. D. 54, 58. Nor is he the agent (in the ordinary sense) of the client; his position is peculiar one; College v. Horn, (1825) 3 Bing 119, 121; Mathews v. Munster, (1888) L. R. 20 Q. B. D. 141; Swinfen v. Lord Chelmsford, (1860) 5 H. & N. 890; see Wills Fig. 3rd 5 H. & N. 890; see Wills, Ev., 3rd Ed. 1734 and also s. 58, post.

Richardson v. Peto, (1840) 1 M. & G. 96 and v. ib, as to the practice of entering warrants of attorney on

the record. Van Wart v. Wolley. (1823) Ry. & M. 4; Haller v. Worman, (1860) 2
F. & F. 165; 3 L. T. N. S. 741, see also notes to S. 58 post; and Taylor, Ev., s. 783.

20. See S. 58, post; and as to power of

counsel and pleaders to compromise, v. ib, and admissions in cri-

minal trials, ib.

21. Sitaram v. Gya Prasad, 1923 Pat,

ings, the Court may put the matter in issue under the proviso to Order VIII, Rule 5 of the Code of Civil Procedure.22 A statement in pleading cannot be evidence in subsequent proceedings before a Court of Law unless it amounts to an admission.23

Concession on a point of law made by an advocate will not bind a party. The plea of res judicata, being a pure question of law, can be raised at any stage, provided that the necessary evidence is on record.24

Information obtained across the bar from counsel as to facts amounts to an admission in so far as it goes against the interest of the party. Such information will legitimately form part of the record in the case.25

An admission made by a counsel in the course of a proceeding can be withdrawn unless the circumstances are such as to give rise to an estoppel. If the other party has acted to his prejudice on the faith of that admission, it may not be allowed to be withdrawn.1

(e) Counsel's admissions in criminal and income-tax cases.-It is an elementary rule, that except by a plea of guilty, admissions dispensing with proof, as distinguished from admissions which are evidential, are not permitted in a criminal trial. No consent or admission by the prisoner's advocate to dispense with the medical witness can relieve the prosecution of proving by evidence the nature of injuries received by the deceased and that the injuries were the cause of death.2 No admission by counsel can relieve the prosecution of the duty of satisfying the Court by proper evidence.3 Where the counsel for accused in his sworn testimony said something about what happened in connection with the proceedings in court, the Court is fully entitled to rely on it as it would be out of place to apply the rule that the accused are not bound by admission of their counsel.4

^{22.} Vir Singh v. Bhola Singh, 1924 Lah.

^{22.} Vir Singh v. Bhola Singh, 1924 Lan.
744: 82 I. C. 617: 6 L. L. J. 358.
23. Raj Kumar v. Gopi Nath, 1971
All. W. R. (H.C.) 295: I. L. R.
(1971) 1 All. 401: A. I. R. 1971
All. 273; Sharat Chandra Misra v.
State of U. P., 1971 Serv. L. R.
624: 1971 All. L. J. 1027: 1971
Lab. I. C. 1429 (The party who had made the admission may show that it was wrong or made under that it was wrong or made under misapprehension); Biswa Nath Rana v. Laxman Rana, (1971) 1 Cut. W. R. 253: A. I. R. 1971 Orissa 267 (admission is best evidence unless explained); Suraj Nath Prasad explained); Suraj Nath Prasad Kedar Nath v. Union of India, A. I. R. 1975 Cal. 203 (one can-not take advantage of his own statement in his own favour but the adversary can use it); Ellamal v. Veeraswamy, 1973 M. L., W. (Cri.) 8; 1975 Cri. L. J. 28 (admission made by husband in former proceeding that she was his wife was held binding though husband resided from it) led from it).

Ram Ratan Lal v. Kashinath Tewari, 1966 B. L. J. R. 287: A. I. R. 1966 Pat. 235, 240.

R. 1966 Pat. 235, 240.

25. Sunder Parmanand Lalwani v. Caltex (India), Ltd., 70 Bom. L. R. 37: A. I. R. 1969 Bom. 24, 31.

1. Abdul Hamid Khan v. Commissioner of Income-tax, Andhra Pradesh, (1967) 1 I. T. J. 66: 63 I. T. R. 738: (1967) 1 Andh. L. T. 182: (1967) 1 Andh. W. R. 42: A. I. R. 1967 Andh. Pra. 211: H. Clark (Doncaster), Ltd. v. Wilkinson, (1965) 1 All E. R. 934, 936.

2. Rangappa v. Empetor. 1936 Mad.

Rangappa v. Emperor. 1936 Mad. 426; I. L. R. 59 Mad. 349; 161 I.

^{426;} I. L. R. 59 Mag, 549; 161 I, C. 663,

3. S. C. Mitter v. The State, 1950 Cal. 435; 86 C. L. J. 21.

4. Raghunath v. State of U. P., (1973) 1 S. C. C. 564; 1973 S. C. C. (Cri.) 448; 1973 Cri. App. R. 157; 1973 S. C. Cri. R. 270; 1973 Cri. L. R. (S.C.) 449; 1973 Cri. L. J. 858; A. I. R. 1973 S. C. 1100; 1973 All Cr. C. 77.

The new Cr.P.C. has made some departure from the hard and fast rule that admission of accused or his counsel cannot relieve the prosecution of the duty to prove the facts leading to the guilt of the accused. Under section 206 of the Cr.P.C. (1973) in cases of petty offences the counsel if so authorized by the accused can plead guilty on his behalf. Under section 294 of the Cr. P. C. (1973) the accused or his pleader may admit the genuineness of a document whereupon it may be read in evidence.

Unless the vakalatnama of a counsel is worded in such a wide terms as to enable him to make a particular admission, or to waive the rights of the client without referring the matter to him, the counsel or other lawyer, is not competent to make an admission affecting the interest of his client to waive the right which his client had. The question, in each case, would be whether the counsel had an express or implied authority to bind the client by his admission or waiver. In law a counsel cannot waive the right of his client, an assessee, to challenge the irregularity in a notice under section 34 of the Income-tax Act, 1922 (now section 149 of the Act of 1961) when the client does not in fact relinquish the right voluntarily with knowledge of the same; the knowledge of the counsel cannot be fastened on his client.5

(f) Admissions by guardians.—Under the English law, the declarations of next friends or guardians are not receivable in evidence against an infant plaintiff since, though the names of these persons appear on the record, they are not really parties to the action, but merely officers of the court specially appointed to look after the interests of the infant. A solemn admission may, however, be made in a pending suit, for the purpose of that trial only, by a guardian or next friend in good faith, and will be equally admissible with like admissions by the solicitor in the cause.6 In India too, the guardian of a minor cannot bind him by any admissions unless it be for the benefit of the minor.7 In Abdul Hye v. Banee Pershad,8 Phear, J., said:

"We are very far from intending to say that the guardian of an infant defendant, if properly advised on all the circumstances surrounding the infant and his relations to the matter of the suit, cannot on his behalf admit facts essential to his adversary's case. It is, however, incumbent upon the Court, which is called upon to try an issue between a person of mature years and an infant, to take care that nothing of this kind is done unadvisedly. It should take nothing as admitted against an infant party to the suit, unless it is satisfied that the admission is made by some one competent to bind the infant, and fully informed upon the facts of the matter in litigation."9

Though an admission in a previous suit by the guardian prejudicial to the interest of the minor is not binding on him, it could not bind him if it

^{5.} B. K. Gooyee v. Commissioner of Income-Tax, (1969) 2 I. T. J. 524: (1966) 62 I. T. R. 109; A. I. R. 1966 Cal. 438, 445.

Taylor, s. 742; see also Phipson, Ev., 11th Ed., p. 705.
 Broiendra Coomar Roy Chaudhary v.

The Chairman of Dacca

pality, (1873) 20 W.R. 223 at 224; see atso surujmookhi Konwar v. Bhagwati Kunwar, (1881) 10 C.L.

 ^{(1874, 21} W.R.C.R. 228 at p. 229,
 See Surujmookhi Konwar v. Bhagwati Kunwar. (1881) 10 C.L.R. 377.

was a necessary allegation and was essential to the case of the minor.10 A bona fide admission by a guardian ad litem of the minor sons of a vendor that the sale for necessity was held to shift the onus of proving absence of legal necessity as to the sale in their suit challenging the sale.11 An admission by the manager of Courts of Wards is not binding upon the ward.12

(g) Admissions by guardians under Hindu Law.-A guardian has, under the Hindu law, a qualified power of dealing with the property of an infant under his charge. It can only be exercised rightly in a case of need, or for the benefit of the estate. The guardian can, in case of necessity, sell, charge, or let it for a long term.13 But the infant is not absolutely bound by the act of guardians, he can, on attaining majority, recover the property, if it has been disposed of without legal necessity; and, in the case of an uncertificated guardian, the burden of proving legal necessity, generally speaking, rests on the person asserting it.14 But he will be bound by the act of his guardian in the management of his estate (1) when bona fide and for his interest, and (2) when it is such as the infant might reasonably and prudently have done for himself, if he had been of full age. 15 And where a contract has been validly entered into on his behalf and there is mutuality in such contract, it may be specifically enforced.16

Even an alienation made without necessity by an unauthorized ae facto guardian will not necessarily be set aside.17 Where a minor will be bound by the act of his guardian, then he may be affected by his declarations made at the same time and forming part of res gestae, in respect of the particular act which constitutes a proper exercise of the functions of guardianship. But, although a guardian may have authority to manage the estate, or possibly even to make a partition, it does not follow that he would have power to make admissions of previous transactions, so as to affect the estate of his

And in the Calcutta High Court it was held that where, in a suit by reversioners to set aside an alienation by their maternal grandmother as without legal necessity, an affidavit filed by their parents in another suit was tendered as an admission of such necessity, nothing in this Act could make the affi-

^{10.} Kesho Prasad v. Parmeshri Prasad, 1923 Pat. 276: I.L.R. 2 Pat. 414; 71 I.C. 902.

^{11.} Dost Mohammad v. Sher Muhammad, 1935 Lah, 489: 159 I.C. 693.

12. Ram Autar v. Muhammad Mumtaz Ali, I.L.R. 24 Cal. 853: 24 I.A. 107: 1 C.W.N. 417 (P.C.); see also Banwarilal Singh v. Dwarkanath 52 I.C. 825: 20 C.L.L. 577

nath, 52 I.C. 825: 29 C.L.J. 577.

13. Hunnooman Pershad v. Mst. Babooee, (1856) 6 M.I.A. 898.

14. Jugal v. Anunda, (1895) 22 C. 545, 550; see Mayne's Hindu Law, 10th Ed., 229-241.

Mayne's Hindu Law, s. 237, and cases there cited. As to the onus in a suit by a minor to set aside a compromise made by a guardian; see Lekhraj Roy v. Mahtab Chund,

^{(1871) 10} B.L.R. (P.C.) 35; 17 W. R. 117; 14 M. I. A. 393. 16. Mir v. Fakharuddin. (1906) 34 C, 163 (F.B.).

Thayammal v. Kuppanna, 1915 Mad. 659 (2): I.L.R. 38 M. 1125; 26 I.C. 179 (Art. 60 of Limitation Act, 1963 does not apply to aliena-tion by unauthorized guardian).

Suraj v. Bhagwati, (1881) 10 C.
 L.R. 377 (P.C.), but in Brojendra v. Chairman, Dacca Municipality, (1873) 20 W.R. 223, 224 it was said that the guardian of an infant has no power to hind him by admissions. As to an admission by the Court of wards-see Ram Autar v. Muhammad, (1897) 24 I.A. 107: 24 C. 853: 1 C.W.N. 417 P.C.

davit relevant, for the reversioners had not derived their interest in the estate from their parents, and the latter, as their natural guardians, were in no way authorized by them to make the admission. 19 As to admissions made merely for probative purpose, see Sec. 58, post.

(h) Admissions by Government servants.—If admissions are made with regard to any legal consequence under a misapprehension as to the true interpretation of the law, such an admission is not binding either upon the maker, or the Government, if the maker happens to be a Government servant.²⁰ When Government servants act in exercise of their legal power, their admissions, express or implied, cannot be binding upon the Government.21 The observations of a Land Acquisition Officer in a proposed award as to the value of certain plots do not amount to a binding admission of that Officer.22

It is always open to a party to assert that an admission on a point of law was erroneously or inadvertently made.23 Thus the admission in an Incometax case contained in the counter-affidavit of an Income-tax Officer of the contents of the affidavit of the assessee-petitioner, even if treated as an admission on a point of law, cannot operate as an estoppel.24

- 5. Statements by suitors in representative character.—The second paragraph of the Section enacts that statements made by parties to suits, suing or sued in a representative character, are not admissions, unless they were made while the party making them held that character. To make this paragraph applicable, the following conditions must be satisfied, namely-
 - (1) statement must be made by a party to the suit;
 - (2) such party must be suing or sued in a representative character; and.
 - (3) the statement must have been made by such party while holding that representative character.

In the case of a joint Hindu family, the admissions of the father or the managing member will not by their own force bind the other members of the family and the admissions cannot be used against them on the ground that the father or the managing member, as the case may be, did not satisfactorily account for those admissions. The junior members can always prove that the admissions are either untrue or incorrect. The admissions made by the father or the managing member in a representative character may be used against all the members but not admissions to advance his own interests and

^{19.} Manokarini v. Haripada, 1914 P.C. 164: 24 I.C. 311; (1914) 18.C.W. N. 718.

N. 718.

20. M/s. Jetmull Bhojraj v. State of Bihar, A.I.R. 1967 Pat. 287, 294.

21. State of Bihar v. Kamakshya Narain Singh, 1961 B.L.J.R. 446, at pp. 475-477; M/s. Jetmull Bhojnaj v. State of Bihar, supra.

22. Ambalal v. Additional Special

Land Acquisition Officer, A.I.R. 1968 Guj. 5, 10.

^{23.} Juttendromohun Tagore v. Ganendromohun Tagore, (1872) I. A. (Supp. Vol.) 47.

^{24.} Income-tax Officer v. Shambhu Dayal and Co., I. L. R. (1967) 1 All. 387; A.I.R. 1968 All, 203 overruling Nand Kishore Rai v. B. Ganesh Prasad Rai, A.I.R. 1929 All. 446, 447.

acquire property for himself without being bound to share it with the sons or other members, such admission cannot bind the sons. The position is a fortiori if such an admission advances not only the personal interests of the managing member or the father but also prejudicially affects the interests of the other members.28

6. Section 18 (1): Party interested in subject-matter. (a) General.-"When several persons are jointly interested in the subject-matter of the suit, the general rule is that the admissions of any one of those persons are receivable against himself and fellows, whether they be all jointly suing or sued, provided the admission relates to the subject-matter in dispute and be made by the declarant in his character of a person jointly interested with the party against whom the evidence is tendered."1 Thus, the representation or misrepresentation of any fact made by one partner with respect to some partnership transaction will bind the firm,2 and so also, the case of a joint-contract, where A, B, C and D make a joint and several promissory notes, either can make admissions about it as against the rest.3 An admission by one zamindar as to the existence of a custom allowing transfers of houses by tenants was held to be admissible against other zamindars of the same village.4 Similarly, a statement made by a co-sharer, admitting the permanency of a tenancy, was held to be admissible against other co sharers.5

An admission made by a guardian ad litem on behalf of himself and on behalf of his minor brother, equally affecting both his interest and the interest of the minor, was held to be admissible against the minor.6 Where the question was whether the defendants 1 to 3 were the nearest reversionary heirs of a deceased owner, an admission that they were so made by defendant 4 who was jointly interested in the subject-matter of the suit along with the plaintiff, was held to be admissible against the latter.7

In order to render the admission of one person receivable in evidence against another, it must relate to some matter in which either both were jointly interested or one was derivatively interested,8 through the other, and mere community of interest is not sufficient. The requirement of the identity in the legal interest between the joint owners is of fundamental import-

^{25.} Nagayasami Naidu v. Kochadai Naidu, I.L.R. (1969) 1 Mad. 459: 81 M.L.W. 486: A.I.R. 1969 Mad.

^{1.} Taylor, Ev., s. 743; cited and adopted in Kowsulliah v. Mukta, (1885) 11 C. 588, 590; see also Chalho Singh v. Jharo Singh, I.L.R. 39 Cal, 995; 18 I.C. 61; Meajan v. Alim-uddin, A.I.R. 1917 Cal. 487; I.L.R. uddin, A.I.R. 1917 Cal. 487: I.L.R. 44 Cal 130: 34 I. C. 571; 25 C. L. J. 42: 20 C.W.N. 1217: S. 18. cl. (1), ante: Whitcomb v. Whiting, (1781) 2 Doug 652; Wood v. Braddick, (1808) 1 Taunt 104; Jagabandhu v. Bhagu, A. I. R. 1974 Orissa 120; as to acknowledgment of joint debts for the purpose ment of joint debts for the purpose of the Law of Limitation v, Post and Taylor, Ev., ss, 600-601 and 724-

Taylor, Ev., s. 743 and v. ante.
 Whitcomb v. Whiting. (1781) 2
 Doug. 652: 1 S. L. C. 644; Steph.
 Dig., Art. 17, Illus, (f).

^{4.} Tirkha Ram v. Murarilal, 1935 All, 720: 158 I.C. 109: 1935 A.W.R.

Jogendra Krishna v. Subasini Dassi, 1941 Cal. 541; I.L.R. (1941) 2 Cal. 44: 197 I.C. 376: 74 C.L.J. 145: 45 C.W.N. 590.

Dost Muhammad v. Sher Muhammad, 1935 Lah. 489; 159 T.C. 693.

Yaggana Obanna v. Kutagulla Gangaiah, 1945 Mad. 361: (1945) 1 M.L.J. 378: 1945 M.W.N. 352: 58 L.W. 321.
 See S. 18, cl. (2) post.

ance.9 Respondents claimed to be tenants of some portions of land in dispute and alleged that other persons were tenants of other portions. Evidence of some of those other persons that neither they nor the respondents were tenants does not attract Sec. 18 (1).10 Also see the undernoted case as to the effect of admissions by parties jointly interested.11 An admission of one co defendant is not receivable against another, merely by virtue of his position as a co-party in the litigation. Indeed it is not by virtue of that person's relation to the litigation that the admission of one can be used against the other. The vital point for consideration accordingly, is, whether there is such privity of obligation or title between two persons as to justify the use of the admission of one against the other; and, this must be determined by reference to the relation between the parties at the time the admission was made.12 An admission of one defendant is not binding upon another defendant, who claims an independent title.18 The general rule is, that an admission can only be given in evidence against the party making it and not against any other party. In general, the statements of defence made by one defendant cannot be read in evidence either for or against his co-defendant, the reason being that as there is no issue between the defendants, no opportunity for cross-examination is afforded, but this rule has no application to cases, where the co-defendants have a joint interest. The admission of one defendant can be used against the other, not by virtue of a person's relationship to the litigation, but because of some privity of title or of obligation.14 An admission by one heir that one of the heirs has an absolute right to the property of the deceased cannot affect the other heirs.15

Where two persons were in partnership, and an action was brought against them as part-owners of a vessel, an admission made by the one, as to a matter which was not a subject of co-partnership, but only of co-part-ownership, was held inadmissible against the other.18 Nor will the admissions of one tenantin-common be receivable against his co-tenant, though both are parties on the same side of the suit.17 And, an admission by a co-tenant as to who is the landlord of a holding is not binding on the other co-tenants.18 Nor is an admission by one rayat as to the rate at which he holds (though against his own interest), evidence to prove the rate at which another rayat holds.29 And, where a joint contract is severed by the death of one of the contractors. nothing that is subsequently done or said by the survivor, can bind the per-

^{9.} Ambar Ali v. Lutfe Ali, 1918 Cal. 971: 1.L.R. 45 Cal, 159: 41 I. C. 116: 25 C.L.J. 619: 21 C.W.N. 995: Brajballav Ghose v. Akhoy Bagdi 1926 Cal. 705: 93 I.C. 115; (Mst.) Ramjhari Kuer v. Deyanand, 1946 Pat. 278; 222 I.C. 604: 12 B. R. 298.

^{10.} Joao Andrade v. Souza, A.I.R. 1971 Goa 2,

Ujali Padhani v. R. Patra, (1972) 38 Cut. L.T. 110. Ganga Ram Kanhyalal v. Pooran

Gulab, 1945 M.B. 58, 13. Abdul Hamid v. Brojendra Kumar, A.I.R. 1926 Cal. 290: 90 I.C. 643; Kishan Singh v. Lachhman Das, 1930 Lah. 238: 122 I.C. 109.

^{14.} Harihar v. Navalkishore, I. L. R. 1962 Cut, 422: A.I.R., 1963 Orissa

^{15.} Maung Thu v. Maung Shwe Hla, 1929 Rang. 272.

Taylor, Ev., s. 750, 751-753 and cases cited there. Steph. Dig., Art. 17; Jagg rs v. Binnings (1815) 1 Stark R. 64; Brodie v. Howard, 17 C.D. 109, as to statements by coexecutors and admissions by one of several trustees, v. ante first paragraph of Commentary.

^{17.} Dan v. Brown, (1825) 4 Cawne 483. 492.

Kali v. Gopi, (1897) 2 C.W.N. 166.
 Nurrohurry Mohanto v. Narainee Dassee, (1862) W. R. (F.B.) 23.

sonal representative of the deceased,20 nor can the acts or admissions of the executor bind the survivors.21 The rule that, where there are several cocontractors, or persons engaged in one common business or dealing, a statement made by one of them, with reference to any transaction which forms part of their joint business, is admissible as against the other,22 was applied in the case of Kowsulliah Sundari Dasi v. Mukta Sundari Dasi.22 The facts this case were, that in a suit between a zamindar and his ijaradars for rent, a person who was one of several jotedars in the mahal, was called as a witness for the zamindar, and admitted the fact that an arrangement existed whereby he and his co-jotedars had agreed to pay rent to the zamindar direct; this suit was decided in favour of the zamindar. The ijaradars then brought a suit against the jotedars, amongst whom was the witness above mentioned, to recover the sum which the jotedars ought to have paid to the zamindar direct and which the ijaradars had been decreed to pay. The jotedars disclaimed all liability to payment to the ijaradars; in this suit, the evidence given by the jotedar in the zamindar's suit was received as evidence on behalf of the plaintiffs against all the defendants. It was contended that the statement of the jotedar might have been received as an admission against himself only, but not as against the other defendants, but it was held, on the principle above stated, that the evidence was admissible. As to admission founded on derivative interest, v. post. In an action for negligence or trespass or in any other action for tort, the admission of one defendant will not be evidence against the others unless combination for a common object be proved; the same rule prevails in criminal proceedings, as the law cannot recognise any partnership or joint interest in crime.24 The joint interest must be proved independently. An apparent joint interest is obviously insufficient to make the admissions of one party receivable against his companions, where the reality of that interest is the point in controversy. A foundation must first be laid by showing prima facie that a joint interest exists. Where, therefore, it is sought to charge several as partners, an admission of the fact of partnership by one is not receivable in evidence against any of the others, to prove the partnership; but it is only after the partnership is shown to exist by independent proof satisfactory to the judge, that the admissions of one of the parties are received in order to affect the others.25

Atkins v. Tredgold, (1823) 2 B. & C. 23; Fordham v. Wallis, (1852-53) 10 Hare 217; Slaymaker v. Gundackers, (1823) Ex. 10 Serge & R. 75.

Slater v. Lawson, (1830) 1 B. & Ad. 396; Hathaway v. Haskell, (1929) 9 Pick 42.

^{22.} Per Garth, C. J., in Kowsulliah Sundari Dasi v. Mukta Sundari Dasi, (1885) 11 C. 588, 590; citing Taylor, Ev., s. 743; Kemble v. Farren, (1829) 3 C. & P. 623; Lucas v. De La Cour, (1813) 1 M. & S.

^{23. (1885) 11} Cal. 588.

^{24.} Taylor, Ev., s. 751; admissions by joint defendants in action for tort are not generally evidence, except against themselves, unless there be

proof of common object or motive; Norton, Ev., 143; see S. 10, ante; and ib. as to conspirators in crime; Taylor, Ev., ss. 597, 598; Daniels v. Potter. (1830) 1 M. & M. 50; Roscoe. N. P. Ev., 68; and observations in R. v. Hardwicke, (1809) 11 East 585; nor in actions ex contractu, unless they relate to a matter in which there is an identity of interest; Fox v. Waters, (1840) 12 A. & E. 43.

^{25.} Taylor, Ev., s. 753, and cases there cited; and as to admissions as to the nature or extent of the partnership business, see Lindley, Partnership. 166; or as to the extent of partners authority to bind the firm. Agace Ex. Parte (1792) 2 Cox. Eq. 312.

In the case of admissions of persons who are not parties to the record, but who are interested in the subject-matter of the suit, the law looks chiefly to the real parties in interest and gives to their admissions the same weight as though they were parties to the record.1 Thus, the admissions of the cestui que trust of a bond, so far as his interest and that of the trustee, are identical,2 those of the persons interested in a policy effected in another's name for their benefit,3 those of the ship-owners in an action by the master for freight,4 and in short, those of any persons who are represented in the cause by other parties, are receivable in evidence against their representatives.5 The admissions must have been made while the real party was actually interested (v. post); and further they are only receivable so far as his own interests, or the interests of those who claim through him are concerned.6 And as a nominal party may be affected by the admissions of a real party, who though not named on the record, has a substantial interest,7 in the result;8 so conversely, the admissions of a representative, if made while sustaining that character9 and touching his principal's interest10 are, in general, receivable against the principal; and this is so, although the representative is a mere nominal party, or bare trustee, whose name is used only for purposes of form.11

(b) Partners, etc. Under Secs. 23 of the Partnership Act,12 "An admission or representation made by a partner concerning the affairs of the firm is evidence against the firm, if it is made in the ordinary course of business".

A partner charges the partnership by virtue of an agency to act for it. How far his admissions are receivable depends therefore on the doctrines of agency as applied to partnership. Partners and joint-contractors are each other's agents for the purpose of making admissions against each other, in relation to partnership transactions, or joint-contractors. Admissions by partners and joint-contractors are receivable both on the ground of agency and of joint-interest.15

1. Taylor, Ev., s. 756; Roscoe, N. P. Ev., 67; Phillips & Arm., Ev., 364.

5.

Bell v. Ansley. (1812) 16 East 141. Smith v. Lyon, (1813) 3 Camp 465. Taylor, Ev., S. 756. Ib., S. 757.

The "interest" is so qualified in Steph. Dig., Art., 16; the words of S. 18 are, however, "any proprietary or perupiary interest" or pecuniary interest".

8. v. ante: Taylor, Ev., ss. 756-757 Roscoe, N.P. Ev., 67; Steph. Dig. Art. 16, Wills, Ev., 3rd Ed., 175. 9. Legge v. Edmonds, (1855) 25 L. J. Ch. 125; Fenwick v. Thornton, (1827) 1 M. & M. 51; Metters v. Brown, (1862) 32 L.J. Ex. 138.

43; Stanton v. Percival, (1854) 5 H.

L.C. 257.

Moriarty v. L. C. & D. Co. 1870 L. R. 5 Q.B. 314: "what the plaintiff on the record has said is always evidence against him, its weight

being more or less, even if the plaintiff is merely a nominal plaintiff a bare trustce for another though slight in such a case; still it would be admissible; ib., per Blackburn J. Steph, Dig. Art. 16; Roscoe N. P. Ev., 67; Bauerman v. Radenius, (1798) 7 T. R. 663; Phillips, Ev., 362; though see Taylor, 741.

12. IX of 1932. 13.

Wigmore, Ev., 1078. Steph. Dig. Art. 17: Lucas v. De La Cour. (1831) 1 M. & S. 249; Whitcomb v. Whiting, (1781) 1 Sm. L. C. 555: 2 Doug. 652; Kail Kissore v. Gopi Mohan, (1897) 2 C.W.N. 166; 168; Chandreshwar v. Bisheshwar, 1997, Part. 61: L. J. P. E. Por. 777. 1927 Pat. 61; I. L. R. 5 Pat 777:

101 I.C. 289.

15. Taylor, Ev., Ss. 593-743; Story on Partnership ss. 101-125; Re Whitely, (1891) L. R. 1 Ch. 558 ante; Steph. Dig. Art. 17; Kowsulliah Sundari Dassi v. Mukta Sundari Dassi, (1885) 11 C. 588, 591; Chalho v. Jharo, (1911) 39 C. 995.

Hanson v. Parker, (1749) 1 Wills 257; as to statements by a cestui que trust, see Roscoe, N.P. Ev., 67.

An admission by one partner made in a representative capacity is evidence against the firm.16 Where the pecuniary interest of certain persons in the subject-matter of a suit is continuing even though the firm of those persons has been dissolved, the admission of one partner is admissible against the other partners under this section. For the application of the section what is required is that there should be an identity of interest and not merely a community of interest.17

Both under the English and the Indian Acts, to be evidence against the firm, an admission or representation made by a partner, (1) must be concerning the affairs of the firm, and (2) must have been made in the ordinary course of business. Hence, an admission made by one person, who afterwards enters into partnership with others, is no evidence against them, merely because they and he are partners when evidence is sought to be used.18

After prima facie evidence of partnership, the declaration of one partner is evidence against his co-partners as to partnership business,19 though the former is no party to the suit.20 Where goods are purchased or money raised for a joint adventure, and the dealing though ostensibly by an individual, is truly and substantially a dealing of the joint adventure, the adventurers are liable as partners.21 Each member of a firm, being the agent of the others for all purposes within the scope of the partnership business, admissions by one (provided the Court regards him as authorized to make the admission) are binding on all, unless under the special circumstances of the case, an intention

 Thomas Bear & sons v. Rulia Ram 1934 Lah. 625; 148 I. C. 763; See Sohanlal v. Gulabchand, A.I.R. 1966 Raj. 229: I.L.R. (1965) 15 Raj,

17. Sohanlal v. Gulab Chand, I.L.R. (1965) 15 Raj. 1035: 1965 Raj. L. W. 346: A.I.R. 1966 Raj. 229 at pp. 231, 232; Taylor, Ev., 12th Edn. paras 740, 743, 750, 753 and 754; Kowsulliah Sundari Dasi v. Mukta Sundari Dasi, (1885) 11 Cal. 588 (admission made by one co-sharer evidence against other co-sharers) cited with approval in Miajan Matbar v. Alimuddi Mia, I.L.R. 44 Cal. 180: A. I.R. 1917 Cal. 487 and Ambar Ali v. Lutfe Ali, I.L.R. 45 Cal. 105: A.I.R. 1918 Cal. 971; Tikoo Ram Brahman v. Jhabur, I.L.R. (1960) 10 Raj 6; Dileshwar Ram Brahman v. Nobar Singh, 48 I.C. 193: A.I. R. 1918 Nag. 41; Harihar v. Nabha Kishore, A.I.R. 1963 Orissa 45 (in the last three cases evidence of codefendants was admitted). cases that follow there was no identity of interest; Amrito Lal Bose v. Rajoonee Kant Mitter, (1874) 2 Ind. App. 113 (P.C.); Dina Nath v. Sayad Habib, A.I.R. 1929 Lah-129: Narinder Singh v. C. M. King, A. I.R. 1928 Lah. 769.

18. Tunley v. Evans, (1845) 2 Dowl, &

L. 747; Catt v. Howard, (1820) 3 Stark 3.

 Roscoe, N. P. Ev., 71: Nichols v. Dowdine, (1815) 1 Stark 81: Taylor. Ev., s. 743: Lucas v. De La Cour supra: "What admissions bind in the case of partners? Those admissions only bind the firm relate to matters connected with the partnership. For instance, an admission by one partner that the two had committed a trespass would not other, for declaration bind the relates to nothing in which there was that community of interest which makes the declaration of one defendant evidence against the other." Fox v. Waters, (1840) 12 A. & E. 43, per Williams, J. See Taylor Ev., s. 751; and see generally as to Partnership ib, ss. 598-601, 743-754, 787; Roscoe, N. P. Ev., 71: Steph. Dig. Art. 17; Lindlay, Partnership, 128 162-166. Supp. 40; Pearson's Law of Agency. 428, 429. Wood v. Braddick, (1808) 1 Taunt 105; Roscoe, N.P. Ev., 71; Taylor, Ev., s. 743. which makes the declaration of one

Ev., s. 743.

21. Karamali v. Karimji, 1914 P.C. 132: 42 I.A. 48: I.L.R. 39 Bom. 261: 26 I.C. 915: 13 A.L.J. 121: 17 B. L.R. 103: 21 C.L.J. 122: 19 C. W.N. 337: 28 M.L.J. 515. can be inferred that a particular act should not be binding without the direct concurrence of each individual partner.22

An admission by a person before he became a member of the partnership is no evidence against the firm.23 On the same principle an admission by a partner that an acknowledgment of debt made by another partner was mide on the authority of the firm is not binding on him when such admission was made after the firm stopped business.24 The Court will not order a partner to pay trust money into Court upon an admission that the money was received by the firm contained in the pleadings and answer to the interrogatories if he denies it, inasmuch as such admission cannot be said to have been made in the usual course of the partnership business.25 Acknowledgment of liability made by a partner of the firm not in the ordinary course of business, but in accordance with a statutory provision, cannot be presumed to have been made on the authority, or on behalf, of the firm.1 An admission by a partner which does not relate to the affairs of the firm or is not made in the ordinary course of business is not evidence against the firm. Thus, when a partner A stands surety to a bond, his liability is personal and as the transaction is not a partnership one, the partner B cannot be presumed to have authority to bind partner A by acknowledging liabilities or payments in respect of the bond so as to save limitation against partner A. Statements or representations made by a person that he is a partner in a certain firm with others, would be evidence against him and he would be liable as a partner on the ground of holding out.3 But such an admission by him would not be conclusive evidence against him and it is open to him to explain the circumstances under which it was made.4 Even a written agreement by certain persons describing themselves as partners is not conclusive proof of their being partners.6 "Though admissions by partners bind the firm when tendered by strangers, they do not necessarily have this effect when tendered inter se. Thus, it has been held that, as between themselves, entries in the partnership book,6 made without the knowledge of a partner, will, as against him, be inadmissible,7 and a similar rule holds as to directors and other members of a company inter se.8 An admission made by a partner in any suit or proceeding, concerning any affair or act of the firm, is evidence against the firm under Sec. 18 of the Evidence Act.

Latch v. Wedlake, (1840) 11 A. & E. 959; Taylor, Ev., s. 598; Kowsulliah Sundari Dassi v. Mukta Sundari Dassi, (1885) 11 Cal. 588; Ex parte Agace, (1792) 2 Cox. 312: 30 E.R. 145; Jacob v. Morris, (1902) 1 Ch. 816, as to acknowledgments of debt by partner giving new period of limitation v. post.

^{23.} Catt v. Howard, (1820) 3 Stark, 3; Tunley v. Evans, (1845) 14 L.J. Q. B. 116: 2 Dowl, D. & L. 747.

^{24.} Naubat v. Sewa Ram, 140 P.R.

Holis v. Burton, (1892) 3 Ch. 226. M. Kullappa v. P. V. Subbaraya, 25 I.C. 22: A.I.R. 1915 M. 353; Kessen Doss v. Khatau Makanjee, 36 I.C. 389.

^{2. 84} I.C. 199 Seth Abde Ali v. As-

karan, A.I.R. 1924 Nag. 411.

See S. 28, Partnership Act, 1932.
 Ridgway v. Phillip, (1834) 1 Cr. M. & R. 415.

^{5.} Bhaggu Lal v. De Gruyther, 4 All. 74; Abdullah v. Allah Diya, 1927 L. 333; 8 Lah. 310; 100 I.C. 846; Mammooji v. Teyebali, 1933 Sind 210; 146 I.C. 730; Mohamad Yusuf v. Pir Mohamad, 1922 Nag. 67: 65 I.C. 368.

^{6.} As to the principle on which partnership books are evidence, see Hill v. Manchester Waterworks, (1833) 5 B. & Ad. 866.

^{7.} Hutcheson v. Smith, (1884) 5 Ir. Eq. 117; Stewart's case, (1866) 1 Ch. App. 511; Daji v. Govind, 10 Bom. L.R. 811

^{8.} Phipson, Ev., 11th Ed., 329.

But such an admission is distinguishable from confessing judgment,9 Where the cause of action for infringement of a trademark arose against the firm when the partnership was going on, but a suit for damages was brought after its dissolution and one partner disputed the claim for damages, but admitted the infringement of trademark, it was held, that the admission bound the firm and made all the partners liable10 unless made collusively with the other side.11 But, where a partner is shown to be hostile to another, such hostility will no doubt affect the question of credibility. Similarly, an admission cannot have any value when it is made in fraud of the copartners and in collusion with the opponent.12 The Madras High Court has held in several cases (in conflict with the Bombay and Allahabad High Courts) that it is not enough to show that an acknowledgment of payment by a partner was an act necessary for, or usual in the course of, the partnership business, but that to bind other partners it must be proved to have been authorized by them.13 But, in a later case, in that High Court, it was held that where a promissory note which contained no indication that it was executed on behalf of the firm was executed by only two of three partners for money borrowed for the purposes of the partnership business, the promisee could recover also against the partner who did not execute it.14

(c) Principal and surety.—"The admissions of a principal can seldom be received as evidence in an action against the surety upon his collateral undertaking. In these cases, the main inquiry is, whether the declarations of the principal were made during the transaction of the business for which the surety was bound, so as to become part of the res gestae. If so, they e admissible; otherwise they are not. The surity is considered as bound only for the actual conduct of the party; and not for whatever he might say he had done; and therefore, he is entitled to proof of the principal's conduct, by original evidence, when it can be had; excluding all his declarations made subsequent to the act to which they relate, and out of the course of his official duty." 15

Thomas Bear & Sons Ltd. v. Rulia Ram, 1934 Lah. 625; 148 I.C. 763.

Ibid.

^{11.} Taylor, Ev., s. 749, and cases there cited.

^{12.} Rawtorne v. Gandell, (1846) 15 M. & W. 304; Veerswamy v. Ibramsa. (1909) 19 Mad. L.J. 221; Sheik Ibrahim v. Rama Aiyar, 37 Mad. 685; Baikunt Nath v. Hira Lal, 13 Cal.L.J. 234; see also Palaniappa v. Veerappa 1918 Mad. 238: 41 Mad. 446: 44 I.C. 466: 34 M.L.J. 41; Motilal v. Sarup Chand, 1937 Bom. 81: 167 I. C. 208: 38 B.L. R. 1058

B.L.R. 1058.

13. K. R. V. Firm v. Seetharama, 1914
Mad. 609; I.L.R. 37 M. 146: 21
I.C. 634: 25 M.L.J. 501: Wallis,
J. expressing reluctance to be
bound by other rulings as for instance Balasubramaina v. Ramanathan, (1908) 32 M. 421; Mohideen v. Official Assignee, (1910) 25
M. 142.

^{14.} Shanmuganatha v. Srinivasa, 1917
Mad. 108: I.L.R. 40 M. 727: 35 I.
C. 219: 31 M. L. J. 38, following
Karamali v. Karimji, 1914 P. C.
132: 42 I.A. 48: I.L.R. 39 B. 261:
26 I.C. 915: 13 A.L.J. 121: 17 B.
L.R. 103: 21 C.L.J. 122: 19 C.
W.N. 337: 28 M.L.J. 515:
distinguishing Muthu' v. Visvanatha, (1914) 26 M.L.J. 19: 21
I.C. 864: A.I.R. 1914 Mad. 657
(2): I.L.R. 38 Mad. 660.

15. Taylor, Ev. s. 785; and v. ib., s.
786: so if a man becomes surety in

^{15.} Taylor, Ev., s. 785; and v. ib., s. 786; so if a man becomes surety in a bond conditioned for the faithful conduct of a clerk or collector, confessions of embezzlement, made by the principal after his dismissal cannot be given in evidence if the surety be sued on the bond. Smith v. Whittingham, (1833) 6 C. & P. 78: rough entries made by the principal in the course of his duty, or whereby he has charged himself with the receipt of money, will, at

The reason why admissions made by the principal subsequently to the transaction do not bind the surety is that as the surety contracts with the creditor, there is no privity between the principal and himself.16 So, in a suit by a creditor against the surety, the latter is not bound by any admissions or statements of the principal as to what amount is due. He is only bound to pay the amount which shall be proved against him 17 Even where the principal and the surety are impleaded as co-defendants the admissions of the principal cannot . ordinarily be received against the surety.18 But the admission of the principal may be admissible against the surety under Sec. 19 when it is necessary to prove the position or liability of the principal.19

So far as one person is privy in obligation with another, i.e., is liable to be affected in his obligation under the substantive law by the acts of the other, there is equal reason for receiving against him such admissions of the other as furnish evidence of the act which charges them equally. Not only as a matter of principle does this seem to follow, since the greater may here be said to include the less, but also as a matter of fairness since the person who is chargeable in his obligations by the acts of another can hardly object to the use of such evidence as the other may furnish. Moreover, as a matter of probative value, the admissions of a person having virtually the same interests involved and the motive and means for obtaining knowledge will, in general, be likely to be equally worthy of consideration.20

(d) Acknowledgments by guardian or manager of joint Hindu family.-Under Secs. 18 and 19 of the Limitation Act, 1963, an acknowledgment of liability made in writing signed by a party, or by some person through whom he derives title or liability, or by the party's "agents duly authorised in this behalf," or a payment on account of a debt or of interest on a legacy made by a party or by his "duly authorised agent," saves limitation against the party. Under Sec. 20 (1) of the same Act, the expression "agent duly authorised in this behalf," in the case of a person under disability, includes his lawful guardian, committee or manager, or an agent duly authorised by such guardian, committee or manager to sign the acknowledgment or make the payment. An admission amounting to an acknowledgment under Sec. 18 made by the guardian of a minor appointed by the Court is binding on the minor.21 The expression "lawful guardian" is not limited to a guardian appointed by the Court. It means any person who is entitled to act as guardian under the personal law of the minor. Thus, under the Hindu law, on the death of the father, the mother is not only

> least after his death, be received as proof against the surety; not altogether as declarations made by him against his interest, but because the entries were made by him in those accounts which it was his duty as clerk to keep, and which the defendant had contracted that he should faithfully keep. Whitnash v. George, (1828) 8 B. & C. 556; Goss v. Watlington, (1821) 3 B. & B. 132.

(1881) 17 Ch. D. 668; cited in Rambhajan Lal v. Sheo Prasad. 5 A. L.J. 142.

18. Gopal Daji v. Gopal Bin Bait, 28 Bom. 248; 5 Bom. L.R. 1020.

^{16.} See Phipson, Ev.,11th Ed., p. 325. 17. Per Lush, L.J. in Young ex parte,

^{19.} Parameshwara Pattar v. Viyathen Sreedevi, 20 I.C. 637: 1913 M.W. N. 596: 25 M.L.J. 51; see also Appavu Chettiar v. Nanjappa Goundan, 20 I.C. 792: 25 M.L.J. 329: 14 M.L./T. 117.

Wigmore, s. 1077.
 Bageshwari v. Bindeshwari, 1932
 Pat. 337: 13 P.L.T. 509.

the natural guardian, but also the legal guardian, and as such she can acknowledge a debt on behalf of the minor.22

(e) Gaurdian's power to acknowledge. Before the addition of sub-section (3) to Sec. 21 of the Limitation Act, 1908 by Sec. 3 of the Indian Limitation (Amendment) Act (10 of 1927) there were conflicting decisions on the question whether a guardian of a minor could keep alive a debt by acknowledgment of, or, by payment towards the interest or the principal of the debt. Such acknowledgments and payments are almost always made to avert an impending suit and guardians of minors and managers of their estates are since declared to be agents duly authorised in that behalf by sub-section (3) of Sec. 21 of the Limi tation Act, 1908 [now section 20 (3) of the 1963 Act].

The managing member of a family has, therefore, authority to acknowledge, on behalf of the family, a debt due by the family, as well as to pay interest on it, or to make part-payment of the principal, so as to enable a fresh period of limitation to be computed.23 But, he is not competent to bind the other members of the joint family by a promise to pay a debt already statutebarred. An acknowledgment to save limitation must be in writing and it must be signed.24 It has been held that an application by a guardian of a minor, for sanction of a grant, amounts to an acknowledgment of the grantor's title, and is binding on the minor.25 A payment by a guardian must be held to be a payment by an agent duly authorised in this behalf.1 A payment even by a junior member, managing the business of a joint, Hindu family, would save limitation against the other members of the family.2 But an acknowledgment of a debt made by a de facto guardian of a minor does not prevent the debt from being time-barred.3 The expression "de facto guardian means and implies a person who is not a legal or lawful guardian, but merely, in fact, performs the functions of a guardian,, and the expression "agent duly authorised" in Secs. 18 and 19 does not include a de facto guardian by reason of Sec. 20.4 Only a lawful guardian or manager can sign an acknowledgment for the purposes of Sec. 18, or in their absence, an agent duly authorised either by the

^{22.} Bechu v. Baldeo. 1933 Oudh 132: 10 O.W.N. 188: 145 I.C. 180.

Chinnaya v. Gurunatham, (1882)
 Mad. 169 (F.B.); Ambalayana v. Gowri, A.I.R. 1936 Mad. 871: 1936 M.W.N. 1274; Lakshmi v. Gunnamma, 1935 Mad. 101: I.L.R. 58 Mad. 418: 154 I.C. 1053; Venkatachalam v. Venkateswara, 1944 Mad. 33: 217 I.C. 61: (1943) 2 M. L.J. 610; Kanshi Ram v. Bhaga, 1945 Bom. 511: I. L. R. 1945 Bom. 976; 47 Bom. L.R. 470; Bhaskar v. Vijalal, (1893) 17 Bom. 512; Har Prasad Das v. Harihar Prasad, (1915) 19 C.W.N. 860; Hari Mohan v. Sourendra, 88 I.C. 1025: 1925 Cal. 1153; Annada Charan v. Jhatu Charan, 1935 Cal. 648: 158 I.C. 512; Ram Autar v. Beni Singh, 1922 Oudh 135; 68 I.C. 196. 24. Nagaemal v. Bajranglal, 1950 P. C. 15; 77 I.A. 22: I.L.R. 29 Pat.

^{272: 1950} A.L.J. 130: 52 Bom. L. R. 467: (1950) 1 M.L.J. 289.

Bageshwari Charan v. Bindeshwari Saran, 1932 Pat. 337: 13 P.L.T.

Mani Devi v. Anpurna Dai. 1943
 Pat. 218: I.L.R. 22 Pat. 114: 206
 I.C. 126: 9 B.R. 260.

Adapa Venkatachalam v. Vemalepathi Venkateswara Rao, 1944 Mad.
 33: 217 I.C. 61: (1943) 2 M.L.J.
 610: 1943 M.W.N. 680: 56 L.W.

K. Chennappa v. K. Onkarappa, 1940 Mad. 33: I.L.R. 1940 Mad. 358: 186 I.C. 749: (1939) 2 M.L. J. 884: 1940 M.W.N. 9: 50 L.W.

^{896 (}F.B.).
4. Dashrath Motiram v. Gajanan Keshav, 1943 Bom. 381: 1.L.R. 43 Bom. 486: 210 I.C. 532: 45 Bom. L.R. 740.

lawful guardian or by the manager. Accordingly, a de facto guardian will not do, and an acknowledgment by him will not extend limitation.5

Where the minor has a separate guardian for his property, an acknowledgment by the guardian of his person cannot save limitation against the minor.6

- (f) Acknowledgment by joint contractors, etc. "Nothing in the said sections renders one of several joint contractors, partners, executors or mortgagees chargeable by reason only of a written acknowledgment signed or a payment made by, or by the agent of, another or others of them.7 One of several co-contractors,8 or joint debtors cannot make an acknowledgment or payment on behalf of the others, so as to save limitation unless authorised to do so.9 Where a part payment by one of the joint debtors is made, the mere presence of the other joint debtors at the place of payment cannot save limitation, unless it is proved that they also made the payment, or that the person making the payment was authorised by the others to do so.10
- (g) Acl:nowledgment by co-heirs. An acknowledgment of liability by some only of the heirs of a mortgagor, against whom a decree for sale on the basis of a mortgage has been passed, does not operate to save limitation as against the other heirs of the mortgagor. If, at the time when the acknowledgment is made or the payment is made, there are more than one person in existence who stand in relationship to each other as joint contractors, partners, executors or mortgagors, then the acknowledgment or payment made by one would save limitation as against that person and would be of no avail against the others.11
- (h) Acknowledgment by co-executors. An acknowledgment by one executor only keeps alive the debt against the assets of the testator, but is not sufficient by itself to make the other executors personally chargeable. 12

Tuka Ram v. Madho Rao, 1948
 Nag. 293: I.L.R. 1947 Nag. 710:
 1947 N.L.J. 405.
 Sardambal v. Kuppusami, 1942
 Mad. 663: 203 I.C. 212: (1942) 2

M.L.J. 281: 1942 M.W.N. 539:

55 LW. 529. 7. Scc. 20 (2), Limitation Act, 1963. Nagayya Naidu v. Duraiswami, 1938 Mad. 111: 175 I. C. 426: 1937 M.W.N. 194: 46 L.W. 688; Jnan-chandra Mukherjee v. Manoranjan Mitra, 1942 Calcutta 251: I.L. R. (1941) 2 Cal. 576: 201 I.C. 138: 74 C.L.J. 327; Oudh Commer-cial Bank Ltd. v. Bishambhar Nath. 1996 Oudh 601: I.L.R. 2 Nath, 1926 Oudh 601: I.L.R. 2

Luck, 180; 96 I.C, 353.

9. Ram Kumar Pandey v. Hiralal, 1939 All. 230; I.L.R. 1939 All. 258; 181 I.C. 490; 1939 A.L.J. 66 (joint judgment-debtors); Naziruddin Ahmad v. Parmanand, 1948 Oudh 193: L.L.R. 23 Luck, 114: 1947 A.W.R. (C.C.) 402: 1947 O. W.N. (C.C.) 623 (F.B.) (joint-

judgment-debtors); Annada Charan Misra v. Jhatu Charan Roy, 1935
Cal. 648: 158 I.C. 512; Jogesh Chandra Saha v. Monindra Narain Chakravarty, 1932 Cal. 620: I.L.R. 59
Cal. 1128: 138 I.C. 740: 55 C.L.
J. 347: 36 C. W.N. 487.

10. Annadacharan v. Jhatucharan, A.
I.R. 1935 Cal. 648: 158 I.C. 512.
Mohammad Tagi Khan v. Raja.

11. Mohammad Taqi Khan v. Ram, 1936 All. 820: 166 I.C. 106: 1936 A.L.J. 1140 (F.B.); see also Arjun Ram v. Rahima, 14 I.C. 128; Azizur Rehman v. Upendra Nath Samanta A.I.R. 1938 Cal. 129: 42 C.W.N. 18; but see Narasimha Rama Aiyar v. Ibrahim, 1929 Mad. 419; 118 I.C. 302: 56 M.L.J. 630: 1929 M.W.N. 146; where it was held that S. 21 (2) of the Limitation 1908 does not apply to co-Act. heirs.

12. McDonald. Re, Dick v. Fraser, (1897) 2 Ch. 787; Fordham v. Wallis, (1853) 17 Jur. 228; Astbury v. Astbury, (1898) 2 Ch. 111.

(i) Acknowledgment by partners.—The mere fact, that one partner is an agent of the others, does not give him authority to acknowledge liability on behalf of the firm. To bind the firm, he must have express or implied authority to make the acknowledgment. If the conduct of the partners be, or the circumstances of any particular case are, such as to justify the inference that one of the partners has authority to acknowledge a liability or pay a debt, his acknowledgment or payment would avail to save limitation as against the whole firm.13 In order to bind the firm, the act of the partner should be done on behalf of the firm but it is not necessary that it should also purport to be so done.14 A partner who has general authority to contract debts, or make payments, has implied authority to acknowledge liability.15 In a going mercantile concern, a partner has an implied authority to make an acknowledgment on behalf of the firm, and this is sufficient to save limitation in spite of the provisions of Sec. 20 of the Limitation Act. 16 The word "only" in subsection (2) of Sec. 20, Limitation Act, 1963, means that the mere writing or signing of an acknowledgment by one partner does not necessarily of itself bind his co-partners, it must also be shown that he had authority, express or implied, to make the acknowledgment on behalf of himself and his co-partners,17 and if it is shown, then of course the acknowledgment will be binding on them all. The use of the word "only" shows that while a partner cannot make another partner liable merely by his acknowledgment, there is nothing to prevent such liability falling on partners, if they are shown to have all joined in the settlement made by one of them.18 The mere fact that persons are partners does not make one partner liable under an acknowledgment by another; but if the acknowledgment is done in the course of partnership business, it is binding on the others.19 Butt admission of liability by a partner in his insolvency schedule does not bind the other partners.20 An acknowledgment by a partner after dissolution may not bind the other partners, unless the creditor had notice of such dissolution or public notice had been given of it.21 But if the ex-

14. Periambala v. Muhammad Ghouse 1945 Mad, 263: (1945) 58 L.W. 236; (1945) 1 M.L.J. 279; 1945 M.W.N. 314.

15. Chegamull v. Govindaswami, 1928

Mad. 972: 112 I.C. 491.

All. 418: 1888 A.W.N. 93: Bengal National Bank, Ltd. v. Jatindra Nath Mazumdar, 1929 Cal. 714 56 Cal. 556: 121 I. C 741: 33 C.W.N. 412.

 Gordhandas v. Bhulabhai, 1932
 Bom. 316; 138 I.C. 805; 34 Bom, L.R. 623; Gadu Bibi v. Parsottam. Doongersay, 10 Bom. 358. gersay, 10 Bom. 358.

18. Kariyappa v. Rachappa, 24 Bom. 493 (502).

19. Debi Dayal v. Baldeo, 1928 All. 491 (492): 26 A.L.J. 1036: 111 I.C.

Kishendos v. K.M. Spinning and Weaving Co. Ltd., 36 I.C. 389.
Dalsukhram v. Kalidas, 26 Bom. 42; Mahadeva v. Ram Krishna, 92 I.C. 653; 1926 M. 114; Bengal National Bank v. Jatindra Nath. 1929 Cal. 714: I.L.R. 56 C. 556; Ganda Singh v. Bhag Singh, 1926, Lah. 616: I.L.R. 7 Lah. 403: 99 I.C. 563; Rajagopala v. Krishna-sami. 8 M. L. J. 261.

^{13.} Veeranna Veerabhadraswami, 1919 Mad. 1140: I.L.R. 41 Mad. 427: 45 I.C. 18: 34 M.L.J. 373 (F.B.); Mahadeva v. Rama Krishna, 1926 M. 114: 92 I.C. 653: 50 M.L.J. 67; Abdulalli v. Ranchod Lal, 19 Bom.L.R. 86; 38 I.C. 873; A.I.R. 1916 B. 119; Bengal National Bank Ltd. v. Jatindra Nath Mazumdar. 1929 Cal. 714: 56 Cal. 556: 88 C. W.N. 412: 121 1.C. 741; Rala Singh v. Bhagwan Singh, 1925 Rang. 30: I.L.R. 2 Rang. 367: 84 I.C.

Gulsaran Das v. Brijmohan, 1939
 L. 397: 184 I.C. 734: 41 P.L.R. 90; Premji Ludha v. Dossa Doongersay, (1886) 10 Bom. 358; Dals-ukhram v. Kali Das, 26 Bom. 42; Gadu Bibi v. Parsottam, (1888) 10

partner is authorized to collect and pay debts, he can acknowledge on behalf of the firm.22 So also, if the partners have all joined in the settlement made by one of them.23 Entries in partnership books are prima facie evidence against each of the partners and therefore also for any of them against the others.24

- (1) Acknowledgment by mortgagees.-An acknowledgment of a mortgage by one mortgagee does not bind the remaining mortgagees, and cannot be used against them under Sec. 19 of the Limitation Act.25 A statement made by the mortgagee in a sub-mortgage executed by him within sixty years of the original mortgage that he was holding the land in mortgage from the owner, amounts to an acknowledgment which saves limitation for redemption in favour of the original mortgagor.1 Where in a suit the plaintiff, mortgagor of a house, claimed release of the mortgaged house and both in the trial and in the appeal the defendant admitted the execution of the suit document and its being a mortgage, the defendant's admission was decisive of the matter and he could not wriggle out of it by a new plea raised in second appeal that due attestation of the suit document had not been proved.2
- (k) Acknowledgment by mortgagors. An acknowledgment of liability by a mortgagor, after he has parted with all³ or any part⁴ of their interest to an assignee, does not bind that assignee. An acknowledgment of liability that gives a fresh start for limitation must be by the person against whom the liability is sought to be enforced. An acknowledgment in the second mortgage of the same property by the mortgagor, cannot give a fresh start for the period of limitation for redemption of the first mortgage.5 Co-mortgagors stand in the same position as co-contractors.6 An acknowledgment or payment made by one co-mortgagor would save limitation as against him, but would be of no avail as against the others.7 A payment by one of co-mortgagors cannot save limitation against the other, even if both are Mahomedan brother and sister.8

22. Muthusami v. Shankaralingum, 30 I.C. 675 (2): 1915 M.W.N. 722.

23. Kariyappa v. Rachapa, 24 Bom. 493 at p. 502.

24. Valliammai Achi v. Ramanathan

Chettiar, I.L.R. (1969) 1 Mad. 734; A.I.R. 1969 Mad. 257, 261 25. Bagga Singh v. Lal Chand, I.L.R. 1951 Pepsu 484: 1952 Pepsu 6; see also Jawala Prasad v. Achhey, 34 All. 371; Dharma v. Balmukund, 18 All. 458; Bhogilal v. Amritlal, 17 Bom. 173.

 Arjan Singh v. Gurdial Singh, 53
 P.L.R. 159: 1951 Pepsu 52: see also Padmanabha v. Lekshmi, 1953 T.C. 244; Neelakanta v. Parvathi Amma, 1954 T.C. 374.

 Danapani Goudo v. Hrushikesh Patnaik, (1969) 35 Cut. L.T. 821.
 Bank of Upper India, Ltd. v. Robert Hercules Skinner, 1942 P.C. 67: I.L.R. 1942 All. 660: I.L.R. 1942 Lah. 686: 262 I.C. 740.

4. Pavayi v. Palanivela, 1940 Mad. 470: I.L.R. 1940 Mad. 872: 188 1.C. 003 (F. B.); Naranappa v. Ramalingam 1950 Mad. 553; (1950) 2 M.L.J. 13.

Mohammad Khan v. Mohammad Salim Khan, 1951 All. 392; 1951 A.

L.J. 174.

6. Dasrath Motiram v. Gajanan Keshav, 1943 Bom. 381: I.L.R. 43
Bom. 486: 210 I.C. 532: 45 Bom.
L.R. 740; U So Maung v. J. Thom,
1939 R. 287: 184 I.C. 622; Azizur
Rehman v. Upendra Nath Samanta, 1938 Cal. 129: 176 I.C. 191; Nagayya Naidu v. Duraiswami, 1938 Mad. 111: 175 I.C. 426: 1937 M.W.N. 194: 46 L.W. 688.

7. Mohammad Taqi v. Raja Ram, 1936 All. 820: 166 I.C. 106: 1936 A.L. J. 1140 (F.B.) per contra: Ghasi Khan v. Thakur Kishori Ramanji. 1929 All. 380: 119 I.C. 347; Achola Sundri v. Doman Sundri, 1926 Cal. 150: 90 I.C. 774. 8. Eusoof Karwa v. Mrs. Nilmeyer,

1941 Rang. 37: 194 I.C. 177.

In some cases, a distinction has been made between the mortgage security, which is indivisible, and the personal covenant to pay, and it has been held that in the case of a debt secured by mortgage, the liability is indivisible; and no splitting up of the security avails to split up the liability unless the mortgagee consents to it, the payment of interest by one of the mortgagors will keep the mortgage alive so that the mortgagee would be entitled to enforce it against all or any part of the mortgaged property.9 But, where the question which arises is a matter not of the liability on the mortgage but the liability on the personal covenant, the matter which has to be determined is, whether payment by one of the joint contractors can be deemed to be the payment of the other joint contractors and that can only arise when the payment is made by the one as the agent of the other. Two joint contractors are not agents, one for the other.10 In case of joint contractors the relationship does not cease with the death of one of the contractors and the surviving contractor still remains a joint contractor with the heirs of the deceased. Since co-mortgagors are in the same position as joint contractors, payment of interest on a mortgage debt by a surviving mortgagor does not give a fresh start of limitation as against the heirs of the deceased co-mortgagor.11

Where after the death of the mortgagor, one of his heirs makes a payment within the period of limitation, it does not save limitation as against all but only as against him who makes the payment.12

7. Section 18 (2): Persons from whom interest is derived.—The subject of the second clause of this Section is usually included under the head of "privity," 13 the rule being that the admissions of one person are evidence against another in respect of privity between them.14 Statements made by persons in possession of property and qualifying or affecting their title thereto are receivable against a party claiming through them by title subsequent to the admission.15 Thus, where A sued B to recover a watch, which B claimed

9. Badridas v. Pasupati, 1933 Pat. 1: I.L.R. 12 Pat. 93: 140 I.C. 145 followed in Sripati Samanta v. Lalji Sahu, 1936 Pat. 361: 163.I.C.

Baijnath Prasad v. Satilal, 1938
 Pat. 383: 174 I.C. 156.

Azizur Rahman v. Upendra Nath Samanta, 1938 Cal. 129: 176 I. C.

Annada Charan v. Jhatu Charan, 1935 Cal. 648: 158 I.C. 512. See Steph. Dig., Art. 16: Taylor, Ev., s., 787, and generally as to admissions on the ground of privity, ib. ss. 90, 785, 787—794, Wills, Ev., 224 Ed. 178

3rd Ed., 178. 14. Taylor, Ev., s. 787; the term "privity" denotes mutual or successive relationship to the same rights of property; and privies are distributed in several classes according to the manner of this relationship, viz. (1) privies in blood, as heir and ancestor, and coparceners, vies in law as executor to testator or administrator to intestate, and

the like; (3) privies in estate or interest, donor and donee, lessor and lessee, joint present and like, ib, s. 787

like, ib. s. 787
Ev., 9th Ed. p. Estoppel, p. 597.

15. ib. S. 18 cl. (2), ante; Phipson, Ev., 11th Ed., 319; Clarke v. Brindabun, (1862) W.R. 20 (F.B.); as to admissions by parties through whom missions by parties through whom others claim; see also Forbes v. Meer, 5 B. L. R. 529, 540: (1870) 14 W. R. (P.C.) 28: 13 M. I. A. 438; Mohun v. Chuttoo, (1874) 21 W.R. 34; Khenum v. Gour, (1866) 5 W.R. 268: Nund v. Gyadhur, (1868) 10 W.R. 89; Avudn v. Ram, (1872) 18 W.R. 105; Situl v. Mono-hur, (1875) 23 W.R. 325; Krish-nasami v. Rajagopala, (1894) 18 M. 73; Anuactmovce v. Sheeb Marsh, (1882) 445: 1865 2 W.R.P. C. 19; Goreebollan v. Boyd, (1865) 2 W.R. 190; Janan v. Doolar, (1872) 18 W.R. 347; Somu v. Rangammal, (1871) 7 Mad. H.C.R. 13. to retain as administrator of C, deceased, a declaration by C that he had given the watch to A was held to be evidence again t B.16 In proceedings for probate of a will, a witness, who attended on the testatrix during her last illness, was asked to depose to a statement made to the witness by the testatrix as to a disposition of her ornament by will. The question was disallowed, but the Court of Appeal held, that the question was improperly disallowed, since a statement by the testatrix, suggesting any inference as to the execution of a will, would be an admission relevant against her representatives and would, therefore, be admissible as evidence.17 Where execution of a mortgage-deed has been proved as required by law, an acknowledgment contained therein of receipt of consideration is evidence, not only as against the mortgagor but also as against a purchaser from the mortgagor or an auction-purchaser at a sale held in execution of a decree on the mortgage, although the value of the acknowledgment as evidence may vary, and possibly it may be more weighty as against a purchaser by private contract than against an auction purchaser; but it is clearly evidence as against both.18 It has, however, been held that although recitals as regards receipt of consideration for a sale or mortgage are regarded as admissions by the vendor or mortgagor, the admission in that regard could not bind strangers, who are neither parties to the transaction nor their privies.19

An assignee from a lesssee is entitled to the benefit of an admission made by the lessor before he transferred his proprietary rights by sale.20 In a suit to recover property claimed by a plaintiff as sebayets lately in possession, and wrongfully ousted therefrom, it was held, that statements made by the ancestors of plaintiffs and defendants were receivable as evidence.21 The admi sion by the predecessor-in-interest of the plaintiffs, before the property was transferred to them, that the defendants were in continuous possession of the property even after asserting a hostile title for 14 years, would be binding on the plaintiffs and conclusively prove that the defendants had acquired title by adverse possession.22

While it is true that a statement by a party made in one litigation can be used against a person claiming under that party in another litigation,23 yet an admission by a party to a suit does not bind a person not claiming through him. Thus, where a widow admits that her husband and her husband's brother had reunited after partition, the admission is not binding upon her daughter who is not her representative-in-interest as she does not

^{16.} Smith v. Smith, (1836) 3 Bing. N. C. 29.

^{17.} Nana v. Shankur. (1901) 3 Born. L.R. 465 not, however, under S. 11 as the headnote suggests but this Morris, L.R. (1897) P. 40 (statements made by a testator are not admissible to prove the execution by him of a will) which was held inapplicable as it was based on the fact that the English Wills- Act prescribes a particular form of proof, while to the will in the case cited no such rule applied,

^{18.} Narain v. Dilawar, 1919 All. 448;

I.L.R. 41 A. 250: 52 I.C. 830; Jamuna Prasad v. Faujdar, 1929 Pat. 254: I.L.R. 8 Pat. 766: 10 P.L.T. 183.

^{19.} Venkateswarlu v. Venkata Narasimham, A.I.R. 1957 A.P. 557.

¹⁹⁵⁴ Kochuvareed v. Mariappa, T.C. 10.

^{21.} Nund Pandah v. Gyadhur, (1868)

¹⁰ W.R. 89.
22. Shamboo Nath v. Kapoor Singh,
A.I.R. 1967 J. & K. 52, 67.
23. Jaiprakash v. Lilabai, I.L.R. 1962
B. 417: A.I.R. 1963 B. 100: 64 Bom. L.R. 322.

claim her title through her mother but through her father.24 The admission of execution of a document is good evidence against the executant and his representatives, but it does not bind third-parties. The mere fact that the desendant purchases property from the executant of the sale-deed in favour of the plaintiff does not make him a representative of the executant inasmuch as, vis-avis the plaintiff's plot, the defendant is not his representative.²⁵ One reversioner should not be regarded as deriving his interest from another in whom no interest ever vested, even though that other was his own father. So, an admission made by one reversioner does not bind another, even though that other is his son.1 Consent of father and grand-father to an adoption does not bind the son or grand-son.2 An admission by a presumptive reversioner does not bind the actual reversioner.3

The declarations of an intestate are admissible against his administrator or any other claiming in his right.4 "The ground upon which admissions bind those in privity with the party making them, is that they are identified in interest; and of course, the rule extends no further than this identity." "It is to be observed that, admissions are relevant only so far as the interest of the persons who made them or those who claim through such persons are concerned. On this principle, a distinction must be made between statements made by an occupier of land in disparagement of his own title, and statements which go to abridge or encumber the estate itself. For example, an admission by a patnidar, or other holder of a subordinate tenure, affects the patni or other tenure as against him and those who derive their title from him, but it will not affect the proprietary interest as against the zamindar or other superior, so as to encumber or diminish his rights."6

8. Admissions must qualify or affect title. (a) General.—The admissions, to be admissible, must qualify or affect the predecessor's title, and not relate to independent matters.7

The cases of coparceners and joint-tenants are assimilated to those of joint-promisors, partners, and others having a joint interest, which have been already considered. Where the party by his admissions has qualified his own right, and another claims to succeed him, as heir, executor or the like, the latter succeeds only to the right as thus qualified at the time when his title and the admissions are receivable in evidence against the recommenced:

25. Bulakidas v. Chotu Paikan, 1942 Nag. 84: I.L.R. 1942 Nag. 661:

Jholi v. Khazana, 1926 Lah, 654:
 96 I.C., 749.

^{24.} Kaliammal v. Sundarammal, 1949 Mad. 84: I.L.R. 1949 Mad. 171: 61 L.W. 332; Hutchegowda v. Chennigegowda, 1953 Mys. 49: I. L.R. 1952 Mys. 49: 31 Mys. L.J.

²⁰⁰ I.C. 194.
Gulab Thakur v. Fadali, 68 I.C.
566: 1921 Nag. 153; Bhagwanta v.
Sukhi, I.L.R. 22 All. 33: 99 A.
W.N. 159; Govinda Pillai v. Thayammal, I.L.R. 28 Mad. 57: 14 M. L.J. 209.

^{3.} Kali Shankar Das v. Dhirendra Nath, 1954 S.C. 505: 1954 S.C. Nath, 1954 S.C. 505: 1954 S.C. J. 670: (1954) 2 M.L.J. 351: 1954 M.W.N. 769: 67 L.W. 776; Mohammad Abdul Karim Khan v. Bishen Sahai, 1930 All, 9: 121 I.C. 387: 1929 A. L. J. 741.

4. Smith v. Smith, (1836) 3 Bing, N. C. 29; Taylor, Ev., s. 787.

5. Taylor, Ev., s. 787.

6. Scholes v. Chadwick, (1843) 2 M

^{6.} Scholes v. Chadwick, (1843) 2 M. & Robb, 507; R. v. Bliss. (1837)
7 A. & F. 550; Papendick v. Bridgewater, (1855) 5 E. & B. 166; Howe v. Malkin, (1878) 40 L. T 196; and Taylor Ev., s. 789. 7. Phipson, Ev., 11th Ed., p. 321.

presentative, in the same manner as they would have been against the party represented.8 Thus, the declarations of the ancestor that he held the land as the tenant of a third person, are admissible to show the seisin of that person in an action brought by him against the heir for the land.9 In a suit, it was attempted to prove a kabuliat by, amongst other evidence, proof of a so-called petition by the defendant's father in which he was represented as having admitted the kabuliat, it appeared that the defendant's father represented to certain persons that this petition was his petition and requested them to verify his signature or to identify him as one of the petitioners. It was held that this request amounted a statement on the part of the defendant's father to these witnesses of all that was contained in the petition and amounted to a statement to them that he made the statements which appeared in the petition, and that even if the petition had not been filed it was just as effective against the defendants as if it had been in fact filed.10 Where tenants sued for a declaration that their holding was mokururee at a given rent, and the surbarakar of their zamindar admitted the right on behalf of the zamindar, who himself filed a petition corroborating his surbarakar's statement, it was held that these admissions would bind any subsequent zamindar, not being an auction-purchaser at a sale for arrears of Government revenue.¹¹ The same principle holds in regard to admissions made by the assignee of a personal contract or chattel previous to the assignment, where the assignee must recover through the title of the assignor and succeeds only to that title as it stood at the time of its transfer,12 But a distinction must be drawn between the case of an assignee of land or other property and that of an ordinary assignee of a negotiable instrument; for, whereas the former has, in general, no title unless his assignor had, latter may have a good title, though his assignor had none. Thus, the declaration of a former holder of a note, showing that it was given without consideration, though made while he held the note, was held to be not admissible against the indorsee, to whom the instrument had been transferred on good consideration, and before it was overdue.13 For such an indorsee derives his title from the nature of the instrument itself, and not through the previous holder. Accordingly, unless the plaintiff on a bill or note stands on the title of a former holder (as if he had taken the bill overdue or without consideration). the declarations of such former holder are not evidence against him.14 There is, however, a distinction between a transfer by assignment and a transfer by endorsement and delivery of a negotiable instrument. In the former case, the transfer is subject to all equities, whereas in the latter case it is not.15

(b) Sales in execution, and for arrears of revenue.- The purchaser of an estate sold for arrears of revenue is not privy in estate to the defaulting proprietor. He does not derive title from him, and is bound neither by his

9th Ed., p. 242. 14. Byles on Bills. loc cit. and cases there cited.

Surath Chandra Sahu v. Kripanath 15. Choudhary, 1934 Cal. 549; I. L. R. 61 Cal. 425; 150 I. C. 925; 38 C. W. N. 465,

Coole v. Braham, (1848) 3 Ex., 183, per Parke, B.; see Rani v. Khagendra, (1904) 31 C. 871.
 Doe v. Pettett, (1821) 5 B. & A.

^{10.} Mohun v. Chuttoo, (1874) 21 W. R. 34.

^{11.} Watson v. Nobin, (1868) 10 W. R. 72. Taylor, Ev., s. 790.

^{13.} Woolway v. Rowe, (1834) 1 A. &

E. 114, 116 explaining Barough v. White (1825) 4 B. & C. 325: Taylor, Ev., s. 791, Byles on Bills. (1891) 15th Ed., 433; Phipson, Ev.,

acts nor by his laches nor by his admission nor by a decree against him and proceedings between the defaulting proprietor and third parties with respect to the title to the land are not admissible in evidence in a subsequent suit brought by the auction-purchaser as against him. 19

It has, in some cases,20 been considered that a similar rule applies to ordinary execution-sales, and that a purchaser, at such a sale, is not in privity with, or the representative-in-interest of the judgment-debtor, so as to be affected by the admissions or bound by the estoppel of the latter. This view appears to have been based on a misapprehension21 of certain Privy Council decisions in which it was pointed out that there is a great distinction between a private sale in satisfaction of a decree and a sale in execution of a decree.22 In both the cases, the purchaser merely acquires the right, title and interest of the judgment-debtor,23 and therefore a suit to enforce an interest purchased at an execution sale was held to be barred as against such purchaser, since if the interest had remained in the judgment-debtor, a suit to enforce such interest would have been barred as against him.24 But, there is this distinction bet ween a private sale in satisfaction of a decree and a sale in execution of a decree, that under the former, the purchaser derives title through the vendor and cannot acquire a better title than that of the vendor. Under the latter, the purchaser, notwithstanding that he acquires merely the right, title and interest of the judgment-debtor, acquires that title by operation of law adversely to the judgment-debtor, and free from all alienations or incumbrances effected by him, subsequently to the attachment of the property sold in execu-

^{16.} Moonshee v. Pran Dhun, (1867) 8
W.R. 222 and Goluck Monee v.
Hure Chunder, 8 W.R. 62 followed in
Radha v. Rakhal. (1885) 12 C. 82,
90; Watson v. Nobin, (1868) 10 W.
R. 72: as to the rights of the auction-purchaser, see Kooldeep v. Government of India, (1871) 11 B.L.R.
71; Forbes v. Meer. (1873) 20 W.R.

Rungo v. Rajcoomaree, (1886) 6
 W. R. 197.
 ib. Radha v. Rakhal, spura, 12, 82.

^{18.} ib. Radha v. Rakhal, spura, 12, 82, 90; but as to purchasers of patni taluq sold under Reg. VIII of 1819, see ib., at p. 90; and Taraprasad v. Ram Nursingh, (1870) 6 B. L. R. App. 5: 14 W. R. 283.

^{19.} Radha v. Rakhal, supra.
20. Lala. v. Mylne, (1887) 14 C, 401, 411—414; Gour v. Hem, (1889) 16 C, 355, 360; Bashi v. Enayet, (1892) 20 C. 236, 239; for earlier decisions see Rungo v. Rajcomaree, (1886) 6 W. R. 197; Imrit v. Lalla, (1872) 18 W. R. 200

²⁰ G. 236, 239; for earlier decisions see Rungo v. Rajcomaree, (1886) 6 W. R. 197; Imrit v. Lalla, (1872) 18 W. R. 200.

21. Ishan v. Beni, (1896) 24 C. 62.

22. Dinendronath v. Ramkumar, 8 I. A. 65; (1881) 7 C. 107, 118; Srimati Anandmayi v. Dharandra, 1871 8 B.L.R. 122, 127 (P.G.).

^{23.} ib. All. that is sold and bought at an execution sale is the right, title and interests of the judgment-debtor with all its defects; Dorab v. Abdool, (1878) 5 I. A. 116, 125; 6 C. 356; followed in Sundra v. Venkatavanada, (1893) 17 M. 228; the creditor takes the property subject to all equities which would affect it in the debtor's hands; Megji v. Ramji, 8 B. H. C. O. C. 169, 174, 175; Sobhag v. Bhaichand, (1882) 6 B. 193, 202, as to the different means available to purchaser of investigating title in the respective cases of private and executionsales, see Dorab v. Abdool, supra at p. 125 of I. A. see also Kishen v. Ganga, (1890) 13 A. 28; Bashi v. Enayet, (1892) 20 C. 236, 239; Bapuji v. Satyabhamabai. (1882) 6

Raja Enayet v. Giridhari, (1869) 2
 B. L. R. (P.C.) 75, 78; 11 W.
 R. P. C. 29 and see Kishen v.
 Ganga Ram, (1890) 13 A. 28; Sobhag v. Gulab Chand, (1882) 6 B.

Dinendronath v. Ramkumar, 8 I.
 A. 65: 7 C. 107; see also Anandmayi v. Dharandra, (1871) 8 B. L.

The Privy Council decisions only show that the rights of an executionpurchaser are in some respects different from those at a private sale. They do not afford any basis for the aforementioned broad proposition deduced from them.1 It is true, that an execution-purchaser makes his purchase not from the judgment-debtor and often against his wish, and he is not bound by some of the acts of the judgment-debtor such as alienations made by the latter to defeat the decree, but that does not show that his rights are not derived from the judgment-debtor, or that he is not the representative-in-interest of the judgment-debtor, in any sense, or for any purpose. Even a purchaser at a private sale is not bound by any prior alienation made by the vendor to defraud him, but that does not show that such purchaser is not a representative-in-interest of the vendor. Because the rights of an executionpurchaser and a purchaser at a private sale are, in some respects, different, it does not follow that the execution-purchaser is not to be regarded as a representative-in-interest of the judgment-debtor even in those respects in which, and for those purposes for which, his rights are not higher than those of the judgment-debtor whose right, title and interest he has purchased.2 In a previous edition of this work, it was pointed out, in respect of admissions made by a judgment-debtor prior to attachment, that in so far as the purchaser acquires only the title of the debtor, he should acquire it as qualified by the latter's admissions, though certain decisions of the Calcutta High Court would appear to have held otherwise. The view thus taken received support from some of the earlier cases,3 and has since been confirmed by decisions of the Privy Council⁴ and the Calcutta High Court.⁵ The Judicial Committee have held that the equitable principle of estoppel laid down in the case of Ram Coomar Koondoo v. Mcqueen,6 which applies to any person, is equally binding on the purchaser of his right, title and interest at a sale in execution of a decree.7 If such a purchaser may be estopped, he may a fortiori be affected

> R. 122, 127 (P.C.); 4 M. I. A. 101 explained in Sobhag v. Bhaichand, (1882) 6 B. 193, 205; Imrit v. Lalla, (1872) 18 W. R. 200; Lalu v. Kashibai, (1886) 10 B. 400, 405; Lala v. Mylne, (1887) 14 C. 401, 413; Bashi v. Enayet, (1892) 20 C. 236, 239; in the case of Gour v. Hem, (1889) 16 C. 355, it was held that a purchaser at a public sale in execution of a decree is not, but a purchaser at a private sale is the representative of the judg-ment-debtor; followed in Janki v. Ulfat, (1894) 16 A. 284; but dissented from in Ishan v. Beni. sented from in Ishan v, Beni. (1896) 24 C. 62 (as to the meaning of the terms "representative" and "legal representative" see Badri v, Jai, (1894) 16 A. 483, Ishan v, Beni. (1896) 24 C. 62, 71; and S. 21 post., see also Vishvanath v. Subraya, (1890) 15 B. 290; referred to in Burjori v. Dhunbai, (1891) 16 B. Ishan v. Beni. (1896) 24 C. 62. The case of Tala v. Mylne, supra, based on an erroneous interpretation of the Privy Council decisions cited. supra, and is followed by Bashi v.

Enayet, supra, see 24 C. 62 at p. 77 approved in Gulzari v. Madho, (1904) I All. L. J. 65 (F. B.).
2. Gulzari v. Madho, (1904) 26 All. 447: (1904) 1 A.L. J. 65 75, 76 (F.B).
3. Unnappoorna v. Nufar, (1874) 21

909, 919; Ishan v. Beni. (1896) 24 C. 62, see also Harbhagat v. Pt. Narayan Rao, 1924 Nag. 208: 78 I. C. 338; Maharaj Bahadur Singh v. A. H. Forbes, 1926 Pat. 478: 97 I. C. 205; Lakhpatlal v. Makhan

W. R. 148. (The purchaser at a sale in execution of a decree is the "representative-in-interest" of the judgment-debtor within the meaning of the Evidence Act (I of 1872), S. 21 referred to in Kishen v. Ganga, (1890) 13 A. 28; Imrit v. Lalla (1872) 18 W.R. 200, "At the utmost, the statements would be nothing more than evidence, certainly they will not conclude him." per Couch, C. J.

4. Mahomed v. Kishori, (1895) 22 C. 909; 22 I. A. 129; 1 C. W. N. 38.

5. Ishan v. Beni, (1896) 24 C. 62.

6. I.A., Sup. Vol., 40.

7. Mahomed v. Kishori, (1895) 22 C. 900, 910; Ishan v. Beni, (1896) 24

by the admissions of the judgment-debtor whose interest he has purchased. The result of the cases would, therefore, appear to be that a purchaser at an ordinary execution-sale is in privity with, and the representative-in-interest of, the judgment-debtor within the meaning of the twenty-first section, post, so as to be affected by the latter's admissions. Prior to the last-mentioned decision of the Privy Council it had been held that, where the execution-purcha er is himself an actual party to the admission, it may, so far as it can be considered as his, be used as evidence against him,8 and that a mortgagee differed from a simple money creditor in that he derives his title directly from the mortgagor, and is bound by his previous conduct in respect of the property mortgaged,9 Therefore, a purchase by a mortgagee at a sale in execution of a decree upon his mortgage, of the right, title and interest of the mortgagor, who has been estopped from asserting a title to the property as against certain parties, does not place such mortgagee in a better position as regards the estoppel, which notwithstanding the purchase, is binding upon him.10 It has also been held by the Madras High Court,11 that it was a well-known principle that a purchaser at a court-sale represents the judgment-debtor to the extent of such right, title and interest as he had in the property purchased at the date of the sale and represents the execution-creditor, in so far as he had a right to bring such right, title and interest to sale in satisfaction of his decree, and that when the plea of estoppel is available to a decree-holder, it is likewise available to the purchaser at the execution-sale as his representative or as one claiming under him. It has, however, also been held that a court-sale cannot by itself be taken to create an estoppel, either in favour of, or against, a court-purchaser, as against or in favour of the person whose right, title and interest, the court-purchaser buys from the Court, because the court-purchaser derives his title from proceedings which are entirely invitum as regards the judgment-debtor.12 And where property purchased in execution of a money decree was subject to a mortgage, but not a mortgage executed by the judgment-debtor, although he would have been estopped from denying liability under the mortgage on account of his conduct in the mortgage transaction, it was held by the Calcutta High Court that the purchaser was bound equally with the judgment-debtor inasmuch as the right, title and interest of the latter had passed to him, and this purchase was therefore subject to the mortgage.13 Where a purchaser claimed under a title partly created by a moregagor, it was held, that he was estopped from pleading non-transferability of the holding.14 Where a mortgagee was himself the purchaser, it was held by the Allahabad High Court

Ram, 1942 Pat. 369; 201 I. C. 786; 23 P. L. T. 342; 8 B. R. 838; Piruji v. Amrati, 1944 Sind 233; I. L. R. 1944 Kar. 284; Nandi Lal v. Jogendra Chandra, 1923 Cal. 53; 70 I. C. 960; 36 C. L. J. 421.

Imrit v. Lalla. (1872) 18 W. R. 200.

Lala Parbhu v. Mylne, supra, at p. 413.

Poreshnath v. Anathnath. (1882) 9
 C. 265: 9 I.A. 147; reported in lower Court sub-nom. Aunath Nath v. Bishu, 4 C. 783; see also Kishory

v. Mahomed, (1890) 18 C. 188, 198, see also ibid. Appeal to Privy Council (1895) 22 C, 909.

Council (1895) 22 C. 909. 11. Krishnabhupati v. Vikrama, (1894) 18 M. 13.

Gajanan v. Nilo, (1904) 6 Bom. L. R. 864.

Prayag v. Sidhu, (1908) 35 C. 877;
 and as to the estoppel, see Sarat v. Gopal, (1892) 20 C. 296; Porter v. Incell, (1905) 10 C. W. N. 313;
 and Ganesh v. Purshottam, (1908) 33 B. 311.

Radha v. Ramananda, (1912) 39 C, 513.

that he was estopped from denying the mortgagor's right to execute a prior mortgage of the property.15

A man may bind himself by an admission, but he cannot bind by his admission those who do not claim under him, but who before the admission had acquired a right.16 But part payment of the mortgage-debt by the mortgagor and appearing in his handwriting, will give a fresh start of limitation to the mortgagee, even as against a person who had purchased a portion of such mortgaged property prior to such payment.17

9. The admission must be made during the continuance of the interest. Statements, whether made by parties interested, 18 or by persons from whom the parties to the suit have derived their interest, 19 are admissions only, if they are made during the continuance of the interest of the persons making the statement.20 It would be manifestly unjust that a person, who has parted with his interest in property should be empowered to divest the right of another claiming under him, by any statement which he may choose to make,21 and so admissions, made by a debtor (whose property has been sold) subsequently to such sale, are not evidence against the purchaser of the property.22 A statement relating to property, made by a person when in possession of that property, may be evidence against himself and all persons deriving the property from him after the statement; but a statement, made by a former owner that he had conveyed to a particular person, could not possibly be evidence against third persons. If it were so, A might sell and convey to B and afterwards declare that he had sold and conveyed to C, and C might use the statement as evidence in a suit brought by him to turn B out of possession.

An acknowledgment by a transferor given after the transfer of his title does not bind the transferee. Limitation can be saved under Sec. 18 of the Limitation Act, 1953, only where the acknowledgment has been made before the transferee has derived his title from the acknowledgor. Therefore, acknowledgments made by mortgagors, after they had parted with all their interest to the purchaser, do not bind the purchaser.23 A subsequent mortgagee is bound by

16. Mowatt v. Castle Steel and Iron Works Co., (1887) 14 Ch. D. 58,

598, 599.

22. Khenum v. Gour, supra.

1942 A. L. J. 648: 47 C. W. N. 43: (1942) 2 M. L. J. 559: 1943 M. W. N. 1: 55 L. W. 854: 9 B. R. 57 (P.C.); Surjiram Marwari v. Barhamdeo Prasad, (1905) 1 C. L. J. 337; Pavayi v. Palanivela Gounden, 1940 Mad. 470: I. L. R. 1940 Mad. 872: (1940) 1 M. L. J. 766: 1940 M. W. N. 448 (F.B.); Radha Kishan v. Hazarilal, 1944 Nag. 163. I. L. R. 1944 Nag. 383: 1944 N. L. J. 229: 216 I. C. 296; Ram Narain v. Nawab Singh, 1947 All. 214: I. L. R. 1946 All. 375: 1946 A. L. J. 104: 222 I. C. 632; Munshi Lal v. Hiralal, 1947 All. 74: I. L. R. 1947 All. 11: 1947 A. L. J. L. R. 1947 All. 11: 1947 A. L. J. 129 (F.B.): 229 I. C. 583; Manohar Janardhan v. Yado Isinath, 1952 Nag. 404: I. L. R. 1951 Nag. 973: 1952 N. L. J. 258: the rulings to the contrary must be deemed to have been overruled by the ed to have been overruled by the decision of the Privy Council.

Tota v. Hargobind, 1914 All. 366;
 I. L. R. 36 A. 141; 21 I.C. 721;
 12 A. L. J. 123; see Bakshi v. Liladhar, (1913) 35 A. 353; Bishambhar v. Parshadi, (1910) 10 A. L. J. 112.

^{17.} Domi v. Roshan, (1906) 11 C. W. N. 107; Krishna v. Bhairab, 9 C: W. N. 868; (1905) 32 C. 1077.

18. S. 18, cl. (1) ante.

19. S. 18, cl. (2), ante.

20. S. 18, ante; Taylor Ev., ss. 794,

Doe v. Webber, (1834) 1 A. & E.
 733; Khenum v. Gour, (1886) 5 W. R. 268: Taylor, Ev., s. 794.

^{23.} Bank of Upper India, Ltd. v. Robert Hercules Skinner, 1942 P. C. 67; I. L. R. 1942 All. 660; I. L. R. 1942 Lah, 686; 202 I. C. 740;

an acknowledgment in favour of a prior mortgagee, if the acknowledgment was made before the subsequent mortgage was executed; but a subsequent mortgagee is not bound by an acknowledgment made behind his back after he has become a mortgagee.24 An acknowledgment by a mortgagor in favour of a first mortgagee cannot operate against a second mortgagee, whose title originated before the acknowledgment has been given. The principle applies also to cases in which the mortgagor, giving the acknowledgment, retains some scintilla of interest, and is not confined to cases in which he has parted with his interest altogether.25 The fact, that the mortgagor had still the equity of redemption over some of the items covered by the security bond does not make his acknowledgement effective so far as the items in which he was no longer interested on the date of the acknowledgment are concerned.1 If the person sought to be bound by the acknowledgment or payment is a person, who has, prior to such acknowledgment or payment, acquired an interest in the property, the acknowledgment or payment will not be binding upon him, although the person making the acknowledgment or payment is at the time possessed of some interest or other in the properties mortgaged.2 "If such evidence were admissible no man's property would be safe."8

As for partners, by the very act of association, each is constituted the agent of the others and of the firm for all purposes within the scope of the partnership concern, and his acts and declarations bind his co-partners and the firm, unless he has, in fact, no authority to act for the firm in the particular matter, and the person with whom he is dealing either knows that he has no authority or does not know or believe him to be a partner.4 But an admission made by a partner before the partnership, is not evidence against his co-partner.5 After dissolution of a partnership, the subsequent acts of the individual members are binding on themselves alone, except so far as there may be acts necessary to wind up the affairs of the partnership or to complete transactions begun, but unfinished, at the time of the dissolution.6 Declarations and admissions made after the dissolution relating to the previous business of the firm are admissible against all the partners interested in the transaction.7 Bankruptcy8 or death will sever the joint-interest; therefore, in the latter case, the admissions of the survivors will not bind the estate of the deceased,9 nor conversely will those of his representatives bind the survivors. 10

So, also, the adjudication of a person as insolvent, though good evidence to charge his estate with debt, if made before his bankruptcy, is not admissible

24. Radhakishan Ramlai Palliwal v. Hazarilal, 1944 Nag. 163: I. L. R. 1944 Nag. 583: 216 I. C. 296: 1944

N. L. J. 229 (F.B.). 25. Munshi Lal v. Hira Lal, 1947 All. 74: I. L. R. 1947 All. 11: 229 I.C. 583: 1947 A. L. J. 129 (F.B.): see also Subbi Setti v. Lakshmi Narasamma, 1946 Mad. 88: (1945)

2 M. L. J. 556. 1. Thommen Chacko v. Narayanan,

1954 T. C. 311. 2. Naranappa Naicker v. Ramalingam Pillai, 1950 Mad. 553; (1950) 2 M. L. J. 13; 63 L. W. 384.

3. Per Curiam in Clarks v. Bindabun,

Taylor, Ev., S. 598.

Stark 3.
6. Taylor, Ev., S. 598.
7. Pritchard v. Draper, (1830) 1 Russ. & My., 191.
8. In re Wolmershausen, (1890) 38 W.

R. (Eng.) 537. 9. Atkins v. Tredgold, (1823) 2 B. & C. 23.

10. Slater v. Lawson, (1830) 1 B. & Ad. 396.

⁽¹⁸⁶²⁾ W. R. (F.B.) 20; Marshall 75.

Tunley v. Evans, (1845) 2 Dow & L. 747; Catt v. Howard, (1820) 3

at all, if it were made afterwards.11 This equitable doctrine applies to the cases of vendor and vendee, grantor and grantee, and generally, to all cases of rights acquired, in good faith, previous to the time of making the admission in question.12

To be admissible, the declaration must qualify or affect the title of the predecessor and not relate to independent matters. The statement must be one which directly affects the person's interest in the property itself; a mere statement against his interest in other respects, as for instance, that he is in debt, whence it might be inferred that he would be likely to part with, or charge his property, does not come within this rule.13 It may further be added that it is not sufficient that the interest be subsequent in point of time; it must (as the words of the section point out) have been derived from the person who made the statement sought to be used as an admission.14

- 10. Proof of admissions. These admissions by third perons, as they derive their legal force from the relation of the party making them to the property in question, may be proved by any witness who heard them, without calling the party by whom they were made. The question is, whether he made the admission and not merely whether the fact is as he admitted it to be. Its truth, where the admission is not conclusive-and it seldom is so-may be controverted by other testimony, and even by calling the party himself; but it is not necessary to produce him, for his declarations, when admis fble at all, will be received as original evidence, and not as hearsay.15
- 11. Miscellaneous. Mere withdrawal of a suit does not destroy the effect of admission made by a party therein,16 so long as such admission is not rebutted or the matter is confronted with it under section 145, post. On questions of fact, parties are bound by the admissions of their advocate. Admissions of counsel on a point of law are not binding on parties as an estoppel, and the court is free to give effect to its view of the law irrespective of such admissions.17 The declarations as to the status of the plaintiff as wife of the defendant, being a judicial act ought not to be founded on admissions but m evidence. Mere admission of second marriage by the accused will not atisfy the ingredients of the offence of bigamy under section 494, I.P.C., which have to be established by the prosecution.18 The admission of an agent, under certain circumstances, might be admissible against the principal, but it must be proved that the person making the admission was, at the time when he made he admission, the agent.19 A lunatic or his guardian, or the latter's advocate, cannot admit that he is a lunatic, or deny that he is a lunatic. A lunatic,

^{11.} Bateman v. Bailey, (1794) 5 T. R. 512; Luchi Ram v. Radha Charan, 1922 Cal. 267; 1. L. R. 49 Cal. 93; 66 I. C. 15; 34 C. L. J. 107. 12. Taylor, Ev., s. 794, and cases there

cited.

Beaucamp v. Parry, (1830) 1 B. & Ad. 89: Wills. Ev., 122: Coole v. Braham, 3 Ex. 183: Taylor, Ev., s.

^{14.} S. 18. CI, (2) ante.

^{15.} Taylor, Ev., s. 793.16. Chandrakanto v. Ram Mohini Debi,

A. I. R. 1956 Cal, 577; Mohammad Seraj v. Adibar Rahman Sheik. 72 C. W. N. 867: A. I. R. 1968 Cal. 550, 555.

^{17.} Veeramma v. Appayya, A. I. R. 1957 A. P. 965.

Boloram Barauti v. Suriya Barauti, 1969 Cr. L. J. 858; A. I. R. 1969 Assam 90, 91.

Briji Sunder Sharma v. Election Tribunal, Jaipur, A. I. R. 1957 Rajasthan 189; I. L. R. (1957) 7 Raj. 34.

by the very fact of his deranged mind, will be unable to know whether he is sound or unsound in mind.20 The guardian ad litem has the power to make admissions, provided they are made in good faith and for the benefit of the minor.21 Where, in a deed of gift executed by the deceased there is a recital that the possession of the property is delivered to the donee it binds the deceased and those claiming under him.22 The acknowledgment of the subsistence of the mortgage by the mortgagor is binding on his assignee who derives his title to the mortgage right from him.23 Under Sec. 47, Registration Act, an instrument, after registration, takes effect from the date of execution and not merely from that of registration; but this does not mean that the recitals in the sale-deed, though made at the time of execution were made at the time when the vendor divested himself of this title. The recitals in a sale-deed are statements which are made at a time when the interest of the party in the property still subsists, and those statements are admissible as against his successor-in-interest.24 Letters written by an accused are evidence as against him.25 Bail applications containing admissions of the accused, which are not put to him under Sec. 342, can be used against him.1 But an admission can be used, as against the party making it, only when the admission is taken as a whole. Hence, a mere recital in judgments, e.g., that the tenant admitted surrender, is not admissible as an admission and cannot be used against him, unless the entire deposition is placed on record.2 Where a party produces a document, containing an admission by his opponent, which is admitted by opponent's counsel, the admission need not be put to opponent, before it is used against him for contradiction, unless it is ambiguous or vague. A document can be used as substantive evidence under Sec. 21, without drawing in cross-examination the attention of the opponent to his admission.³ An admission is not conclusive as to the truth of the matter stated therein. It is only a piece of evidence, the weight to be attached to which must depend on the circumstances under which it is made. It can be shown to be erroneous or untrue, so long as the person to whom it was made has not acted upon it to his detriment, when it might become conclusive by way of estoppel.4 An admission though a very good piece of evidence against the maker, can be met by showing that it was due to misrepresentation, fraud, coercion,5 in ignorance of legal right or under duress (in terrorem).6-7 The effect of admission is merely to shift the onus of disproving

<sup>Balakrishnan v. Balachandran, (1956) 1 M. L. J. 459.
Moirangthem C. Singh v. C. N. M. Devi, A. I. R. 1957 Manipur</sup>

Yusuf Rowther v. Md. Yusuf Rowther, A. I. R. 1958 Mad. 527

Sankara Pillai v. Ananda Pillai,
 A. I. R. 1958 Ker. 307: I. L. R. 1957 Ker. 859.
 See Sm. Krishna Subala Bose v.

Dhanapati Dutta, A. I. R. 1957

^{25.} Sardul Singh v. State of Bombay, A. I. R. 1957 S. C. 747: 1957 Cr. L. J. 1325: (1957) 1 M. L. J. (Gr.) 739: 1958 All. W.R. (Sup.) 1, 1. Satya Vir v. State, A. I. R. 1958 All. 746: 1958 Cr. L. J. 1266. 2. Dasarathi Chamar v. Balmukunda

Das. A. I. R. 1959 Orissa 38; I. L. R. 1959 Cuttack 410.

^{3.} Ajodhya Prasad Bhargava v. Bhawani Shankar Bhargava, A. I. R. 1957 All. 1: I. L. R. (1956) 2 All. 399 (F.B.).

^{4.} Nagubai Ammal v. B. Shama Rao, A. I. R. 1956 S. C. 598; I. L. R. 1956 Mys. 152; see also Srinivasan v. Union of India, A. I. R. 1958 S. C. 419; I. L. R. 1958 Punj. 1400; Ranian v. Sewa Singh, 1972 Punj. 333.

Sanwal Singh v. Cantonment Board, Ambala, 1975 Cur. L. J. 640: 78 Punj. L. R. 127.

^{6-7.} Sri Krishna v. University of Kurushetra A. I. R. 1976 S. C. 376: (1976) 1 S.C.C. 311; Mohd. S. Labbai v. Mohd. Hanifa, A.I.R. 1976 S.C. 1569.

them on the party making them unless a plea of estoppel can be successfully invoked.8 The usual rule of law is that the admissions of ryots that they have no occupancy rights in ryoti lands will have little value in the face of the statute, if they are proved as a matter of fact to be ryoti land. The policy of the law has been to protect the weak man against himself.9

Where respondents allege that they and others were tenants of portions of land in dispute and some of the others were examined on behalf of the landlord and gave evidence that they were not tenants of the landlord, the provisions of section (184) are not applicable and the evidence is not admissible, 10

Statement by husband in the suit for maintenance by wife admitting her as his wife being admission against his own interest, is relevant in subsequent suit, and cannot be ignored simply because he resiles from it.11

The admission of making signature on blank paper is not an admission of execution of document and the onus of proving due execution is on the party who relies on it.12

19. Admissions by persons whose position must be proved as against party to suit. Statements made by persons whose position or liability it is necessary to prove as against any party to the suit, are admissions, if such statements would be relevant as against such persons in relation to such position or liability in a suit brought by or against them, and if they are made whilst the person making them occupies such position or is subject to such liability.

Illustration

A undertakes to collect rents for B.

B sues A for not collecting rent due from C to B.

A denies that rent was due from C to B.

A statement by C that he owed B rent is an admission, and is a relevant fact as against A, if A denies that C did owe rent to B.

SYNOPSIS

1. General.

3. Master and servant.

- 2. Admissions by strangers.
- 1. General. Statements, made by persons whose position or liability must be proved as against any party to the suit are admissions, if they-
 - (1) would be relevant as against such persons in relation to such position or liability in a suit brought by or against them, and
 - (2) were made whilst the person making them occupied such position or was subject to such liability.

The meaning of the section is made clear by illustration.

Jadho Nagu Bai v. Jadho Gangu Bai, A. I. R. 1958 A. P. 19, 20.
 Marian v. Mohammad Rowther, (1959) 1 M. L. J. 22.
 Jona v. Kashinath, A. I. R. 1971 Goa 2, 3.

Ellamal v. Veeraswamy, 1973 M. L. W. (Cri.) 8: 1975 Cr. L. J. 28.
 Ethirajulu Naidu v. K. R. C. Chettiar, 88 M.L.W. 265: (1975) 1 M. L. J. 5: A. I. R. 1975 Mad. 333.

- 2. Admissions by strangers. Statements by strangers to a proceeding are not generally relevant as against the parties,18 but, in some cases, the admissions of third person, strangers to the suit, are receivable.14 The admission of a third person against his own interest, when his position or liability has to be proved against a party to the suit, is relevant against the party. Thus, the admission by one co-mortgagee of the receipt of the whole mortgage debt is admissible in evidence against the other co-mortgagee.15 These exceptions to the general rule arise when the issue is substantially upon the mutual rights of such persons at a particular time, in which cases, the practice is to let in such evidence, in general, as would be legally admissible in an action between the parties themselves. Thus, the admissions of an insolvent, made before the act of insolvency, are receivable, in proof of the petitioning-creditor's debt,16 but, if made after the act of insolvency though admissible against himself,17 they cannot furnish evidence against the official assignee or receiver, because of the intervening rights of creditors and the danger of fraud.18 So, his answers on public examination are inadmissible, even in subsequent stages of the same insolvency against all parties other than himself.19 In actions against Sheriffs, for not executing process against debtors, statements of the debtor, admitting his debt to be due to the execution-creditor, are relevant as against the Sheriff.20
- Master and servant. A statement made by a servant is admissible in evidence against his master under this section, both as regards his position, that is to say, whether he is a servant, and also as regards his liability as such servant.21 The admissions of a person, whose position, in relation to property in suit, it is necessary for one party to prove against another, are in the nature of original evidence, and not hearsay, though such person is alive and has not been cited as a witness.22 In the case noted, plaintiffs who were two out of five brothers used to establish their right to a two-fifth share in properties which were sold in execution of a money decree against another brother U, and purchased by the defendant on the allegation that the properties when sold were the joint family properties of the five brothers. The defendant, whose case was that the brothers were not joint at the date of the sale, and that the properties were exclusively owned by U, put in a deposition given by another

Taylor, Ev., s. 759: see S. 19,

16. See Coole v. Braham, (1848) 3 Ex., 183.

Jarrett v. Leonard. (1814) 2 M. & S. 265; in action by the trustees of bankrupts an admission by the bankrupt of the petitioning-creditor's debt, is deemed to be relevant against the defendants; Steph Dig., Art. 18.

18. Taylor, Ev., s. 759 and cases there cited, see also ex parte Edward, Re Tollemache, (1885) 14 Q. B. D.

606; Ex parte Revell Re Tollema-

che. (1884) 13 Q.B.D. 720. 19. Re Brunner, (1887) 19 Q.B.D. 572; Janendra Bala Debi v. Official Assignee of Calcutta, 1926 Cal. 597: 93 I. C. 834.

 Steph. Dig., Art. 18; Kempland v. Macaulay, (1791) Peek R. 66; Williams v. Bridges, 2 Stark 42 as to admissions of an undersheriff or bailiff against the sheriff, see Sno-wball v. Goodricks, (1883) 4 B. & Ad. 541; Jacobs v. Humphrey, 2 C. & M. 413; Scott v. Marshall, (1832) 2 C. & J. 238; North v. Miles, 1 Camp. 389; Edwards on Execution,

p. 72. M. E. Moses v. Sheikh Baikridhone Chowdhury, 39 C. W. N. 736. 21.

Ali v. Elayachanidathil, (1882) 5 M. 239.

Steph. Dig. Art. 18; Coole v. Brah-am. (1848) 3 Ex., 183; Taylor, Ev., s. 740: Barough v. White, (1825) 4 B. & C. 325.

^{15.} Appavu Chettiar v. Nanjappa Gounden, 20 I. C. 792: 25 M. L. J.

brother K in the suit in which the money decree against U was passed, in the course of which K stated that the family was not joint and the properties belonged exclusively to U. It was held, that the deposition of K in the previous suit was not admissible against the plaintiffs.23

20. Admissions by persons expressly rejerred to by party to suit. Statements made by persons to whom a party to the suit has expressly referred for information in reference to a matter in dispute are admissions.

Illustration

The question is, whether a horse sold by A to B is sound.

A says to B-"Go and ask C; C knows all about it." C's statement is an admission.

SYNOPSIS

1. Referees. 2. Admissions not conclusive.

4. Referees in criminal cases.

3. Answer of referee

1. Referees. "The admissions of a third person are also receivable in evidence against the party who has expressly referred another to him for information in regard to an uncertain or disputed matter. In such cases, the party is bound by the declarations of the party referred to in the same manner, and to the same extent, as if they were made by himself."24 The section contemplates the existence of three parties: first, the party who refers; secondly, the party who is referred; and thirdly, the party to whom the reference is made. The principle is, that when one party refers another second party to a third party for information, the first party is presumed to undertake to adopt, as his own, the information furnished by the third party. These conditions cannot be said to be fulfilled, where a master calls for a report from a servant, regarding the conduct of another servant who is dismissed for misconduct, where there is nothing to indicate that, in doing so, the master intends to regard the servant's report as conclusive on the matter.25 A fire insurance company informed the plaintiff that it had appointed S, as surveyor, to assess the loss in its behalf and requested the plaintiff to assist the surveyor. The surveyor did not supply any information to the plaintiff, and submitted his report to his employer. It was held, that, as the plaintiff did not receive directly any information from S the case did not fall within the scope of this section,1 but where an insurer referred the assured to a surveyor for certain information, the latter's report was held to amount to an admission against the insurer.2 In an action against executors, where the defendants had written to the plaintiff that if she wished for further information, as to the assets, it

^{23.} Nagendranath v. Lawrence Jute Co.,

¹⁹²¹ Cal. 197; 61 I. C. 544; 25 C. W. N. 89.
24. Taylor, Ev., s. 760 sec S. 20. ante; Roscoc, N. P. Ev., 69; Steph. Dig., Art. 19; this comes very near to the case of arbitration; ib note xiii,

^{25.} M. D'Cruz v. Secretary of State for India in Council, 40 C. W. N.

^{1.} S. Bhattacharjee v. Sentinel Assurance Co., Ltd., A. I. R. 1955 Cal. 594.

^{2.} I. L. R. (1973) 2 Cal. 392.

could be obtained from a certain merchant, the replies of the merchant were held receivable against the executors.8

In the application of this principle, it matters not under the English law whether the question referred be one of law or of fact; whether the person to whom reference is made, have or have not any peculiar knowledge on the subject; or whether the statement of the referee is adduced in evidence in an action on contract, or an action for tort.4

The word 'information' in the section means only a statement of fact and not a decision of any kind.8

In India too it is not necessary that the reference should be on questions of fact within the knowledge of the referee,6 but it should not be on a question of law, for an admission must relate to a matter of fact and not to a point of law.7 The information, referred to in this section, need not be information specially within the knowledge of the person referred to. It may be gathered by inspection of the lands or by referring to accounts, or by other means.8 The reference must be for information in reference to a matter in dispute. A reference to an outside party to decide matters in dispute in a suit and the question of costs is not a reference to that party for information in reference to a matter in dispute.9

Where both the parties to a suit agree to abide by the statement of a third person, the statement of that person becomes the admission of both the parties and binds them. The binding character of the agreement is based on the hypothesis that the statement of the third person is an admission under this section. Such admissions primarily are unilateral. Under Sec. 31 of the Act, they are not conclusive. They become binding solely on the ground of estoppel. The true basis of the binding character of such agreements is that the original contract to abide by the statement of a third person is perfected into an adjustment of the claim in terms of the statement made, as soon as the referee makes the statement. After that stage, neither party can resile from

^{3.} Williams v. Innes, 1 Camp. 364, see also Daniel v. Pitt, 1 Camp. 366; Pea. Ad. Cas. 238; as to the applicapability of the rule in criminal cases, see R. v. Mallory, 15 Cox 458 (the accused told a constable that his wife would make out a list of certain property, a list afterwards made out by her and handed over to the constable in the husband's presence was held evidence against the latter: Coleridge, C. J., however expressly refrained from giving an opinion upon the question if the prisoner had been absent. As to reference by accused to examination of others taken in his presence, see

Russ. Cr. 487 note (E.). 4. Taylor, Ev., s. 761 and cases there-

^{5.} Sadhu Ram v. Ude Ram, I. L. R. (1967) 1 Punj. 218; A. I. R. 1967

Punj. 179, 181.

6. Mst. Akbari Begam v. Rahmat Hussain, 1933 All. 861 at 879: I. L. R. 56 All. 39: 146 I.C. 84: 1933 A. L. J. 1127 (S.B.).

7. See notes, ante Admissions, General under the heading 16: "Matters provable by admission" under Sec.

provable by admission" under Sec.

^{8.} Samudrala Seetaramacharyulu v. Samudrala Ranganayakamma, A. I.

R. 1958 A. P. 304.

9. Chabba Lal v. Kallu Lal, 1946 P.
C. 72: 73 I. A. 52; I. L. R. 1946 All., 193: 223 I.C. 567.

the agreement, because the claim has been duly adjusted, and it has become the duty of the Court not only to record it, but also to pass a decree in terms of it.10

Where the parties refer all their disputes to a person for decision and that person proceeds exactly in the manner of an Arbitrator though called a referee, the reference does not fall within the scope of this section and the reference is to all intents and purposes a reference to decide the disputes between the parties as an Arbitrator. His decision is clearly not a statement of the kind referred to in the section, the word 'information' in the section does not mean a decision of any kind.11 Information in this section means a statement on a question of fact and not a decision of a question; therefore a referee is not entitled to make enquiries or to take evidence.12

An offer to be bound by the special oath of a particular person, once accepted by the other party, cannot be withdrawn except on ground sufficient for exercising discretion to allow the special oath to be administered. But the party, making such an offer cannot withdraw it on frivolous grounds, after it has been accepted by the other party. He can withdraw such an offer only so long as it has not been accepted by the other party and acted upon.18

The parties to a suit can agree, apart from the provisions of the Oaths Act, 1969, that they will abide by the statement of a witness, including one, who is a party to the suit. Where, therefore, the defendant in a suit agrees to abide by the plaintiff's statement in the witness-box, the agreement, apart from the provisions of Oaths Act, is binding on him and he cannot be allowed to resile from it. Whether the provisions of O. XXIII, R. 3, C.P.C., can be made applicable in such a case or not, the parties are bound by their agreement 14

2. Admission not conclusive. The answer of the person referred to will not be conclusive under this Act, unless the admission operates as an estoppel.15

11. Sadhu Ram v. Ude Ram, I. L. R. (1967) 1 Punj. 218: A. I. R. 1967 Punj. 179 at pp. 181, 183.

12. Smt. Suraj Kaur v. Som Dutta, (1976) 78 Punj. L. R. 46.

13. Baldeo Singh v. Niras Singh. 1946

Pat. 272: 222 I. C. 210: 27 P. L. T. 22: 12 B. R. 223; Ram Narain Singh v. Babu Singh, I. L. R. 18 All. 46; Abaji v. Bala I. L. R. 22 Bom. 281; Shek Khan Mahmud

v. Syedali, 1931 Cal. 549: 132 I.C. 682: 35 C. W. N. 130. Bishunath Singh v. Jamna Das, 1937 Oudh 67: I. L. R. 12 Luck. 349: 164 I. C. 1116: 1936 O. W. N. 841.

N. 841.

15. See S. 31 post. See Basant Singh v. Janki Singh, (1967) 1 S. C. R. 1: 1967 S. C. D. 399: (1967) 1 S. C. W. R. 125: I. L. R. 46 Pat. 175: 1967 B. L. J. R. 27: A. I. R. 1967 S.C. 341, 343 approving D. S. Mohite v. S. I. Mohite, A. I. R. 1960 Rom. 153 (explaining) I. R. 1960 Bom. 153 (explaining Ramabai Shrinivas v. Bombay Gov-vernment, A. I. R. 1941 Bom. 144; See also Bharat Singh v. Bhagirathi, (1966) 2 S. C. J. 53: A. I. R. 1966 S. C. 405, 410.

Mst. Akbari Begam v. Rahmat Husain, 1933 All. 861: 146 I. C. 84 at 880; Ram Narain v. Santosh at 880; Ram Narain v. Santosh Kumar, 1952 Punj. 344; see also Umrai Ali Khan v. Intizami Begum, 1939 All. 176: 180 I. C. 364: 1939 A. L. J. 1: 1939 A. W. R. 7; Narain Das v. Firm Ghasi Ram Gajar Mal, 1938 All. 353: 176 I. C. 99: 1938 A. L. J. 449; Suraj Narain v. Beni Madho. 1937 All. 701: 171 I. G. 697: 1937 A. L. J. 1066; Abdul Rahman v. Kalloo Khan, 1935 Oudh 118: 153 I. C. 608: 1935 O. W. N. 15; Sadhu Ram v. Ude Ram, I. L. R. (1967) 1 Punj. 218: A. I. R. 1967 Punj. 218.

3. Answer of referee need not be express. To render the declarations of a person referred to equivalent to a party's own admission, it is not necessary that the reference should have been made by express words; but it will suffice, if the party by his conduct has tacitly evinced an intention to rely on the statements as correct. Therefore, where a party, on being questioned by means of an interpreter, gives his answer through the same medium, the language of the interpreter should be considered as that of the party; and consequently, it might be proved by any person who heard it, without calling the interpreter himself.¹⁸

On the same principle¹⁷ (though, as a general rule, the affidavits, depositions or viva voce statements of a party's witnesses are not receivable against him in subsequent proceedings),¹⁸ documents or testimony which a party has expressly caused to be made, or knowingly used as true, in a judicial proceeding, for the purpose of proving a particular fact, are evidence against him in subsequent proceedings to prove the same fact even on behalf of strangers.¹⁹

- 4. Referees in criminal cases. The rule which makes statements made by referees admissible applies also to criminal cases. Thus, where the accused told a constable that his wife would make out a list of certain property, a list afterwards made out by her was held evidence against her husband.²⁰ Here, the list was handed over to the constable in the husband's presence, and Lord Coleridge, C.J., expressly refrained from giving an opinion upon what would have been the effect of the prisoner's absence. But the accused's absence will not exclude the evidence; and where he had asked for certain inquiries to be made, facts elicited in direct answer thereto, although not further facts, or mere hearsay, are evidence against him.²¹
- 21. Proof of admissions against persons making them, and by or on their behalf. Admissions are relevant and may be proved as against the person who makes them, or his representative-in-interest; but they cannot be proved by or on behalf of the person who makes them or by his representative-in-interest, except in the following cases:
- (1) An admission may be proved by or on behalf of the person making it, when it is of such a nature that, if the person making it

Taylor Ev., s. 763; Fabrigas v. Mostyrt, (1776) 20 How. St. Tr. 122, 123.

^{17.} The following classes of cases are explained in Boileau v. Rutlin, (1848) 2 Exch. 678 as instances of admissions by conduct; see Richards v. Morgan, (1863) 4 B. & S. 641, 657, 658, in which the grounds upon which such evidence is admitted are considered.

^{18.} Gardner v. Moult, (1839) 10 A. & E. 464; Brickell v. Hulse (1837) 7 A. & E. 454; Richards v. Morgan, supra.

^{19.} Brickell v. Hulse, (1837) 7 A. & E. 454; Gardner v. Moult, (1839) 10 A. & E. 464; Boileau v. Rutlin. (1848) 2 Exch. 678 as instances of admissions by conduct see Richards v. Morgan, (1863) 4 B. & S. 641 657, 658; Pritchard v. Bagshawe. (1851) 20 L. J. C. P. 161; 11 C.B. 459; White v. Dowling, (1845) 8 Ir. L. R. 128; Taylor, Ev., ss. 763, 784.

^{20.} R. v. Mallory, (1884) 3 Q. B. D. 33: 15 Cox. C. C. 458: 50 L. T. 429.

^{21.} Phipson. Ev., 11th Ed., 337.

were dead, it would be relevant as between third persons under section 32.

- (2) An admission may be proved by or on behalf of the person making it, when it consists of a statement of the existence of any state of mind or body, relevant or in issue, made at or about the time when such state of mind or body existed. and is accompanied by conduct rendering its falsehood improbable.
- (3) An admission may be proved by or on behalf of the person making it, if it is relevant otherwise than as an admission.

Illustrations

(a) The question between A and B is, whether a certain deed is or is not forged. A affirms that it is genuine, B that it is forged.

A may prove a statement by B that the deed is genuine, and B may prove a statement by A that the deed is forged; but A cannot prove a statement by himself that the deed is genuine, nor can B prove a statement by himself that the deed is forged.

(b) A, the captain of a ship is tried for casting her away.

Evidence is given to show that the ship was taken out of her proper course.

A produces a book kept by him in the ordinary course of his business showing observations alleged to have taken by him from day to day, and indicating that the ship was not taken out of her proper course. A may prove these statements, because they would be admissible between third parties, if he were dead, under section 32, clause (2).

(c) A is accused of a crime committed by him at Calcutta.

He produces a letter written by himself and dated at Lahore on that day, and bearing the Lahore post-mark of that day.

The statement in the date of the letter is admissible because, if A were dead, it would be admissible under section 32, clause (2).

(d) A is accused of receiving stolen goods knowing them to be stolen.

He offers to prove that he refused to sell them below their value.

A may prove these statements, though they are admissions, because they are explanatory of conduct influenced by facts in issue.

(e) A is accused of fraudulently having in his possession counterfeit coin which he knew to be counterfeit.

He offers to prove that he asked a skilful person to examine the coin as he doubted whether it was counterfeit or not, and that that person did examine it and told him it was genuine.

A may prove these facts for the reasons stated in the last preceding illustration.

- s. 17 ("Admission.") s. 3 ("Relevant.") s. 3 ("Proof.")

- s. 14 (State of mind or body).
- s. 32 (Statements by person who cannot be called as a witness).

Steph. Dig., Art. 15; Best, Ev. ss. 519-520; Norton, Ev., 151.

SYNOPSIS

- 1. Principle.
- 2. Scope.
- "As against the person who makes them".
- 4. Incriminating statements,
- 5. Recitals in deeds:
 - (a) General.
 - (b) Road-cess returns,
- 6. Confessions and admissions in crimi-
- nal cases. "Representative-in-interest".
- 8. Exceptions:
 - (a) General.
 - (b) Clause (1).
 - (c) Clause (2).
- (d) Clause (3). 9. Confessions.
- 10. Miscellaneous.
- 1. Principle. The section is an affirmance of the well-known principle that a party's admissions are only evidence against himself and those claiming through him and not against strangers, and of the rule that when in the selfserving form, it is not in general receivable, which is itself a branch of the general rule that a man shall not be allowed to make evidence for himself.²² Not only would it be manifestly unsafe to allow a person to make admission. in his own favour which should affect his adversary,23 but also such evidence has, if any, but a very slight and remote probative force.24 With regard to the exceptions to this general rule, see the notes to this section and thirty-second section, post.
- 2. Scope. Sections 17 to 20 only define admissions. They do not by themselves make the admissions therein mentioned relevant. The relevancy of admissions is primarily governed by this section.25 The general rule enunciated in the section is that admissions are admissible against, but not in favour of, the person who makes them, or his representative-in-interest. If an admission is made in a document, then, despite all technicalities, it can still be em-

A's recollection of his having lent the money. To that facts of course A can satisfy, but his subsequent assertions add nothing to what he has to say. If, on the other hand, A had said, 'B does not owe me anything', this is a fact of which B might make use and which might might make use, and which might be decisive of the case, Steph. Dig., Introd. 164, 165; Norton, Ev., 151; see Best Ev., s. 519. Illust. (a) gives a double example showing how the same statement may be used against, but not for the interest of

the party making it. 25. Gulab Thakur v. Fadali, 1921 Nag.

153: 68 I. C. 566.

^{22.} Best. Ev., s. 519; Norton, Ev., 151 and notes 10, 11, 12 of Admissions General ante; Krishnawati v. Hansraj, (1974) 1 S.C.C. 289: (1975) 1 S.C.J. 87: (1974) 2 S. C. R. 524: A. I. R. 1974 S.C. 280: 1974 Rajdhani L. R. 171: 1974 Cur. I. I. 48: R. 171: 1974 Cur. L. J. 48: 1974 Rev. Cas. 167: 1974 Rev. C. J. 164: 1974 C. W. App. J. 1 (S.C.).

^{23.} Ibid. v. ante. p. 224.
24. The reason of the rule is obvious. If A says: "B owes me money", the mere fact that he says so, does not even tend to prove the debt. If the statement has any value at all, it must be derived from some fact which lies, beyond it, for instance,

ployed against his maker, for the real question in the case is what is the truth and how do the facts stand.1

To this rule there are three exceptions which are mentioned in the three classes of this section.2 Even though a document is not communicated to anyone, an admission contained in it can be used against its maker.3 An admission in a letter by accused of business dealings with co-accused is not binding against the co-accused but is binding against the writer.4

A statement by a party to a partition suit that he continued to be the son of his natural mother was inadmissible in his favour unless it came within the exceptions to this section.4

3. "As against the person who makes them." "As against the person who makes them" means "as against the person by or on whose behalf they are made."5 Thus, if admissions are made by a referee they would not ordinarily be relevant against him as "the person who makes them!" but against the referee on whose behalf, and as whose agent they are made. The expression "person who makes them" must, therefore, mean the person who makes them either personally or through others by whose admission he is bound. With the exceptions mentioned in the notes to the preceding sections, the rule is absolute that an admission can only be read against the party making it and that party's representative-in-interest.⁶ It is a well established rule of law, that estoppels bind parties and privies, not strangers7 and the same rule applies to all admissions and not to estoppels only.8 A statement of a party can be of no avail to that party. The mere fact that it is repeated by the opposite-party cannot make it his admission.9 And, therefore, evidence of an admission out of Court by an arbitrator that he made his award improperly, as, for example, by collusion or in consequence of a bribe, is not admissible against a party to the proceedings in support of an application to set aside the award.16 The principle upon which the rule rests that the admissions can only be proved as against the party has been already considered, and, in accordance with this rule, it has been held that where the accounts of a mortgagee who has been in possession are being taken, his income-tax papers are inadmissible as evidence in his favour, though they may be used against him.11

3. Veerbasavaradhya v. Devotees of Lingadagudi Mutt, A.I.R. 1973 Mys.

7. Heane v. Rogers, (1829) 9 B. & C.

577, 586.

 In re Whiteley (1891) L. R. 1 Ch
 558. 564. See also K. S. Srinivasan v. Union of India, A.I.R. 1958 S.C. 419: I.L.R. 1958 Punj. 1400.

9. Bans Narain v. Mst. Chandrani Kuer, 1944 All. 130, 134: 215 I. C. 138: 1944 A. L. J. 121. 10. In re Whiteley, (1891) L. R. 1 Gh.

558, 564. 11. Shah v. Emamun, (1868) 9 W. R.

See Neminath Appayya Hanaman-nanavar v. Jamboorao, A. I. R. 1966 Mys. 154: (1965) 1 Mys. L. J. 442; Madhao v. Yashwant, A. I.

R. 1974 Bom. 12.

2. Jagbandhu v. Bhagu, (1973) 1 Cut.
W. R. 809; I. L. R. (1973) Cut.
553; A. I. R. 1974 Orissa 120; I.
L. R. (1970) 1 Delhi 21; Sooraj
Nath v. Union of India, A. I. R. 1975 Cal. 203 (Person making admission cannot use it in evidence in his favour).

Khali Sahu v. State, (1975) 41
 Cut. L. T. 751.
 See Steph, Dig. Art. 15. An oral confession is an admission provable under this section: Feroz v. Emperor, 1918 Lah, 92: 45 I. C. 843: 19 Cr. L. J. 651.

See In re: Whiteley, (1891) L. R.
 Ch. 558, 564. In this respect a distinction must be drawn between statements under the preceding sections and under Sec. 32, post. Under the last section the statements there enumerated are admissible against all the world. Norton Ev., 143; Avadh Beharee v. Ram Raj. (1872) 18 W. R. 105.

An admission by a karta is binding on other members of the joint family. But the admission of any member, senior or junior, of the joint family is not binding on other members of the joint family.12

4. Incriminating statements. It is a general principle of law that any statement made by a man on oath may be used against him as an admission, 18 The only principle on which an exception to this rule can be founded is the principle that a man is not to incriminate himself. That is a principle which is not open to an insolvent who, once he has been adjudicated, is bound because he has been adjudicated, to give information touching his conduct, dealings, and affairs, even though he incriminates himself thereby.14 Admissions, which would expose a man to a criminal prosecution, are not admissions in his own lavour, though they may, as the result of unusual circumstances, be in his favour at some subsequent time, and are admissible in evidence.15 Admissions may constitute good evidence, but their evidentiary value depends on the circumstances in which they are made; and the possibility of incorrect statements being made by ignorant persons should not be overlooked. If it is proved by other evidence that the facts admitted cannot be true, no court should hesitate to give effect to that conclusion.16 But a correct admission made by the accused, e.g., in his bail application, is admissible against him at the trial 17 if it is not hit by law. The statement by accused in police custody to the doctor that injuries were caused by the murdered person amounts to admission of fact, and though incriminating is not a confession, so it is admissible under this section.18

When asked about his wife and children a person wrote on a paper at a time when he was not accused that they were not in this world, it is not a confession, but simply a statement of fact and is admissible under this section. His oral statement in such circumstances regarding the manner of death of his wife and children is also admissible for the same reason.19

5. Recitals in deeds. (a) General. Recitals in a deed are only evidence as against the parties to the deed, or those who claim through or under them.20

Recitals in a sale-deed by the owner of a limited estate that the property was acquired with funds belonging to the estate may be taken to be against

 Udayanath Sahu v. Ratnakar Bej,
 Cut. L. T. 1163; A. I. R. 1967
 Orissa 139, 140; Nagendranath v. Lawrence Jute Co., A. I. R. 1921 Lah. 197.

13. Jessel, M. R. in Hall, Ex parte

Coper, (1882) 19 Ch. D. 580: 51 L. J. Ch. D. 556: 46 L. T. 549. 14. Joseph Perry In re, 1920 Cal. 170: I. L. R. 46 Cal. 996: 54 I. C. 478: 21 Cr. L. J. 78; see also Yakub v. Union. 62 C. W. N. 589 (value

of admission in visa). Haji Mahamood Khan v. Emperor, 1942 Sind 106, 109; I. L. R. 1942 Kar. 94; 202 I. C. 681; 43 Cr. L. J. 888. 16. Jadho Nagu Bai v. Jadhø Gangu

Bai, A. I. R. 1958 A. P. 19.

17. Satya Vir v. State, A. I. R. 1958
All. 746; 1958 Cr. L. J. 1266.

18. Kanda Padayachi v. State of Tamil
Nadu, 1972 Cr. L. J. 11; A. I.

R. 1972 S.C. 66.

 State of Assam v. Upendra Nath Rajkhowa, 1975 Cr. L. J. 354 (Gauhati).

Shrinivasdas v. Meherbai, 1916 P. Shrinivasdas V. Menerbai, 1910 P.
C. 5; 44 I. A. 36; I. L. R. 41
Bom. 300; 39. I.C. 627; 19 Bom.
L. R. 151; 25 C. L. J. 311; 21 C.
W. N. 558; 32 M. L. J. 175; 1917
M. W. N. 258; 21 M. L. T. 236.
See also Venkateswarlu V. Venkatanarasimham, A. I. R. 1957 A. P. the pecuniary interest of the vendor, and are therefore admissible.21 An entry in a bond, that no further account is outstanding against the debtor, does not bind the creditor in any way and is merely an admission by the debtor in his own interest.22 A statement which suggests an inference as to a fact in issue, cannot be proved by or on behalf of the person who made it or his representative-in-interest.23 Neither the declaration of a transferor nor the declaration of a transferee, made in his own favour, can be admitted in evidence as against the person disputing the transfer.24 Self-serving statements cannot be relevant and admissible. Thus, a mere allegation by a person, that he had made a prior statement earlier, cannot by itself be evidence of the fact that such a statement was made by him as it was a self-serving statement and would not be relevant for that purpose.25 So also, when a creditor comes into Court with a claim which is capable of being regarded as a stale or time barred claim, it is to his interest to make allegations which would save the claim from the bar of limitation. Having this, in view, the mere fact, that the statement of receipt of interest is against the pecuniary interest of the person making the admission, cannot be regarded as of great weight.1

Entries in solicitors' books of account, regarding transactions of their clients, are neither inadmissible, nor irrelevant, nor hearsay.2 But letters written by parties are evidence only against themselves.8 A previous statement by a person, before a public officer, that a certain deity had been installed by the public and signed by him, is evidence of an admission against him in a subsequent suit by him for a declaration that the deity is a family deity.4

Admissions made by a party are binding on him. So also, the representatives of the original executant of a document are bound by admissions made therein even as much as the executant himself. Those who sign an acknowledgment of any liability are deemed to have admitted that liability. The burden of proving that that liability did not exist, at the time when the acknowledgment was signed, is on those who make the assertion.⁵

A receipt is nothing but an admission, by the party making it, that he is receiving the money specified in the document. It is an admission against his own interest and he is bound by it, and so are those who claim through or under him. But it is not an admission against those who do not claim through him.6

Padibai, 1936 Sind 217. 24. See S. Mohammad Hydar v. Moti-

1. Ammalu Amma v. Narayanan Nair, 1928 Mad. 509, 511-512; I. L. R.

51 Mad. 549; 111 I. C. 210.
2. See Hari Ram Serowgee v. Madan Gopal Bagla, 1929 P. C. 77; 114 I. C. 565.

 See Sardul Singh v. State of Bombay, A. I. R. 1957, S.C. 747: 1957
 Cr. L. J. 1325: (1957) 1 M. L. J. (Cr.) 739; 1958 All. W. R. (Sup.)

4. Ramachandra v. Rajendra Narayan,

 Ramachandra v. Rajendra Narayan, A. I. R. 1957 Orissa 104: I. L. R. 1956 Cut. 689.
 Khetu Ram v. Harphool, 1927 Lah. 800; 105 I. C. 487.
 Nazir Abbas Shujjat Ali v. Raje Ajamshah, 1949 Nag. 60, 63: I. L. R. 1947 Nag. 955: 1948 N. L. J. 908 293.

Ramayya v. Mahalakshmi, 1922
 Mad. 357; 64 I. C. 481; 1921 M.
 W. N. 434; 14 M. L. W. 35.
 Gurditta Mal v. Nabi Bakhsh, 1925
 Lah. 381; 93 I. C. 996.

Nalam Pattabhiram Rao v. Mandavilli Narayanmoorthy, 1922 P.C. 102, 103: 26 C. W. N. 278: 15 L. W. 404; Manglomal Sugnomal v. Mst.

lal, 1928 Oudh 414; 110 I. C. 26.
25. See Alluri Satyanarayana v. Ramineedi Rayalamma, 1943 Mad. 501:
(1943) 1 M. L. J. 386; 1943 M.
W. N. 445; 56 L. W. 333.

The value of an admission made by a party against his own interest is not lost merely because it was made with a view to avoid a prosecution.7

- (b) Road-cess returns.-Road-cess return, signed by one of the plaintiff's vendors and the defendant, was filed by the plaintiff's vendors. It consisted of two parts, in one of which the joint properties of the plaintiff's vendors and the defendant were set out, and in the other the properties belonging to the defendant alone were mentioned. In a suit by the plaintiff for some lands, as being the joint property of his vendors and the defendant, the latter put in the road-cess return in order to disprove plaintiff's allegation, by showing that the lands were included in the second part. The lower courts had relied on his return. It was contended in appeal that it was inadmissible under Sec. 95 of the Bengal Cess Act, being evidence in favour of the principal defendant. It was, however, held that the road-cess return was evidence against the plaintiff claiming through his vendor, and it was none the less evidence merely because by admitting it as evidence against the plaintiff it became evidence in favour of the defendant.8 And, in a later case, it was held that a road-cess return filed by a temporary lessee is admissible in favour of a superior landlordo and one filed by certain co-sharer is admissible against other co-sharer.10 The Road Cess Act does not stand in the way of admission of road-cess returns, filed by the entire body of landlords, and the statements made by all the proprietors can be used by one of them against the other.11
- 6. Confessions and admissions in criminal cases. A confession, being a species of admission, would be relevant, and can be proved as against the accused unless it can be shown that there is some provision of law which excludes the proof of such a confession.¹² A confession inadmissible under Sec. 164, Criminal Procedure Code, is not admissible under the provisions of this Act, such as Secs. 21 and 22.18 Sections 164 and 281 (old 364), Cr. P. C., must be construed together. Their effect is to prescribe the mode in which

Veerhasavaradhya v. Devotees of Lingadagudi Mutt. A. 1: R. 1973

Mys. 280.

8. Beni v. Dina, (1899) 3 C. W. N. 343. See as to the use of these returns under Secs. 21. 22, and other sections of this Act; Hem v. Kali, 30 I. A. 177: 30 C. 1033 (P.C.): where in a suit for enhancement of the rent of talukdari tenure roadcess returns, though not conclusive, were held to be admissible in evidence as a basis on which to ascertain the assets of the taluk, and so fix a fair and equitable limit of enhancement.

9. Sewdeo v. Ajodhya, 39 C. 1005: 15 I. C. 284.
10. Chalho v. Iharo, 39 C. 995: 18 I. C. 61; distinguishing Nusserim v. Gouree, 22 W. R. 192 and following Market V. Vali ing Hem v. Kali, supra.

11. Mahabir Ram Marwari v. Bhadai Mander, 1937 Pat. 561, 562: 172 I.

C. 129; Sadhu Saran v. Ambika Lal, 1923 Pat. 163; 68 I. C. 676.

Sidheshwar Nath v. Emperor, 1934
 All. 351, 352; I. L. R. 56 All. 730;
 152 I. C. 174; 36 Cr. L. J. 45; 1934

152 I. C. 174: 36 Cr. L. J. 45: 1954
A. L. J. 178.

13. Nazir Ahmad v. King-Emperor,
1936 P.C. 253 (2): 63 I.A. 372;
I. L. R. 17 Lah. 629: 163 I.C.
881: 37 Cr. L. J. 897: 1936 A. L.
J. 895: 38 B. L. R. 987: 64 C. L.
J. 445: 40 C. W. N. 1221: 71 M.
L. J. 476: 1936 M. W. N. 745;
Sardar Miya Mannu Miya v. Emperor, 1937 Nag. 257: I. L. R.
1937 Nag. 416: 170 I. C. 868: 38
Cr. L. J. 987: 20 N. L. J. 128:
Mahfuz Ali v. State, 1953 All. 110;
I. L. R. (1954) 1 All. 45: 1954 Cr.
L. J. 340: 1953 A. L. J. 193; State
v. Lobsang, 1973 Cr. L. J. 85 (Him.
Pra.) (confession not recorded under Pra.) (confession not recorded under Sec. 164 Cr. P. C. is not admissible as admission).

confessions are to be dealt with when made to a Magistrate during an investigation, and to render oral evidence of such confessions inadmissible.14 In this respect, no distinction can be drawn between a statement made by the accused and a confession made by him. If the statement made by the accused to the Magistrate is not recorded as provided in Sec. 164, Cr. P. C., the Magistrate's evidence regarding the unrecorded statement is inadmissible.15

A confession may be made at any time, even during the trial or in the court of the committing Magistrate.16 But a confession cannot be recorded by a Magistrate under Sec. 164, Cr. P. C., after the investigation has concluded and enquiry has commenced before the committing Magistrate. A confession so recorded by him cannot be taken in evidence.17

In the undernoted case, it has been held that a confession recorded by a Magistrate holding an inquest under Sec. 176, Cr. P. C., but not empowered to record confession under Sec. 164, Cr. P. C., is not inadmissible for non-compliance with that section.18 But, in a later case, another Bench of the same Court has held that the correct interpretation of the Privy Council decision in the case of Nazir Ahmed v. King-Emperor, 19 is that no confession recorded by a Magistrate of any rank is admissible unless it conforms to the provisions prescribed in Sec. 164, Cr. P. C.20 But Nazir Ahmed v. King-Emperor refers only to admissibility of confessions made after investigation had started, attracting the operation of the provisions of Sec. 164, Cr. P. C. In such a case, the confessional statement has to be recorded in due compliance with the provisions of that section. The principle is, that once an investigation has started, and the Police find that an accused would like to make a confession that accused in police custody should be forwarded only to a Magistrate duly empowered under Sec. 164, Cr. P. C., who will record the confessional statement in accordance with the elaborate provisions of that section, to assure himself that the statement which the accused was going to make is not a tutored and enforced one. It is on this principle that the learned Judges (Mack & Chandra Reddi, II.) who decided in In re Ramaswami Reddiar21 held, that, if a Magistrate holding an inquest under Sec. 176, Cr. P. C. records a confessional statement, it would fall outside the purview of Sec. 164 and would be admissible as admissions within Sections 18 to 21 of the Act. The decision in Nazir Ahmed v. King-Emperor nowhere says that a Magistrate not competent to act under Sec. 164, Cr. P. C., can never record a confession made to him and such a Magistrate cannot be on a worse footing than a private person who is competent to depose about extra-judicial confessions. Further even Sec. 26 of the

W. R. (Sup.) 49. 17. State v. Ram Autar, 1955 All. 138,

Nazir Ahmad v. King-Emperor, A.I.
 R. 1936 P. C. 253 (2); Abdul Rahim v. Emperor, 1945 Lah. 105: I. L. R. 1945 Lah. 290; 220 I. C.

^{467: 47} Cr. L. J. 4 (F.B.).

Legal Remembrancer, Bengal v.

Lalit Mohan Singh Roy, 1922 Cal.

342: I. L. R. 49 Cal. 167; R. v.

Rajani Kanto Koer. 1 Cr. L. J. 10:

8 C. W. N. 22; Amiruddin Ahmed v. Emperor. I. L. R. 45 Cal. 557: 44 I. C. 321: 27 C. L. J. 148: 22 C. W. N. 213: A. I. R. 1918 C.

^{16.} Hem Raj v. State of Ajmer, 1954

S. C. 462: 1954 S. C. J. 449: 1955 Cr. L. J. 1313; (1954) 1 M. L. J. 694: 1954 M. W. N. 468; 1954 All.

In re Ramaswami Reddiar, 1953
 Mad. 138; 1954 Cr. L. J. 315; (1952) 2 M. L. J. 814; 1952 M. W.

 ^{19. 1936} P.C. 253 (2), supra.
 20. In re Thothan, 1956 Mad. 425; (1956) 1 M. L. J. 206: 1955 M. W. N. 1042 (2).

^{21.} A. I. R. 1953 Mad. 138.

Evidence Act does not restrict the word 'Magistrate' therein as referring only to one empowered under Sec. 164, Cr. P. C. That being so, the decision in In re Ramaswama Reddiar cannot be considered to have been wrongly decided. This view was taken in In re Natesan²² relying on two other decisions of the Madras High Court.23

If a person appears before a Magistrate and gives a statement at a time when there was no case already registered against him, the statement is admissible in evidence against him.24

But a Coroner need not comply with all the formalities for recording confessions under Sec. 164, Cr. P. C., and so a confession recorded by him would not be inadmissible on the ground of violating the provisions of that section.25

A statement made under Sec. 164, Cr. P. C., which does not amount to a confession can be used against the maker as an admission within the purview of Secs. 18 to 20 of the Act.1 No particular formality under the Indian law is required to enable an admission by an accused person to go in as an admis-

The Allahabad High Court has held that the rigour and inhibition of procedure relating to the recording of confession does not apply to admissions under Sec. 164 of the Cr.P.C.2 But according to the Himachal Pradesh High Court, if the Magistrate fails to administer the necessary warning and does not comply with the mandatory procedure laid down in Sec. 164, Cr. P. C., the confession will not amount to an admission within the meaning of Section 21 of this Act. 3.4

A previous deposition is admissible against the witness on his subsequent trial, unless he has brought himself within the protection of the proviso to Sec. 132 of the Act.5 The admission of guilt in an application, dictated to a petition writer in a Magistrate's Court and afterwards presented to the Magistrate, is admissible under this section.6

22. 1960 Mad. 443: 1960 Cr. L. J.

 Arunachala Reddi v. Emperor. (1932) M. W. N. 644: A. I. R. 1932 Mad. 500; In re Nainamuthu Kannappan, 1939 M. W. N. 1132;

A. I. R. 1940 Mad. 138.

 Yendra Narasimha Murthy. In re (1965)
 Andh. W. R. 344: 1965
 M. L. J. (Cr.) 800: 1966
 Cr. L. J. 509: A. I. R. 1966
 Andh. Pra. 131, 133; Arunachala Reddi v. Emperor, 1932 M. W. N. 644; A. I. 1932 Mad, 500; In re Nainamuthu Kannappan, 1939 M. W. N. 1132 (Cr.): A. I. R. 1940 Mad. 138; In re Natesa, 1960 Cr. L. J. 443,

25. Government of Bombay v. Dashrath Ramniwas, I. L. R. 1945 B. 614: 220 I. C. 182: 1945 Bom. 265: 47 Bom. L. R. 145 (F.B.).
Ghulam Hussain v. The King. 77 I. A. 65: 1950 A. L. J. 305: 1950 A. W. R. 408; 52 Bom. L. R. 508; 54 C. W. N. 464 (P.C.); Abdul

Rahim v. Emperor, 1925 Cal. 926; 88 I. C. 1055; Golam Mohammad Khan v. Emperor, 1925 Pat. 536; I. L. R. 4 Pat. 327; 86 I. C. 814; Muhamad Bakhsh v. Emperor, 1941 Sind 129; I. L. R. 1941 Kar. 257; 195 I. C. 458.

Nathoo v. State, 1971 A.W.R. (H. C.) 757; 1971 All Cr. R. 543.

3-4. State v. Lobsang Sharap, 1973 Cr. L. J. 85 (H.P.).

 Akhoy Kumar v. Emperor, I. L. R. 45 Cal. 720; 45 I. C. 999; A. I. R. 1919 C. 1021; Emperor v. E. C. D. Wheeler, 1929 Sind 15: 112 I. C. 50; Abdul Ghani v. Emperor, 1931 Lah. 763: 133 I.C. 55; Nanhkoo Mahton v. Emperor, 1936 Pat. 358: 163 I.C. 805; Nathoo v. State, 1971 A. W. R. (H.C.) 757; 1971 All. Cr. R, 543.

 Ram Naresh v. Emperor, 1939 All. 242: I. L. R. 1939 All. 377: 181 I. C. 646: 40 Cr. L. J. 559: 1939 A. L. J. 107.

Although, as already stated, incriminating statements not admissible as confessions, may be admissible as admissions against interest under Secs. 18 to 217 it is an ordinary rule of prudence that a Court should reject an admission made by an accused under such circumstances that if the admission amounted to a confession, it would be excluded by any of the Sections 24 to 26.8 A statement, whether it amounts to a confession or not, made to a police officer in the course of an investigation under Chapter XII of the Criminal Procedure Code is not admissible.9 But incriminating statements not hit by Sec. 162, Cr. P. C. may be admissible as admissions against interest, even in criminal cases. 10 Thus where in the course of a police inquiry about a theft case against a person, a woman made a statement that she had been intimate with that person and lived with him as his wife, and subsequently, she took proceedings under Sec. 488 (new S. 125) Cr. P. C., against her husband, it was held that the proceedings under S. 488 (new S. 125) did not amount to any inquiry or trial in respect of any offence under investigation at the time when the former statement was made, and that the statement was admissible as an admission, which could be used against her under this section also, and Sec. 25 of this Act could not prohibit its admission in respect of proceedings under this section.11

Admissions in a document, whatsoever the stage at which the document is secured, can be used against the maker. 12

Statements recorded by inquiring officers of the Customs Department under Section 107 or Section 108, Customs Act, 1962, are not inadmissible evidence in a criminal case by reason of the bar under Section 25 post or under Section 162, Cr. P. C.¹³

The entire statement made by an accused before the committal court is admissible but to rely on an admission, it must be read as a whole. It is not permissible to take into consideration only those portions of the statement which are inculpatory and reject the other portion which are beneficial to the accused.¹⁴ As to the general proposition that an admission or a confession must be read as a whole and that it cannot be split and part of it used against, is too widely stated, see Section 17 ante, Note 5.

Even when a document has been admitted by the accused in his statement under Section 342 (new S. 313), Cr. P. C., the prosecution is bound to prove

Muhammad Bakhsh v. Emperor,
 1941 Sind 129, 134; I. L. R. (1941)
 Kar. 257; 195 I. C. 458.

9. See Pakala Narayanaswami v. Emperor, 1939 P. C. 47; 66 I. A. 66; I. L. R. 18 Pat. 234; 43 C. W.

10. Akal Sahu v. Emperor, 1948 Pat. 62; I. L. R. 26 Pat. 49; 230 I. G. 167; In re B. Titus 1941 Mad. 720; 197 I. C. 81; 54 L. W. 81; Muhammad Baksh v. Emperor, 1941 Sind 129; I. L. R. 1941 Kar. 257; 195 I. C. 458; Pakala Narayanaswami v. Emperor, 1939 P.C. 47 supra, see also Nga Ba Kyaing v. Emperor, 1936 Rang. 131; 162 I. C. 6; Allahwarayo Darya Khan v. Emperor, 1940 Sind 53; I. L. R. 1939

Kar. 800: 187 I. C. 576.

11. Pattammal v. Munuswami, A. I. R. 1966 M. 392: (1966) 1 M. L. J. 540: 1966 Cr. L. J. 1275/: see also Queen-Empress v. Tribhovan Manekchand. I. L. R. (1884) 9 Bom. 13 (1).

 Neminath Appayya v. Jamboorao, (1965) 1 Mys.L.J. 442: A.I.R. 1966

Mys. 154, 159.

Collector of Customs Madras v. Kotumal, 1967 Cr. L. J. 1007; A. I. R. 1967 Mad. 263 (F. B.) following Badaku Joti Savant v. State of Mysore, (1966) 2 S. C. W. R. 154; (1966) 2 S. C. A. 77; A. I. R. 1966 S. C. 1746.

In re Pagoti Sanyasi Rao. (1968) 2
 Andh. W. R. 86; 1968 M.L.J. (Cr.)
 453; 1968 Cr. L. J. 1345, 1351

it if it is not to fail.15 The principle is that a gap in the prosecution evidence cannot be filled up by the statement of the accused under Sec. 342 (new S. 313), Cr. P. C.16

An admission by the accused that he was driving the truck at the time of the accident, can be used to support the prosecution witnesses to prove the accused to be the owner of the truck.17 The statement of accused that the deceased had gone to his house and since then was not seen alive is an admission and as such admissible.18

For proving the contents of a document it is essential that a person having knowledge of those contents must appear before the court to give evidence in that regard.19

7. "Representative-in-interest." No definition has been given of this somewhat vague expression.20 Whatever scope may be given to these words, it is apprehended that they will, generally speaking, include most of the privies in blood, law or estate, of which mention has been already made in the notes to Secs.17-20, ante. A purchaser at an ordinary execution sale is in privity with, and the representative-in-interest of, the judgment-debtor, within the meaning of this section, so as to be bound by his admissions.²¹ Where the execution of a mortgage-deed is admitted and the deed contains a definite admission by the executants regarding the passing of consideration, the admission is evidence against the mortgagors and their representatives-in-interest under this section.22

In a joint Hindu coparcenary, a son does not derive interest in the coparcenary property through his father, and the sons cannot be said to be the representatives-in-interest of their father.23 A statement made in a previous suit, against the interest of the maker, is admissible in evidence in a subsequent suit against his successor-in-interest as an admission under this section, without calling the maker as witness even though he is alive.24

 Hardev Malkani v. State. 1968 A.
 L. J. 466: 1967 A. W. R. (H.C.) 789: A. I. R. 1969 All, 423, relying on Mohideen Abdul Kadir v. Emperor, (1904) 27 Mad. 238 which followed Basant Kumar Ghatak v. Queen Empress, (1903) 26 Cal. 49.

16. Mohideen Abdul Kadir v. Empe-

ror, supra.

17. Maina v. Niranjan, 1976 A. C. J.

1: 1975 W. L. N. 442; 1975 Raj.

L. W. 399: A. I. R. 1976 Raj. 71.

18. Moba Singh v. State, 1975 W. L.

18. Moba Singh V. State. 1975 W. L.
N. 373 (Raj.).

19. Maharao Shri Mahan Sinhji V.
State of Gujarat, 10. Guj. L. R.
870; A. I. R. 1969 Guj. 270.

20. See remarks in Ishan V. Beni, 24
C. 62, 72; 1 C. W. N. 36 (F.B.);
Unnoporna V. Nafur. (1874) 21 W. R. 148, as to the meaning of the terms "representative" and "legal representative," See Badri v. Jai. 16 A. 483, 487: Stroud's Judicial Dictionary, 674 (1890); Chathakelan v. Govind, 17 M. 186: 4 M. L. J. 59 and ante notes to Secs. 17-20 "Sale in Execution."

 Ramcoomar Koondoo v. Mcqueen, 18 W. R. 166; 11 B. L. R. 46 (P. C.); Mahomed Mozuffer Hossein v. Kishori Mohun Roy, 22 I. A. 129: I. L. R. 22 Cal. 909: 5 M. L. J. 101 (P. C.); Harbhagat v. Pandit Narayan Rao. 1924 Nag. 208: 78 I. C. 338.

22. Padam Kumar v. Nanhu Singh, 1916 Pat. 27: 39 I. C. 635; Gadian Chetti v. Veerappa Chetti, 1915 Mad. 1156: 26 I. C. 899.

23. Jagmohan Lakhmichand v. Ran-choddas, 1946 Nag. 84, 87: I. L. R. 1945 Nag. 892: 1945 N. L. J. 630; but see Pratap Kishore v. Gyanendranath, 1951 Orissa 313.

Prosanna Mukherjee v. Hari Kison, 1937 Cal. 515: 173 I. C. 427: 41 C. W. N. 1089.

Though admissions may be proved against the party making them, it is always open to the maker to show that the statements were mistaken or untrue, except in the single case in which they operate as estoppels.25

- 8. Exceptions. (a) General. The section proceeds to specify those cases in which an exception is permitted to the general rule, and admissions in a person's own interest are admissible in evidence.
- (b) Clause (1). The first clause is considered under the thirty-second section, post, which must be read in conjunction with it. Illustrations (b) and (c) refer to this clause. Under Sec. 32 a statement relating to the existence of any relationship by blood, marriage or adoption between the persons as to whose relationship the person making the statement had special means of knowledge and when the statement was made before the question in dispute was raised, is relevant. Therefore since a wife has special means of knowledge about her marriage, a statement by her that she is the wife of her husband is admissible in evidence and can be proved if the statement was made before the controversy arose.1,2
- (c) Clause (2). The second clause has received no illustration in the Act, probably because it has already been sufficiently treated of in the fourteenth section (ante) under the head of 'facts', showing the existence of any state of bodily feeling, and in illustrations (k), (l) and (m) thereto, which, together with the notes therein, should be here consulted. The fourteenth section merely declared that such facts are relevant. The present clause shows that such facts or statements may be proved on behalf of the person making them, notwithstanding the general rule that persons cannot make evidence for themselves by what they choose to say.3

Where a husband, accused of murder of his wife, stated to police that the wife provoked him, the statement could be used by him to show an extenuating circumstance to mitigate the offence.4

Where the religion of a deceased person is a fact in issue, any solemn declaration made by him as to his religion, made in a formal document, is relevant as an admission, and is entitled to weight in deciding the question.5

(d) Clause (3).—The third clause provides that a fact which is relevant under the sixth section, ante, or some of the sections following it, shall not be rejected simply because it assumes the form of an admission.6 Admission made by defendant in his deposition in prior proceedings about the continuance of plaintiff's right of Shebaitship, can be used in a subsequent civil suit under this section, when, in the same deposition, he had admitted that there were litigations going on between his father and the grandfather of the plaintiff.7

^{25.} See Ss. 31, 115, post.

^{1-2.} Mst. Bashiran · v. Mohammad Husain, 1941 Oudh 284: I. L. R. 16, Luck, 615; 193 I. C. 161.

^{3.} Norton, Ev., 152

^{4.} In re Thandavan, 1978 Cr. L. J. 1041 (Mad.).

^{5.} Leong Hohe Waing v. Leon Ah

Foon, 1930 Rang. 42: I. L. R. 7 Rang. 720: 121 I. C. 796. 6. Ib.; see Fellowes v. Williamson, (1829) M. & M. 306: v. ante, Ss. 8 and 14 and notes thereto.

^{7.} Jankiraman v. Koshalyanandan, A., I. R. 1961 Pat. 293, 297: 1960 B. L. J. R. 717.

This clause, being an exception to the general rule, should be strictly construed. It is intended to apply to cases in which the statement is sought to be used in evidence otherwise than as an admission, for instance as part of the res gestae, as a statement accompanying, or explaining, a particular conduct, but it cannot be held that a statement which is inadmissible in evidence under the general rule can be made admissible as such by reference to this clause.8

Admissions in one's own favour have been admitted as being relevant under Secs. 21 and 11 also.9

Documents in which there was clear assertion of the rights of the plaintiffs regarding cultivation and possession of the disputed lands are admissible under Section 13 (b) read with Section 21 (3) of the Act. They are relevant to the determination of the question of permanent tenancy.10

Illustrations (d) and (e) refer to this clause. "Care must likewise be taken not to confound self-serving evidence with res gestae. The language of a party accompanying an act, which is evidence in itself, may form part of the res gestae and be receivable as such."11

It was held in the undermentioned case¹² in which the second and the fourth defendants sold a jote to the first defendant, and subsequently colluded with the plaintiff and denied a partition which had taken place as well as the sale, that the statements previously made by them which went to show that there had been a partition, and they had changed their attitude were admissible under the third clause of this section and the second clause of the eleventh section of this Act. Where in a prior sale-deed, executed in favour of the plaintiff and M, the widow of G, the plaintiff was described as the adopted son of G, but in a subsequent will executed by M it was stated by M that she had no son, the admission in the first document will not avail, if in fact the adoption had not been satisfactorily established.13 In a suit against an insolvent and the Official Assignee for sale of mortgaged property, the onus is on the plaintiff to prove that title-deeds in his possession after the insolvency were deposited with him as security before the adjudication. Evidence of admissions by him, at an earlier date than the adjudication, to the effect that the deeds were then in his possession; is inadmissible in his favour under this section, not being within any of the exceptions to inadmissibility named in this sections. An erroneous omission to object to such evidence does not make it admissible.14 Any statement, as to rent payable for a holding, made by a person in a sale-certificate, which was obtained by him as purchaser of the holding, at a sale in execution of a decree against the former tenant, being in the nature of an admission, cannot be used as evidence on his behalf as such a

A. G. Paschaud v. E. B. Paschaud Nixon, 1930 Oudh 441; 128 I. C. 721: 7 O. W. N. 683.

Sayeruddin v. Samiruddin, 1923 Cal. 378: 72 I. C. 985—relevant under section 11 (2); Ram Bharose v. Rameshwer Prasad, 1938 Oudh 26; I. L. R. 13 Lucknow 697: 171 I. C. 481—relevant under S. 11 (1); Raghunath v. Bindeshwari Nandan, 1924 All. 526; 82 I. C. 582 relevant under Ss. 11(2), 13(b).

Atmakuri Rajeshwari Rao v. Jogin-10. adha Patro, 34 Cut, L. T. 1131,

^{11.}

^{1142.}Best, Ev., s. 520.
Gyannessa v. Mobarakunnessa, 25
Cal. 210: (1897) 2 C. W. N. 91.
Mst. Bajji v. Bhairon, A. I. R.
1957 Raj. 261: 1957 Raj. L. W.

^{14.} Miller v. Madho, (1896) 19 A. 76: 23 I. A. 106 (P.C.).

statement does not come within the exceptions to this section.15 An admission by ryots that they have no occupancy rights in the ryoti lands, will have little value, if, as a matter of fact, they are ryoti lands, because the policy of the law is to protect the weak against the strong.16 An admission must be taken as a whole,17 Answers in re-examination can be tacked on to the answers in cross-examination. A deposition cannot be split up.18

9. Confessions. This section is subject to the special provisions relating to confessions enacted in the twenty-fourth, twenty-fifth and twenty-sixth sections.19

A party producing documents can be permitted under this section to use them as substantive evidence in the case without drawing the attention of the opponent to the admission in cross-examination. The rule of fairness in Sec. 145 that if a witness is under cross-examination on oath, he should be given an opportunity, if documents are to be used against him, to tender his explanation and to clear up the particular point of ambiguity or dispute, should also be applied to parties who enter the witness-box. But, the omission to follow the procedure in the case of a party who is examined as a witness, does not make his admission which is otherwise relevant under this section inadmissible.20 See also Note 15 (b) under the heading 'Effect of Section 145' where this matter is fully discussed.

10. Miscellaneous. The section enacts that admissions are relevant and may be proved as against the persons who make them, or their representativesin-interest. But they cannot be proved by or on behalf of the persons who make them, or by or on behalf of their representatives-in-interest, except in certain cases mentioned in it. Section 31 of this Act lays down that admissions are not conclusive proof of the matters admitted but they may operate as estoppels. The law appears to be that admissions are admissible in evidence as against the persons who make them, and though, under certain circumstances, they operate as estoppels against them, they are not conclusive proof of the matters admitted, and they can be explained away by the makers thereof, or the persons against whom they are sought to be proved, as, for example, by proving that they were made without their knowledge, or in ignorance of facts admitted, or under such other circumstances. But they are admissible in evidence against the maker thereof.21 The admission must however be clear and unambiguous.22

^{15.} Ramani v. Adaiya. (1903) 31 C.

Marian v. A. S. M. Rowther, (1959) 1 M. L. J. 22; 72 L. W.

Dasarathi v. Balmukunda, I. L. R. 1959 Cut. 410; A. I. R. 1959

Orissa 38.
C. R. Narasimhan v. M. G.
Natesa Chettiar, I. L. R. 1959
Mad 669: A. I. R. 1959 M. 514.
R. v. Bhairab, (1898) 2 C. W. N.
702, diss, from in Madan v. R. 24 881; a statement of accused as witness in a previous case has been

held admissible under this section; R. v. Banarsi. 1924 All. 381; I. L. R. 46 All. 254; 77 I. C. 829.

^{20.} Seethamma v. Hanumanthuvajjulu, (1959) 2 Andh. W. R. 7; Arjun Mahton v. Monda Mahtain, A. I. R. 1971 Pat. 215; Veerhasavaradhya v. Devotees of Lingadagudi Mutt, 1973 Mys. 280.

^{21.} Satyadeo Prasad v. Chunderjoti, A. I. R. 1966 Pat. 110: 1965 B. L. J. R. 800.

^{22.} Ram Prasad v. Kalyani, 1972 Raj. L. W. 522: 1972 W. L. N. 784: A. I. R. 1973 Raj. 208.

What party himself admits to be true may reasonably be presumed to be so and until the presumption is rebutted, the fact admitted must be taken to be established.23

Although a statement made by an accused to the Magistrate, during the course of investigation into the very crime of which he is accused, cannot be admitted in evidence unless the provisions of Section 164, Cr. P. C., are sufficiently complied with, yet such a statement is admissible in evidence under this section, unless it falls within the mischief of the succeeding sections, such as Sections 24, 25 and 26.24 Where the person who lodges the first information report regarding the occurrence of the crime is himself subsequently accused of the offence and tried, and the report lodged by him is not confessional but is an admission by him of certain facts which have a bearing on the question to be determined by the Court, as, for instance, how and by whom the offence has been committed, or whether the statement of the accused in the Court denying the correctness of certain statements is correct or not, the first information report is admissible to prove against him his admissions and they are relevant under this section.25 In other words, where the report is an admission by the accused of certain facts which have a bearing on the question to be determined by the Court, the admission contained in the report is admissible in evidence under this section and is provable against the accused.1 But if the entire report is in the nature of confession no part of it would be admissible.2

Even though an admission of guilt by a Government servant was treated as supporting the evidence against him which appealed to the disciplinary authority, that did not vitiate the inquiry proceedings.3 Admission before the enquiry officer is admissible.4

Mere withdrawal of a suit does not destroy the effect of an admission made in the plaint so long as such admission is not rebutted and the maker is not confronted with it under Section 145 post.5

An admission or a party in his pleading can be used against him in subsequent proceedings unless he can show that it was made under some misapprehension.

^{23.} Revappa v. Madhava Rao. A. I.

R. 1960 Mys. 97. In re Natesan, A. I. R. 1960 Mad. 443.

Faddi v. State of Madhya Pradesh,
 A. I. R. 1964 S.C. 1850: 1964 Jab.
 L. J. 252: 1964 M. P. L. J. 519: 1964 Mah. L. J. 519: (1964) 2 Cr. L. J. 1744.

^{1.} Sankaran v. State of Kerala, I. L. R. (1965) 2 Ker. 33: A. I. R. 1965 Ker. 248; Faddi v. State of M. P., supra and Dal Singh v. King-Emperor, A. I. R. 1917 P. C. 25 relied on; I. L. R. (1970) 2 Delhi 854.

^{2.} Jalam Singh v. The State of Rajasthan, 1975 W. L. N. 623; Badri v. State of U. P., 1973 All. Cr. C. 201: 1973 Cr. L. J. 1478 (All).

3. Ram Subhak Ojha v. The Com-

missioner of Police, 12 Fac. L. R. 50: (1966) 2 Lab. L. J. 22; A. I. R. 1967 Cal. 381, 382 distinguishing Jagadish Prasad Saxena v. State of Madhya Bharat, 1961 Jab. L. J. 414; A. I. R. 1961 S. C. 1070 where no formal inquiry was held before passing an order of dismissal dismissal.

^{4.} Md. Yusuf v. State of Rajasthan,

Md. Yusur V. State of Rajastan, 1976 Raj. Cr. C. 299.
 Mahammal Serai V. Adibar Rahman Sheikh, 72 C. W. N. 867: A. I. R. 1968 Cal. 550, 553; see

also Chandrakanto v. Ram Mohni Debi, A. I. R. 1956 Cal. 577. 6. Sharat Chandra Misra v. State of U. P. 1971 Serv. L. R. 624; 1971 All. L. J. 1027; 1971 Lab. I.C. 1429.

If the first information to a police officer does not amount to a confession, any admission made therein can be proved against the maker under this section.7

Where the admission that the plaintiff was adopted was in a document by the adopter and the document is alleged to be fraudulent, and the question of adoption arose in a suit filed by the plaintiff after the adopter's death and long after the alleged adoption making any explanation by the adopter impossible, even if it be held, the admission would shift the burden on the defendants, the question of burden becomes immaterial in the appellate court when the whole evidence was before the trial court.8

Where the predecessor of the defendant and another defendant admitted in a prior suit the registration of a society under the Societies Registration Act 21 of 1860, the admission would be binding on the defendant in the instant case and would be evidence of due registration of the society under the Act aforesaid.9

A statement regarding confessional facts in the judgment must be accepted as true unless it is properly challenged and it cannot be challenged by a mere incorporation of a ground in the memorandum of appeal.10

An admission in a written statement in a previous suit by an agent without the instigation or persuasion of the principal or for the principal's benefit is not binding on the principal in a subsequent suit.11

An admission is not conclusive unless it amounts to an estoppel. It may be proved to be wrong; but unless so proved, it is a very strong piece of evidence against the maker thereof and is decisive of the matter, though not conclusive.12 The effect of admission is to be judged in the light of the circumstances in which it is made. 12

If a record of statements made by an accused before a Magistrate contains admissions, they can be used as evidence against the maker only under this section. Such an admission must be used as a whole or not at all.14

 Natesan In re, (1968) 1 M. L. J. 304 following Faddi v. State of Madhya Pradesh, (1964) 5 S. G. R. 312; (1965) 1 S. G. J. 203: 1965 M. L. J. (Cr.) 93: A. I. R. 1964 S.C. 1850,

Govinda v. Chimabai, 13 Law Rep. 681; A. I. R. 1968 Mys. 309 following Kishani Lal v. Mt. Chaltibai, A. I. R. 1959 S.C. 504.
 Shanti Sarup Radhaswami Satsang Radhaswami Satsang

Sabha, Dayalbagh. A. I. R. 1969 All. 248, 258, admission in Incometax assessment proceedings.

Nrusinghanath Deb v. Banamali Panda, A. I. R. 1970 Drissa 218,

Luxmi Narayan v. State Bank of India. I. L. R. 48 Pat. 204: A. I. R. 1969 Pat. 385, 390.
 Ghasiram Majhi v. Omkar Singh, 34 Cut. L. T. 328 at p. 336;

Prem Ex-Serviceman Coop. Tenant Farming Society Ltd. v. State of Haryana, (1974) 2 S. C. C. 319: 1974 C. W. App. J. 185 (S.C.): 1974 Punj. L. J. 272: 1974 U. J. (S.C.) 366: A. I. R. 1974 S.C.

13. Pullangoda Rubber Produce Co., Ltd. v. State of Kerala, (1971) 2 S. C. W. R. 630; 1972 U. J. (S.C.) 445; 91 I. T. R. 18: (1973) 2 I.T. J. 446; (1973) 2 S. C. J. 538: 1972 Tax, L. R. 1186 (S.C.); Veerbasavaradhya v. Devotees of Lingadagudi Mutt, A. I. R. 1973 Mys. 280.

14. Laxmavva v. Hanamappa, (1967) 1 Mys. L. J. 553, at pp. 554, 555. The proposition that an admission must be used as a whole or not at all is widely stated, see section 17 ante, Note 5.

A signed statement by the husband to the police, containing clinching admissions regarding his conjugal vicissitudes on an interrogation in a curious petition by the neglected first wife, is not one recorded from an accused person nor in connection with any criminal investigation. In such a case neither Section 162, Cr. P. C., nor Section 25 of the Evidence Act, operates as a bar to the admissibility of the statement containing admissions. 15

An admission of a second marriage in an objection filed by the husband in an application by the first wife for maintenance under Section 488, old Cr. P. C. (Sections 125 and 126 of Cr. P. C., 1973) is not evidence of the fact that the second marriage has taken place for the purpose of proving an offence of bigamy or adultery.16

22. When oral admissions as to contents of documents are relevant. Oral admissions as to the contents of a document are not relevant, unless and until the party proposing to prove them shows that he is entitled to give secondary evidence of the contents of such document under the rules hereinafter contained, or unless the genuineness of a document produced is in question.

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s. 17 ("Admission,")
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s. 58 (Facts admitted.) s. 63 ("Secondary Evidence.")

ss. 65,66 (Rules as to giving of secondary evidence).

\$.65 (b) (Written admissions as to contens of documents).

SYNOPSIS

1. Principle.

2. Contents of documents,

1. Principle. The general rule is that the contents of a written instrument, which is capable of being produced, must be proved by the instrument itself and not by parole evidence.17 An exception to this rule prohibiting the substitution of oral testimony for the document itself exists according to English law, in favour of the parole admissions of a party. The admissions being primary evidence against a party, and those claiming under him are receivable to prove the contents of documents without notice to produce, or accounting for the absence of, the original.18 The principle upon which such evidence is receivable has been stated to be that what a party himself admits to be true may reasonably be presumed to be so and that therefore such evidence is not open to the same objection which belongs to parole evidence from other sources, when the written evidence might have been produced,19 But the correctness of

19. Slatterie v. Pooley, (1840) 6 M. & W. 664, per Parke, B.

s. 3 ("Document.")

s. 3 ("Relevant."

N. Krishna v. Lakshmi Ammal, 1971 Ker. L. T. 182, 183.
 Priya Bala Ghosh v. Suresh Chandra Ghosh, (1971) 2 S. C. D. 439; Kanwal Ram v. Himachal Pradesh Administration, 1966 Mad. W. N. 19: 1966 Cr. L. J. 472: 1966 All. W. R. (H. C.) 99: 1966 M. L. J. (Cr.) 157: 1966 S.C.D. 174: (1966) 1 S.C.J. 210: (1966) 1 S.C.W.R. 64: A.I.R. 1966 S.C. 614, for effect

of admission of marriage, Taylor Ev., s. 396; Ss. 59. 64, 91, 17.

post.
Taylor, Ev., s. 410: and cases there cited; Roscoe, N. P. Ev., 63: Best Ev., ss. 525. 526; and 'see Muttukaruppa v. Rama, (1866) 3 Mad. H. C.R. 158, 160.

this reasoning and of the decisions founded upon it has been questioned and the dangerous consequences which are liable to follow on the reception of such evidence have been pointed out.20 The views there expressed have been adopted in the present section which alters the law laid down in Slatterie v. Pooley.21 For though what a party himself admits may fairly be presumed to be true, there is no such presumption in favour of the truthfulness of the evidence by which such admission must be proved.22

Where the terms of transaction are reduced to writing, in the absence of that direct evidence of the transaction, which might reasonably be accepted, in accordance with principle, it would be exceedingly dangerous, especially in this country, to rely upon verbal statements of oral admissions.23

2. Contents of documents. When the existence, condition, or contents of an original document have been proved to be admitted in writing by the person against whom it is proved, or by his representative-in-interest, such written admission is admissible,24 but oral admissions, except in the cases above mentioned, are excluded by the present section. The circumstances under which a party is entitled to give secondary evidence of a document are laid down in Secs. 65 and 66, post. Thus, it is not permissible to prove the fact that a particular private forest is a private protected forest within the meaning of Bihar Private Protected Forests Act,25 by any other evidence, excepting the Gazette containing the notification under Sec. 3 of that Act, or by its certified copy. Where, however, an admission of the document is to be relied upon in order to be exempted from the liability of proving the contents of the document, that admission has to be in writing by the person against whom it is proposed to be proved or by his representative-in-interest and then in that case that written admission is admissible as the secondary evidence of the document.1 Where the question is, not what are the contents of a document, but whether the document itself is genuine, that is, in the handwriting of the party whose writing or signature it is alleged to be, evidence may, of course, be given to prove or dispose the forgery. This may be effected in a variety of ways; by the party, Secs. 21 and 70; by an autesting witness, Sec. 68; by the oath of witness acquainted with the handwriting Sec. 47; by experts, Sec. 45; or by comparison of hondwriting Sec. 73 unless the genuineness of a document and its production is in question. The effect of the last clause of this section seems to be that if such a document is produced, the admissions of the parties to it

^{20.} See observations of Pennefather, C. J. in Lawess v. Queale, (1845) 8 Ir. Law. R., 385, cited ib., s. 412, Law. R., 385, cited ib., s. 412, Cunningham. Ev., 136. (1840), 6 M. & W. 664; Norton, Ev.,

^{152.}

[&]quot;According to Slatterie v. Pooley, what A states as to what B, a party has said respecting the contents of a document which B has seen is admissible; whilst what A states respecting a document which he himself has seen, is not admissible, although in the latter case, the chance of error is single in the former, double" per Reporter in 9 Com. B. 501 n. c. Darby v. Ous-lev (1850) 1 H. & N. 1; as to oral

testimony by the party to the same effect see Farrow v. Blomfield, (1859) 1 F & F. 653; Henman v. Lester, (1862) 12 C.B.N.S. 781; as to the application of the rule in to the application of the rule in criminal cases, see Roscoe, Cr. Ev., 13th Ed., 7; and as to the case first cited, see Chandra v. Chaudhri, (1906) 29 A. 184 (P.C.): 34 I.A. 27 Hean v. Rogers, (1829) 9 B. & C.

^{23.} Raghubar Dayal v. Bhikya Lal, I.

L. R. 12 Cal. 69 at 78.

24. S. 65, cl. (b), post.

25. Bihar Act 9 of 1947.

1. Jaigopal Singh v. Divisional Forest Officer, 1953 Pat. 310: 1953 Cr. L. J. 1660.

that it is or is not genuine, even though such admissions involve a statement of the contents of a document, may be received.2 This section does not, it is apprehended, exclude admissions which the parties agree to make in the trial, in which case it becomes unnecessary to prove the fact so admitted.3

Notwithstanding the admission of the contents of a contract, a question about the validity of the contract arising on its face can be raised.4

23. Admissions in civil cases when relevant. In civil cases no admission is relevant if it is made either upon an express condition that evidence of it is not to be given or under circumstances from which the Court can infer that the parties agreed together that evidence of it should not be given.

Explanation. Nothing in this section shall be taken to exempt any barrister, pleader, attorney or vakil from giving evidence of any matter of which he may be compelled to give evidence under Section 126.

s. 17 ("Admission") s. 3 ("Relevant")

s. 3 ("Evidence") s. 126 (Professional Communications.)

Steph. Dig. Art. 20; Taylor, Ev., ss. 775, 795, 798, 799; Roscoe, N. P. Ev. 62, 63; Powell, Ev., 9th Ed. 421; Phillips Ev. 326, 328; Cordery's Law Relating to Solicitors, 2nd Ed., 83.

SYNOPSIS

Principle.
 Scope.

3. Admissions without prejudice.

- Negotiation for compromise,
- 5. Admissions before arbitrator.

1. Principle Confidential overtures of pacification and any other offers or propositions between litigating parties, expressly or impliedly made without prejudice,5 are excluded on grounds of public policy. For without this protective rule, it would often be difficult to take any steps towards an amicable compromise or adjustment; and, as Lord Mansfield has observed, all men must be permitted to buy their peace, without prejudice to them, should the offer not succeed; such offer being made to stop litigation, without regard to the

Norton, Ev., 153.

S. 58, post; Cunningham, Ev., 186; cf. Ibrahim v. Pasvata, (1871) 8
 Bom. H. C. A. C. 163.
 Union of India v. B. C. Nawa (Bros). Pvt., Ltd., A. I. R. 1961
 Cal. 620; Agricultural Produce Market Committee v. Contractor Mun-shi, (1968) Guj. L. R. 1082.

^{5.} In re River Steamer Co., (1871) L. R. 6 Ch. 822, 827, per James, L.J., the words "without prejudice" mean, "I make you an offer: if you do not accept it, this letter is not to be used

against me" ib. 831, 832 (cited in Madhavrav v. Gulabbhai. (1898) 23 B. 177, 180. "Now if a man says his letter is without prejudice, that is tantamount to saying, "I make you an offer which you may accept or not as you like; but if you do not accept it will not have effect at all" per Mellish. I.I. see also Walall" per Mellish, LJ., see also Wal-ker v. Wilsher, (1889) 23 Q.B.D. 335, 337; per Lindley, L.J. Hari Krishna Agarwala v. K. C. Gupta, 1949 All. 440, per Malik, C. J.

question whether anything is due or not.6 It is most important that the door should not be shut against compromise.7 When a man offers to compromise a claim, he does not thereby necessarily admit it, but simply agrees to pay so much to be rid of the action.

- 2. Scope. This section in terms applies only to civil cases. But even in criminal cases, evidence relating to proposals of compromise ought not, in the exercise of a proper discretion, to be allowed to go in as evidence of guilty knowledge against the accused.8
- 3. Admissions without Prejudice. Admissions, either verbal or in writing, by way of compromise or during treaty, are, if made under the circumstances mentioned in the section, protected. Generally, neither letters written without prejudice nor replies to such letters, though not similarly guarded, can be used as evidence against the parties writing them.9 Thus, a letter marked "without prejudice" protects subsequent10 and even previous11 letters in the same correspondence. Such letters, however, are only protected, if bonu fide written with a view to a compromise.12 Thus, a letter "without prejudice", which contains a threat against the recipient, if the offer be not accepted, is admissible to prove such threat.13 So also, if the admission be merely of a collateral or indifferent fact, such as the handwriting of a party, which is capable of easy proof by other means, and is not connected with the substantial merits of the case, it will be received, even though made pending negotiations14 as also will offer without prejudice, if the offer has been accepted.¹⁵ For, if the terms proposed in such a letter are accepted, a complete contract is established, and the letter, although written "without prejudice" operates to alter the old state of things and to establish a new one. A contract is constituted in respect of which relief by way of damages or specific performance would be given.18 The mere fact that a document is stated to have been written "without prejudice" will not exclude it. The rule which excludes documents marked "without prejudice" has no application unless some person is in dispute or negotiation with another,

Phillips, Ev., 326.

7. Per Bowen, L. J. in Walker v. Wilsher, (1889) 23 Q.B.D. 335.

8. Abbas Peada v. Queen-Empress, L. L. R. 25 Cal. 736; 2 C. W. N. 484.

9. Roscoe, N. P. Ev., 62; Paddock v. Forrester, (1841-42) 3 M. & G. 903; Hoghton v. Hoghton (1872) 15 Hoghton v. Hoghton, (1872) 15 Beav. 278, 321; Walker v. Wilsher,

(1889) 28 Q. B. D. 335. 10. Paddock v. Forrester, supra; Re Harris, (1875) 44 L. J. Bkcy. 33. "It is not necessary to go on putting 'without prejudice' at the head of every letter", ib; Walker v. Wilsher,

supra 337.

11. Peacock v. Harper, (1878) 26 W.R. (Eng.), 109. In this case a second letter 'without prejudice' was held to protect previous letter not ex-

pressed to be "without prejudice"

on the ground that the second letter to be taken as a postscript to the former.

12. Grace v. Baynton (1877) 21 Sol. Jour. 631, See Re Daintrey, Ex-parte Holt, (1893) 2 Q. B. 116. In the case of Hicks v. Thompson, Times, 19th Jan., 1857 a lawyer's clerk sued for breach of promise of marriage, sought to exclude his love letter because he had headed them all "without prejudice."

13. Kurtz v. Spence, (1888) 57 L.J. Ch.

238: 58 L. T. 438. Waldridge v. Kenneson, (1794) 1 Esp. 143: see also per Lord Kenyon, C. J. in Turner v. Railton, 2 Esp. 474.

Walker v. Wilsher, supra, 337; in re River Steamer Co. 1871 L. R.

6 Ch. 822, 16. Per Lindley L.J. in Walker v. Wilsher, (1889) 23 Q.B.D. 335 at p. 337.

^{6.} Taylor, Ev., s. 759 and see ib, ss. 774, 796. 797 and cases there cited; Roscoe. N. P. Ev., 62, 63; Steph. Dig., Art. 20: Powell, Ev., 300;

and terms are offered for the settlement of the dispute or negotiation.17 All that is said and written during negotiations for settlement of a dispute is generally without prejudice, whether the two words 'without prejudice' are used or not.18 Where in a land acquisition case, although a notification for compulsory acquisition had been issued, it is still open to the owner to take the matter to the Civil Court on the question of the amount of compensation, and if, in order to avoid that contingency, a certain amount is offered as compensation "without prejudice", evidence as to the offer is not admissible.19 But, an admission without prejudice may be used against the party making it, where it is made subject to a condition which has been performed by the other party. Thus, in a suit on a bill of exchange, where the defendant stated in a letter to the plaintiff that he had not had notice of the dishonour of the bill, but that, if the debt was accepted without costs, he would give the plaintiff a cheque for it, and the plaintiff thereupon discontinued the action on payment of costs, it was held, that the plaintiff was, in a second action on the bill, entitled to use the letter in proof of waiver of notice of dishonour. The first action being discontinued before the second was begun, the conditional waiver became absolute and the letter admissible in evidence.20 Letters without prejudice cannot, without the consent of both parties, be read on a question of costs to show willingness to settle. although the mere fact and date of such letters or negotiations as distinguished from their contents, may sometimes be received to explain delay.20.1

It is permissible in law for the assessee to file a statement which may in terms or impliedly, admit a matter in dispute in income-tax proceedings without affecting the merits of the issue in the civil litigation. In order to make out that the admission is meant for the limited purpose of the income-tax assessment, it is open to him to mark it as "without prejudice." 21

Statements made "without prejudice" should not be treated as admissions against the maker or as binding between the parties. They are merely tentative statements, the object of which is to put an end to litigation Offers and propositions between the litigating parties are generally excluded on grounds of public policy.22

The section does not contain the words "without prejudice." An admission is not relevant if there is an express or implied condition that it will not be used in evidence. It is a question of fact in each case whether a document bearing the words "without prejudice" was given on the condition that it would not be used as evidence. Thus documents exchanged between parties in the course of negotiations for a compromise, if marked "without prejudice", will be inadmissible under the section. But a certificate of damage written on a

17. Madhavrav v. Gulabbhai, (1898) 23 B. 177, 180 citing In re Daintrey ex

19. Ranzor Singh v. Secretary of State,

1926 Lah. 509; 92 I.C. 319.

20. Holdsworth v. Dimsdale, (1871) 19
W.R. (Engl.) 798.
20.1. Walker v. Wilsher, (1889) 23 Q.
B. D. 385, C. A.
21. Gajadhar Kamanuj Das v. Collector,
1953 Orissa 283, 284: 19 C.L.T. 76,
22. Kurtz v. Spence, (1888) 57 L.J. Ch.
238: 58 L.T. 438 relied on in Union
of India v. Shew Bux A I R. 1965 C. of India v. Shew Bux, A.I.R. 1965 G.

parte Holt (1893) 2 Q.B. 116.

18. Parkash Chandra Gangoly v. Nawan Estates Private Ltd., 72 C. W. N. 852, 857: (1966) 2 Comp. L.J. 102; In re: River Steamer Co., (1871) L. R. 6 Ch. 822, per Wellish, L. J. at pp. 831, 832 and per James, L.J. at p. 827; Ajit Kumar Bose v. Sneha-lata Biswas, 72 C.W.N. 1.

printed form and issued by a Station Master under the rules of the Railway, does not become inadmissible because it contains the words "without prejudice". These words only reserve the right of the Railway and the customer to challenge the accuracy of the certificate by leading evidence to prove that the damage was higher or lower (as the case may be) than stated in it. It is, therefore, admissible as prima facie evidence of the quantum of damage.23

The privilege conferred by the section may be waived. Where letters marked "without prejudice" were filed by the plaintiff and the defendant's counsel admitted them, it was held, that the admission implied that the privilege was withdrawn and the letters were free to be used as evidence.24 In the case last cited, it was also held, that the letters were not inadmissible as there was only a desire on the part of the defendant to have the privilege attached to the letters and there was nothing to show that the plaintiff also agreed to respect the privilege. It is respectfully submitted that this loses sight of the distinction between the two parts of the section. The letters in question being marked "without prejudice", the case falls under the first part of the section, and, to render the letters inadmissible, it is not necessary that both parties should agree to respect the privilege.

An admission contained in a draft of a compromise deed filed in Court has to be excluded where the document provides that the parties to it would be free to repudiate any condition of the proposed compromise by which, in their opinion, their rights are prejudicially affected.25

4. Negotiation for compromise. "Perhaps also, an offer of compromise, the essence of which is that the party making it is willing to submit to a sacrifice or to make a concession,1 will be rejected, though nothing at the time was expressly said respecting its confidential character, if it clearly appears to have been made under the faith of a pending treaty, into which the party has been led by the confidence of an arrangement being effected." But in the absence of any express, or strongly implied, restriction as to confidence, an offer of compromise is clearly admissible and may be material as some evidence of liability,3 although it may not be proper to enquire into the terms offered,4 though it must still be borne in mind that such an offer may be made for the sake of purchasing peace and without admitting liability to the extent of the claim,⁵ and it would be unfair to hold them, if the compromise

24. Lucknow Improvement Trust v. P. L. Jaitley & Co., 1930 Oudh 105; I. I.R. 5 Luck. 465: 124 I.C. 423.

25. Surendra Persad Lahiri v. Govinda Das, 48 C.W.N. 15.
1. Thomson v. Austen. (1823) 2 D. &

 Waldridge v. Kennison, (1 Esp. 143; Taylor, Ev., s. 795. (1794) 1

3. Wallace v. Small, (1830) 1 M. & M. 446; Watts v. Lawason, ib 447 n. Nicholson v. Smith, (1822) 3 Stark R. 129; Taylor, Ev. s. 795; Firm Bulaki Ram Amarnath v. Bhagat Ram, 1926 Lah. 548; 95 I.C. 363.

 Harding v. Jones, (1835) T. & G. 135; see also Thomas v. Morgan, (1835) 2 C. N. & R. 496. Morgan,

5. Meajan v. Alimuddin, 44 C. 130: 34 I. C. 571: 25 C.L.J. 42: (1917) 20 C.W.N. 1217: A.I.R. 1917 C: 487. Letters Patent appeal, per Sanderson, C.J. and Mookerjee, J.,

^{23.} Union of India v. Nathi Mal Mahabir Prasad. 1966 A.L.J. 495, at pp. 497, 498; Balchand Badri Prasad v. Union of India, A. I. R. 1957 Cal, 656. In the Allahabad case Kurtz v. Spence (1888) 57 L.J. Ch. 238, 241 relied on in Union of India v. Shew Bux, A.I.R. 1965 Cal. 636 was distinguished as in the English case documents were exchanged between the parties trying to settle disputes by compromise.

falls through.⁶ Much depends upon the circumstances of the case.⁷ Admission of cruelty in a letter written during negotiations for compromise in a proceeding for restitution of conjugal rights may be privileged disentitling the other party to use it as admission.⁸

- 5. Admissions before arbitrator. The rule does not apply to admissions made before an arbitrator, for though in this last case, the proceedings are said to be before a domestic forum, yet the parties are, at the time, contesting their rights as adversely as before any other tribunal.9 The rule enunciated in this section does not apply to admissions made before an arbitrator. In the absence of an express or implied understanding between the parties that the evidence of the conversation during the period when negotiations for settlement of the claim are being carried on before the arbitrator is not to be tendered, such conversation cannot be held to be privileged and must be held to be admissible in evidence.10 It has, however, been held that nothing which passes between the parties to a suit in any attempt at arbitration or compromise should be allowed to affect the slightest prejudice to the merits of their case as it eventually comes to be tried before the Court. No presumption can be raised against a party to a suit from his refusal to withdraw from the determination and submit to arbitration.11 It has also been held that where negotiations are being conducted with a view to settlement it should be taken that these negotiations are being conducted "without prejudice", and that it is not open for one of the parties to give evidence of an admission made by another.12 An admission before an arbitrator is admissible in evidence, but the Court dealing with the facts can attach such weight as it thinks proper to such admission. This section does not apply to such admission.18
- 24. Confession caused by inducement, threat or promise when irrelevant in criminal proceedings. A confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the Court to have been caused by any inducement, threat or promise¹⁴ having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the Court, to give the accused person grounds, which would appear to him reasonable, for supposing that by making it he

8. Surjit Kaur v. Gurcharan Singh. 1972 Cur. I. J. 577; 73 Punj. L.R. 726; A.I.R. 1973 Punj. 18.

9. Deod Lloyd v. Evans, (1827) 3 C. & P. 219; the admissions may be proved by the arbitrator; Gregory v. Howard, (1800) 3 Esp. 113; Taylor Ev., ss. 798. 799; Roscoe, N.P.

Ev., 63: as to incriminating answers, see s. 132, post.

 Gangaram Kanhaiyalal v. Pooran Gulab, 1954 M.B. 58, 59: see also cases cited therein.

 Mahabeer v. Dhujjoo, (1873) 20 W. R. 172.

 Shibcharandas v. Firm Gulab Chand Chhotey I.al. 1936 All, 157; L. R. 1936 All. 51; 160 I. C. 76; 1935 A. W.R. 1486.

Punjab Singh v. Ram Autar, 1920
 Pat. 841; 52 I.C. 348; 4 P.L.J. 676

 For prohibition of such inducements, etc. see the Code of Criminal Procedure. 1973, Sec. 316.

^{7.} See also observations of Lord St.
Leonards in Jorden v. Money, (1854)
5 H.L.C. 185 "when an attorney
goes to an adverse party with a view
to a compromise, or to an action,
you must always look with very great
care at his evidence of what then
occurred,"

would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him.

s. 17-22 ("Admission"). s. 3 ("Relevant"). s. 3 ("Court").

s. 28 (Confession after removal of impression caused by inducement).

s, 80 (Presumption as to document purporting to be a confession).

Steph. Dig., Arts. 21-23; Taylor, Ev., ss. 862-906; Best, Ev., 551-553; 3 Russ. Cr. 440-449; Powell Ev. 9th Ed., 104-116; Phipson, Ev., 11th Ed., 349-367; Wills Ev., 3rd. Ed., 309-311; Norton, Ev., 154-174; Cr.P. Code, 1898 ss. 163, 343, Cr. P. C., 1973, ss. 163, 316; Roscoe Cr. Ev., 16th E., 38-56. A Treatise on the Admissibility of Confession and Challenge of Jurors in Criminal Cases in England and Ireland by Henry H. Joy; Chaudhari's Law of Confessions; Wigmore, Ev., s. 822 et seq.

SYNOPSIS

1. General:

(a) The Section. (b) "Confession".

- (c) Judicial and extra-judicial confessions.
- (d) Confession consisting of several
- (e) Admissibility of confessions in evidence and weight to be attached to them, Soliloquies,
- (f) Voluntary confessions.
- (g) Involuntary confessions.
 (h) Retracted confessions.
 (i) Extra-judicial confession, if valid, can be acted upon.
- 2. Scope and nexus of Sections 24 to 30 and relevant provisions of Cr. P. C.

3. Principle of this section.

4. Conditions for validity and admissibility of confessions.

"Appears to the Court".

6. Burden of proof. Procedure in recording confessions.

- 7. Evidentiary value of confessions. 8. Retraction of confession, effect of.
- Corroboration, necessity of.
 "By an accused person."

10.

"Caused by any inducement, threat or 11. promise."

12. Relevancy, question of law.

13. Confession to whom.

14. Confession after prolonged custody. 15. 16. Presumption about voluntariness. "Person in authority".

- 17. Inducement etc. must have reference to the charge.
- The advantage to be gained or the evil to be avoided.
- "Sufficient 19. to give the accused grounds".
- 20. (a) Partial rejection of a confession: (b) Confession contradicted by confession; and (c) Confession contradicted by medical evidence.

21. Magistrate not follwing precautions under Sec. 164, Cr. P. C.

- 22. Judicial confession, admission of.
- 1. General. (a) The Section.-The marginal note to the Section seems to pose the question that, if a confession is caused by inducement, threat or promise, when it may be deemed to be irrelevant in criminal proceedings? The Section lays down that
 - a confession made by an accused person is irrelevant in a criminal proceeding, (as distinguised from a civil proceeding) if the making of the confession appears to the Court to have been caused by any inducement, threat or promise having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the Court, to give the accused person grounds which would appear to him reasonable, for supposing that by making it he would gain any advantage, or avoid any evil of a temporal nature in reference to the proceedings against him.

In answering the above question, each and every one of the above expressions has to be considered.

(b) "Confession".-Confession is a direct admission or acknowledgment of his guilt by a person who has committed a crime. In Pakala Narayanaswami's case,16 their Lordships of the Privy Council had occasion to define the term 'confession' and observed: "No statement that contains self-exculpatory matter can amount to a confession, if the exculpatory statement is of some fact which if true would negative the offence alleged to be confessed. Moreover a confession must either admit in terms the offence, or at any rate substantially all the facts which constitute the offence. An admission of a gravely incriminating fact, even a conclusively incriminating fact, is not of itself a confession."

These observations received the approval of the Supreme Court in Palvinder Kaur v. State of Punjab17 and Veera Ibrahim v. The State of Maharashtra.18 See also the undernoted cases.19

A confession or admission is evidence against the maker unless its admissibility is excluded by some provision of law. Except as provided by Sec. tion 27 post, a confession to a police officer is absolutely protected under Section 25 post, and if it is made in the course of an investigation, it is also protected by Section 162, Cr. P. C., and a confession made to any other person by him while in the custody of a police officer is protected by Section 26 post unless it is made in the immediate presence of a Magistrate.20

In State of U. P. v. Deoman Upadhyaya,21 Shah, J., referred to a confession as a statement made by a person stating or suggesting the inference that he has committed a crime. In Aghnoo Nagesia v. State of Bihar22 it was said that a confession may be defined as an admission of the offence by a person charged with the offence. If an admission of the accused is to be used against him, the whole of it should be tendered in evidence, and it a part of the admission is exculpatory, and part inculpatory, the prosecution cannot use in evidence the inculpatory part only, and the accused is entitled to insist that the entire admission, including the exculpatory part, must be tendered in evidence. But the Supreme Court has observed that the proposition that a statement which contains any admission or confession must be

860: 1976 C. L. R. 134: A. I. R. 1976 S. C. 1167.

^{15.} Encyclopaedia of the Laws of England, Vol. III, p. 448; (1972) 1 Cut. L. R. 253 (Orissa); State v. Youssuf Dar, 1973 Cri. L. J. 955 (J.

[&]amp; K.).

16. A.I.R. 1939 P.C. 47: 40 Cr. L.J. 364: (1939) 1 M. L. J. 756; Pati Sonra v. State, (1970) 36 Cut. L. T. 774; Lokanath v. State, 1966 Cr. L.J. 1180: A.I.R. 1966 Orissa 205, 206 (admission not amounting to not amounting to confession).

^{17. 1953} S. C. R. 94, 104; A. I. R. 1952 S. C. 354, 357; 1953 A. L. J. 18: 1953 M. W. N. 418; I. L. R. 1953 Punj. 107; 1 B. L. J. 30; 1953

Cr. L. J. 154.

18. (1976) 2 S.C.C. 302: 1976 S. C. C. (Cri.) 278: 1976 Cri. A. R. (S.C.) 140: 1976 S.C. Cri. R. 235: (1976) 3 S. C. R. 672: 1976 Cri. L. J.

¹⁹⁷⁶ S. C. 1167.

19. Passang Lama v. State of Sikkim, 1975 Cr. L. J. 1350 (Sikkim); (1972) 1 Cut. L. R. 253 (Orissa); Kanda Padayachi v. State of Tamil Nadu, 1972 Cri. L. J. 11; A. I. R. 1972 S.C. 66.

20. Aghnoo Nagesia v. State of Bihar, A.I.R. 1966 S.C. 119 at p. 123.

21. (1965) 2 S. C. A. 367; 1966 S. C. D. 243; (1966) 1 S. C. J. 193; (1965) 2 S. C. W. R. 750; 1965 A. W. R. (H.C.) 648; (1965) 1 Andh. L. T. 430; 1966 B. L. J. R. 865; 1966 Cr. L. J. 100; 1966 M. L. J. (Cr.) 134; 1965 M. W. N. 216; A. I. R. 1966 S. C. 119.

22. (1965) 2 S. C. A. 367; A. I. R. 1966 S. C. 119.

considered as a whole and the court is not free to accept one part while rejecting the rest. is too widely stated.23 In Bhagwan Singh Rana'v. State of Haryana,24 the Supreme Court has again said that it is permissible to believe one part and reject another part of a confession. What is necessary is that the whole confession be tendered so that the Court may reject the exculpatory part and take inculpatory part into consideration if its correctness is corroborated by other evidence. The decision enumerating the wide proposition aforesaid cannot be considered to be laying down the correct law.25 It was held by the Cuttack High Court in the undernoted case that court cannot accept only the inculpatory part and reject the exculpatory portion that the accused acted in the exercise of right of self-defence.1 But in a later case2 the same High Court held that if the exculpatory portion is found to be inherently improbable, after rejecting that portion regarding murder having been committed in selfdefence, the Courts may act on the inculpatory portion and this seems to be correct approach in view of the decision of the Supreme Court in Nishi Kant Jha v. State of Bihar.8

A confession admitting in terms an offence and substantially all facts constituting that offence does not by the addition of a plea of justification become self-exculpatory.4

A statement made to Custom Officers acting in exercise of their powers to a confession, can be used as an admission against the maker within the purview of Sections 18 to 21 of the Act.5

Before he was accused of any crime, a person in answer to a question of a witness stated that his wife and children were not in this world. This is simply a statement or at the best an admission of fact, and not a confession as such not hit by section 24, because an admission of even a gravely incriminating circumstance is not a confession.6

A statement made under Section 164, Cr. P. C., which does not amount

(1976) Cri. L. J. 1379; A. I. R. 1976 S.C. 1797.

25. See for instances, Jairam Ojha v. State. 34 Cut. L. T. 141: 1969 Cr. L. J. 765: A. I. R. 1968 Orissa 97, 99; Pagoti Sanyasi Rao, In re,

1. State of Orissa v. Rama Mudali, 39 Cut. L. T. 44: 1973 Cr. L. J. 1326 (Orissa).

2. 1972 Cut. L. R. (Cri.) 73 (Orissa); Kadraka Sitana v. State, (1975) 41 Cut. L. T. 945: 1976 Cri. L. J.

A. I. R. 1969 S. C. 422. Buda Kisani v. State, I. L. R. 1965 Cut. 369; (1965) Orissa J. D. 198 at pp. 206, 207; 31 Cut. L. T. 804.

5. Golam Mohammad Khan v. Emperor, A. I. R. 1925 Pat. 536; Abdul Rahim v. Emperor, A. I. R. 1925 Cal. 926; Muhamad Bakhsh v. Emperor, A. I. R. 1941 Sind 129. 6. State of Assam v. V. N. Raj Khowa, 1975 Cr. L. J. 354.

^{23.} Nishi Kant Jha v. State of Bihar. (1969) 2 S. C. R. 1033: I. L. R. 48 Pat. 9: (1969) 1 S. C. A. 537: (1969) 1 S. C. C. 347: (1969) 1 S. C. J. 844: (1969) 1 S. C. W. R. 1149: 1969 B. L. J. R. 781: 1969 M. P. W. R. 590: 1969 M. L. J. (Cr) 456: 1969 A., L. J. 638: 1969 A.W.R. (H.C.) 549: A.I. R. 1969 S. C. 422; see section 17 (ante) distinguishing the decisions in Hanumant v. State of Madhya Pradesh, A. I. R. 1952 S. C. 343; Palvinder Kaur v. State of Punjab, A. I. R. 1952 S.C. 354 and Narain Singh v. State of Punjab, (1964) 1 Cr. L. J. 730 (S.C.). (1976) 2 S. C. J. 464: (1976) 3 S. C. C. 101: (1976) S. C. C. (Cri.) 373: 1976 Cri. A. R. 204:

^{(1962) 2} Andh. W. R. 86; 1968 Cr. L. I. 1345; 1968 M. L. J. (Cr.) 453, 461. But see Jaswant Singh v. State, I. L. R. (1965) 15 Raj. 968; 1965 Raj. L. W. 441; 1966 Cr. L. J. 451; A. J. P. 1966 Pai. 98 98 I. 451: A. I. R. 1966 Raj. 83, 88 which correctly states the principle.

under Section 171-A, Sea Customs Act, 1878 (now Section 103, Customs Act, 1962) does not stand at par with a confession.7

(c) Judicial and extra-judicial confessions. Confessions may be divided into two classes, viz., judicial and extra-judicial. Judicial confessions those which are made before a Magistrate or court in the course of judicial proceedings. Extra-judicial confessions are those made by the party elsewhere than before a Magistrate or court. In short extra-judicial confessions are generally those made by a party to or before a private individual which includes even a judicial officer in his private capacity. It also includes a Magistrate who is not especially empowered to record confessions under Section 164, Cr. P. C., or a Magistrate so empowered but receiving the confession at a stage when Section 164 does not apply.8

A Postal Inspector does not exercise the same powers as a police officerin-charge of a station in the context of the provisions of the Criminal Procedure Code.9 Hence, extra-judicial confession made to a Postal Inspector is admissible in evidence as it does not attract the bar to admissibility enacted under Section 25 post. It is relevant and admissible under the present section.10

(d) Confession consisting of several parts.-A confession may consist of several parts and may reveal not only the actual commission of the crime but also the motive, the preparation, the opportunity, the provocation, the weapons used, the intention, the concealment of the weapon and the subsequent conduct of the accused. If the confession is tainted, the taint attaches to each part of it. It is not admissible in law to operate one part and to admit it in evidence as a non-confessional statement. Each part discloses some incriminating fact, that is, some fact which, by itself or along with other admitted or proved facts, suggests the inference that the accused committed the crime, and though each part taken singly may not amount to a confession, each of them being part of a confessional statement, partakes of the character of a confession. If a statement contains an admission of an offence, not only that admission but also every other admission of an incriminating fact, in the statement, is part of the confession.11

Sometimes, a single sentence in a statement may not amount to an admission of an offence, but the statement read as a whole may amount to a confession. Each and every admission of incriminating fact contained in the confessional statement is part of the confession.12

(e) Admissibility of confessions in evidence and weight to be attached to them. Soliloquies.—There is a distinction between the admissibility of evidence and the weight to be attached to it. The Act makes admissions and confessions exceptions to the hearsay rule. It places them in the category of relevant evidence, presumably on the ground that, as they are declarations against the

^{7.} H. H. Advani v. State of Maharashtra, (1970) 1 S. C. R. 821; (1970) 2 S. C. A. 10; (1970) 2 S. C. J. 192; 1970 M. L. J. (Cr.) 490; A. I. R. 1971 S.C. 44, 56.

^{8.} R. v. Gopinath Kollu, 13 W. R. Cr. 69.

^{9.} See State of Punjab v. Barkat Ram, (1962) 3 S. C. R. 338; (1962) 2 S. C. A. 321; (1962) 1 Cr. L. J. 217;

A. I. R. 1962 S. C. 276.

10. State of Mysore v. D. C. Nanjappa. 1968 M. L. J. (Cr.) 226;
(1968) 1 Mys. L. J. 457 at pp. 461, 463.

Aghnoo Nagesia v. State of Bihar, (1965) 2 S. C. A. 367: A. I. R. 1966 S. C. 119.

^{12.} Ibid.

interest of the person making them, they are probably true. The probative value of an admission or a confession does not depend upon its communication to another. Communication to another is not a necessary ingredient of the concept of "confession". A statement, whether communicated or not, admitting guilt, is a confession of guilt.\(^{13}\) Therefore, a confessional soliloquy is a direct piece of evidence. It may be an expression of conflict of emotion; a conscious effort to stifle the pricked conscience, on argument to find excuse or justification for his act; or a penitent or remorseful act of exaggeration of his part in the crime. The tone may be soft and low; the words may be confused, they may be capable of conflicting interpretation depending on witnesses. Generally, they are the mutterings of a confused mind. But, before such evidence can be accepted, it must be established by cogent evidence what were the exact words used by the accused. Even if so much is established, prudence and justice demand that such evidence should not be made the sole ground of conviction. It may be used only as a corroborative piece of evidence.\(^{14}\)

- (f) Voluntary confessions.-As to extra-judicial confessions, two questions arise-
 - (1) were they made voluntarily? and
 - (2) are they true?

As the section enacts, a confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the Court to have been caused by any inducement, threat or promise, (1) having reference to the charge against the accused person, (2) proceeding from a person in authority, and (3) sufficient, in the opinion of the Court to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him. It follows that a confession would be voluntary if it is made by the accused in a fit state of mind, and if it is not caused by any inducement, threat or promise which has reference to the charge against him, proceeding from a person in authority. And it would not be involuntary, if the inducement, etc.—

- (a) does not have reference to the charge against the accused person, or
- (b) it does not proceed from a person in authority; or
- (c) it is not sufficient, in the opinion of the Court to give the accused person grounds which would appear to him reasonable for supposing that, by making it, he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him.

Sahoo v. State of U. P., (1966) 2
 S. C. J. 172; 1965 S. C. D. 809; (1965) 2 S. C. W. R. 464; (1965)
 2 Andh. L. T. 215; 1966 M. P. L. J. (Cr.) 558; 1966 M. L. J. (Cr.)
 558: 1966 Cr. L. J. 68; A. I. R. 1966 S. C. 40 at p. 42; Taylor, 11th Edn. Vol. 1 at p. 596; Best. 12th

Edn. at p. 596; Phipson, (1970) 11th Edn., para. 815, p. 366; Citing R. v. Simons, (1834) 6 C. & P. 540; Babi v. State of M. P., 1966 M. P. L. J. (Notes) 9. 14. A.I.R. 1966 S.C. 40 at p. 43.

Viran v. State, A. I. R. 1961 J. & K. 11.

Whether or not the confession was voluntary would depend upon the facts and circumstances of each case, judged in the light of this section.16 In the absence of any evidence to show that any threat, promise or inducement was made to the accused, when he made the confessional statement, his confession cannot be one other than free and voluntary,17 provided it is made in a fit state of mind. The law is clear that a confession cannot be used against an accused person unless the court is satisfied that it was voluntary and at that stage the question whether it is true or false does not arise.18

The question whether a confession is voluntary or not is always a question of fact. All the factors and all the circumstances of the case, including the important factors of the time given for reflection, must be considered before deciding whether the Court is satisfied that in its opinion the impression caused by the inducement, threat or promise (if any) has been fully removed. 10 So, when the accused confesses his guilt on being asked twice or thrice, or on being asked to produce stolen articles, the confession cannot be held to be the result of persuasion in the absence of anything to the contrary.20

A free and voluntary confession is deserving of highest credit, because it is presumed to flow from the highest sense of guilt.21 It is not to be conceived that a man would be induced to make a free and voluntary confession of guilt, so contrary to the feelings and principles of human nature, if the facts confessed were not true (Phipson). So, as Taylor points out: Deliberate and voluntary confessions of guilt, if clearly proved, are among the most effectual proofs in law. Therefore, both in England and in India convictions have been sustained in capital cases on voluntary and unsuspected confessions, where there has also been independent proof of the corpus delicti. (Will's Circumstantial Evidence). But, at the same time, no portion of evidence has invited so much careful scruitny as the law of confessions. It is due to two factors.

First of all, untrue confessions are often made for various reasons. To quote Taylor: The prisoner oppressed by the calamity of the situation may have been induced by motives of hope or fear to make an untrue confession and the same result may have arisen from a morbid ambition to obtain an infamous notoriety, from insane or criminal desire to be rid of life, from a reasonable wish to break off old connection and to commence a new career, from an almost pardonable anxiety to screen a relative or a comrade or even the delusion of an overwrought and fantastic imagination. This is not, however, intended to imply that there are no genuine incentives to confess which have been set out in several leading judgments. Horwill, J. in Boya Chinna

421: 9 Sau. L. R. 109: A. I. R. 1956 S.C. 217 at p. 221.

20. Srimanta v. State, A. I. R. 1960

R. v. Warwickshall, (1783) 1 Leach

Ueggappa Shetty, In re, (1970) 1
 Mys. L. J. 149, 160.
 Ratan Gond v. State of Bihar,
 1959 S. C. R. 1336; I. L. R. 37
 Pat, 1409; A. I. R. 1959 S. C. 18:
 1959 Cr. L. J. 108; 1959 B. L. J.
 R. 1: 1959 A. L. J. 35; 1959 M.
 P. C. 46; 1959 M. L. J. Cr. 109.

 Aher Raja Khima v. State of Saurashtra, (1955) 2 S. C. R. 1285;
 1956 S. C. A. 440; 1956 S. C. J.
 243; 1956 A. W. R. (Sup.) 60; 1957
 Andh. L. T. 92; 1956 Cr. L. J.

See Vali Isa v. State, A. I. R. 1963 Guj. 135: 1963 Guj. L. R. 1052; Sarwan Singh v. State of Punjab, A. I. R. 1957 S. C. 637: 1957 Gr. L. J. 1014: 1957 All, W. R. (Sup.) 99: 1957 M. P. C. 781: (1957) 1 M. L. J. (Cr.) 672.

Papanna, In re,22 has pertinently remarked: "It is frequently assumed that a person would not make a confession of his guilt which would be prejudicial to his interest unless some pressure were exerted on him. I do not wish to believe this to be the case. A man who has committed a grave crime, unless he is a hardened offender, has an overwhelming desire to unburden himself and share with somebody his terrible secret. If he thinks of the consequences of his conviction, fear of them will act in restraint of his natural impulse to confess. At the moment of his arrest the ordinary accused feels that the game is up and that it is fatal to attempt to try to conceal his guilt any longer. Even in cases, in which no confession of the accused is tendered in evidence because it does not lead to any discovery, a perusal of the record shows that some sort of a confessional statement is made." Similarly, in Jiwan v. Emperor,23 it was observed: "Much is said about the difficulty of understanding why a man should at one time make a confession and afterwards repent it. This is not a question of law but a question of human psychology and of experience. It is not really at all difficult to understand that a man who has committed a murder and who knows that all his neighbours and friends are well aware that he might be the guilty person should not have the hardihood to continue denying his guilt when he is confronted by persons who are making enquiries from him. It would probably be much more difficult in these circumstances for a man to maintain his innocence than for him to confess his guilt. Afterwards, when he has time to consider his position and when he is removed from his everyday surroundings and possibly apprised by others (fellow prisoners, touts, etc.) that it is foolish of him to confess his guilt, it is natural that he should retract his confession. The mere fact, therefore, that an accused person subsequently retracts his confession is not by itself a sufficient reason for believing that the confession is false, when the confession has been made by the accused after he has time to consider the position and after he had been duly warned that it would be read in evidence against him. This is put in another way in Ghulam Muhammad v. Emperor.24 "A man !abouring under great emotion may confess. When time has passed and feelings have cooled, discretion may cause him not to confess. But that is no reason for rejecting the confession made at another time and under different circumstances."

When the Magistrate who recorded the confession has given sufficient time to the accused to think over the consequences of making confession, the mere fact that the police had brought the accused from jail would not be any indication of police pressure because bringing of the accused from jail to the Court has got to be done by the police.25 Mere statement of the accused without any evidence of extortion of confession would not make it involuntary.1

Where the accused gave various details in his statement before the custom authorities, which could be only within his personal knowledge and did not complain to the Magistrate of any force, the confession is voluntary.2

A. I. R. 1942 Mad. 49: 198 I.C. 22. 295.

A. I. R. 1936 All. 470; 37 Cr. I. J. 852; 163 I. C. 661. A. I. R. 1943 Sind 114; 44 Cr. I. J. 530; 206 I. C. 493. State of M. P. v. Mst. Gangabai, 1971 M. P. W. R. 443; I. L. R.

⁽¹⁹⁶⁹⁾ M. P 1014.

State of Orissa v. Surji Dei, 1975 Cut. L. R. (Cri.) 144: 41 Cut. L. T. 1144.

Sripad Bhiku , v. State of Mysore, (1971) 1 Mys. L. J. 423; 1971 Mad, L. J. (Cri.) 290; 1971 Cri. L. J. 1636.

Magistrate gave 31 hours for reflection, confession is not inadmissible.3 iee tollowing cases also.4

The second factor is, that it is undoubted that confessions are frequently brought about by "third degree methods" employed by the police. The term connotes in the public mind the forcible extraction of information or conession from persons in police custody by methods of violence or by the use of hreats or improper inducement.5

The use of third degree methods for extracting confessions is certainly prevalent all over the world in varying degrees from the more brutal practice in the United States of America to the more refined forms in the United Kingdom. In India, in the past, the use of third degree methods for extracting confession was very widely prevalent.

Precautions have since been taken, but in spite of all these precautions, it is doubtful whether the evils associated with confessions can be completely eradicated.

(g) Involuntary confessions.-An involuntary confession is one which is not the result of the free will of the maker of it. So, where the statement is made as a result of the harassment and continuous interrogation for several hours after the person is treated as an offender and accused, such statement must be regarded as involuntary.6 Where an accused person persists before the Committing Magistrate's court and the Sessions court that he was tortured by the police and his confession was retracted, the confession cannot be said to be voluntary.7 What is required is the likelihood of police influence for treating the confession as not voluntary. If the police are in any way connected with the administration in such manner as to create an impression in the mind of an under-trial prisoner that he is under police control, it would be correct to treat his confession as not voluntary. The position is different when the jail is merely guarded by the police and they have nothing to do with its administration or control.8 Though sufficient time was given to an accused for deliberation as required by the Criminal Rules of Practice, yet if it is apparent from the answer given by the accused that he had not completely got over the warning and the inducement offered by the police, the court will not accept the statement as voluntary.9 Where one of several

684 (Raj). 5. Cited in Wigmore on Evidence, Vol. 2, p. 196, Paras 263-64.

L.J. 1023: A.I.R. 11, 19. 1967 Manipur

Khima v. State of Saurashtra, (1956) 2 S.C.R. 1285; 1956 S.C.A. 440; 1956 S.C.J. 243: 1957 Andh. L.T. 92; 1956 A.W.R. (Sup.) 60; 1956 Cr. L. J. 426; (1956) 1 M.L.J. (S. C.) 135; 9 Sau L.R. 109; A.I.R. 1956 S.C. 217, at pp. 221, 222 (Threats to accused in jail custody amounts to evidence of access of police to him. Thus it is reasonable that confession was not volun-

9. Pageti Sanyasi Rao, In re. (1962) 2 Andh. W.R. 86: 1968 Cr. L.J. 1345: (1968) 1 M.L.J. (Cr.) 453.

^{3.} Kadrake Sitana v. State, (1975) 41 Cut. L.T. 945: 1976 Cri. L.J.414.

 ¹⁹⁷² Cut. L.R. (Cri) 554; Kuma v. State, 1975 Cut. L. R. (Cri.) 404 (Orissa); I.L.R. (1971) 21 Raj. 209; State v. Shankarea, 1977 Cri. L.J.

Amrut v. State of Bombay, I.L.R.
 1960 B. 664: A.I.R. 1960 B. 488.
 A.N.T.O. Thapa v. State, 1967 Cr.

Mingular Mallik v. The State, 32. Cut. L.T. 1011: A. I. R. 1967 Orissa 24 at 26. See also Aher Raja

accused was arrested five days after the occurrence and according to his statement under section 342, Cr. P. C., (section 313 of Code of 1973), he was detained in the village school for several days and was assaulted severely, his confessional statement was excluded from consideration.10 Also, a confession caused by inducement to withhold criminal prosecution11 is involuntary.12 Confession was held to be involuntary, where accused remained in police custody for three days and even half an hour before his production in the Court he was in police custoty where he produced incriminating articles;13 where accused was detained on 9-1-1972 but was arrested on 13-1-72:,14 where the prolonged custody of police immediately before recording the confession was not explained satisfactorily; 18 where the accused was produced before Magistrate 10 days after arrest and there was evidence that accused was subjected to torture by police and the delay in production was not explained,16 where it was made before a man of influence due to threat proceeding from him,17 or when it was made only after he was assured that no harm would be done to him.18 Such a confession is of no use to the prosecution as it is not voluntary, of one's free will, as a result of remorse and penitence.

(h) Retracted confession. Where a confession is made voluntarily, and is also true, but is subsequently retracted by the accused, there is no legal bar in basing a conviction on the retracted confession. But the rule of prudence requires that, to form the basis of conviction, the retracted confession should be corroborated by independent evidence. In other words, it is not safe to act upon a confession made before the committing Magistrate, but retracted during the Sessions trial, unless it is corroborated by other evidence, direct or circumstantial. A retracted confession may form the legal basis of a conviction, if the Court is satisfied that it was true and was voluntarily made, but the Court should not base a conviction on such a confession without corroboration, unless the Court is convinced of the absolute truth of the confession.19 It being a weak

10. Chandra Majhi v. State, 32 Cut. L.

12. Ibid.

14.

18. State v. Jayadhar, 1975 Cut. L. R.

(1972) 2 S.C.W.R. 838; 1973 Cri. L.J. 280: 1973 S.C.D. 208: 1973 S. C.C. (Cri.) 658; (1973) 4 S.C.C. 17: 1973 Cri. L.R. (S.C.) 64; A I. R. 1973 S.C. 264 (Corroboration is R. 1973 S.C. 264 (Corroboration is a rule of prudence not of law); Public Prosecutor v. Baggu Ram, 1978 Cri. L. J. 1761 (A.P.); 1975 Guj. Cri. R. 134; 1975 Mah. Cri. R. 134; Anam v. V. N. Rajkhowa. 1975 Gri. L. J. 354 (Gauhati); Nalini Ranjan v. Republic of India, 1974 Gut. L. R. (Cri.) 318 (Orissa); State v. Dhanna Ram, 1973 W. L. N. 463; 1973 Raj. L. W. 535; 1974 Cri. L. J. 1123; I. L. R. (1971) 21 Raj. 209; In re Karunakaran. 1975 Cri. L. J. 798 (Mad.); State of Orissa v. Khagpati Majhi, 1973 Cri. L. J. 1699; Kuma v. State, 1975 Cut. L. R. (Cri.) 404 (Orissa); Walia v. The State of Rajasthan, 1976 Raj. Cri. C. 155 (For estab-1976 Raj. Cri. C. 155 (For establishing its truth it is necessary to examine the confession and compare it with the rest of prosecution

T. 121 at pp. 126. 127.

11. Abraham Vargheese v. State of Kerala, A.I.R. 1965 Ker. 175: I.L. R. (1964) 2 Ker. 312.

^{13.} Medu Sekh v. State of Assam, Assam L.R. (1972) Assam 48: 1972

Cri. L.J. 362. I.L.R. (1974) I Delhi 419. Hari Ram v. State, 1972 Cri. L.J.

^{961 (}J. and K.).

16. State v. Suram Singh, 1976 Cri. L.
J. 96 (J. & K.).

17. Male Boroni v. State, Assam L.R
(1971) Assam 59: 1971 Cri. L.J.

State v. Jayadhar. 1975 Cut. L. R. (Cri.) 433: I.L.R. (1975) Cut. 1557.
 Balbir Singh v. State of Punjab. A. I. R. 1957 S.C. 216: 1957 Cr.L.J. 481; Pyare Lal v. State, A.I.R. 1963 S. C. 1094: 1963 A.L.J. 459: 1963 B. L.J.R. 407: 1963 (2) Cr. L.J. 178: 1963 All. W.R. (H.C.) 374; Roshanlal v. Union of India. A.I.R. 1965 H.P. 1.: 1972 Cut. L.R. (Cri) 554; Abdul Ghani v. State of U.P.,

piece of evidence has to be corroborated by other evidence on record.20

When a confession is retracted subsequently, the proper approach is to consider the confession as a whole on its merits and use it against the maker thereof,²¹ only if the Court unhesitatingly comes to the conclusion that it was made voluntarily and was true,22 but the rule of purdence requires that it should be corroborated by independent evidence.23 The reasons for making the confession and for its retraction must be weighed,24 and if the retraction is found to be an afterthought due to ulterior motives, the retraction should not weigh with the Court.25 If the essential part of the retracted confession is corroborated by the prosecution evidence, minor variations between the two are immaterial.1

(i) Extra-judicial confession, if valid, can be acted upon. An extra-judicial confession, if voluntary and true, and made in a fit state of mind, can be relied upon by the Court, along with other evidence, in convicting the accused.2 The confession will have to be proved like any other fact. The value of the evidence as to the confession, like any other evidence, depends upon the veracity of the withness to whom it has been made. The court requires the witness to whom the confession was made to give the actual words used by the accused as nearly as possible; this is not an invariable rule for the court can accept the evidence even if the substance was given. It is for the Court, having regard to the credibility of the witness, his capacity to understand the language in which the accused made the confession, to accept the evidence or not. The Court should accept and act upon the confession, if it is made voluntarily by the accused immediately after the crime to strangers visiting the accused with every token of truthfulness and repentance, even if momentary. But it must be ac-

> evidence and the probabilities of the case); Hukma v. The State of Rajasthan, 1976 Raj. L. W. 150; 1976 W. L. N. 118; I. L. R. (1972) 1 Delhi 788.

20. State v. Dwari, 1976 Cr. L. J. 262:

42 Cut. L. T. 726. 21. Narbahadur v. The State, A. I. R. 1965 Assam 89.

22. Pyare Lal v. State of Rajasthan, A.I.
R. 1963 S.C. 1094; 1963 A. L. J.
459; 1963 B. L. J. R. 407; 1963
(2) Cr. L. J. 178; 1963 All. W.
R. (H.C.) 374.

23. See Dewan Chand v. The State, A. I. R. 1965 Orissa 66; Pyare Lal v. State of Rajasthan, supra; 1975 Mah. Cri. R. 141 (Bom.): 1975 Guj. Cri. R. 141; I. L. R. (1973) Him. Pra, 495: (1974) 1 Cri. L. T. 107 Pra, 495: (1974) I Cri. L. I. 107 (if corroborated in broad and material particulars it can form basis of conviction); (1972) I Cut. L. R. 101; I. L. R. (1972) I Delhi 788; Mazhar Ali and another v. State, 1976 Cri. L. J. 1629 (J. & K): 1976 Kash. L. J. 179; Chet Ram v. The State, 1976 Cri. L. T. 71 (Him Pra.): Bharat v. State. 71 (Him, Pra.); Bharat v. State,

1. L. R. (1971) 2 Ker. 30.
 24. Nika Ram v. State of H. P., 1971 Sim. L. J. (H.P.) 190; 1972 Cri. L. J. 204 (Him. Pra.).
 25. Bharat v. State, I. L. R. (1971) 2 Ker. 30 [(1970) 1 S. C. W. R. 683, relied on]; Nika Ram v. State of H. P., supra.
 1. Darbari Kumar v. State, I. L. R. 1969 Cut. 417: 1970 Cr. L. J. 580; A. I. R. 1970 Orissa 54, 56; State v. Ramachandra, A. I. R. 1965 Orissa 175.

Orissa 175.

2. Mulk Raj v. State of U.P., 1960 A. Mulk Raj v. State of U.P., 1960 A. W. R. (H.G.) 18: 1959 Cr. L. J. 1219: A.I.R. 1959 S.C. 902, 905; Ludra Honsa v. State. 1968 Cr. L.J. 697, 698 (Orissa); Dasaundhi v. The State, (1965) 2 Cr. L.J. 766: A.I. R. 1965 Him, Pra. 68, 70: Budha Kirsani v. State, I.L.R. 1966 Cut. 369: 31 Cut. L. T. 804: (1965) 7 Orissa J.D. 198, 204; Public Prosecutor v. Islavath Fakeeraya, 1967 Andh. W. R. 58: 1967 M. L. J. (Cr.) 115: 1967 Cr. L. J. 1407, 1410; Mulk Raj, v. State, 1969 Cr. L. J. 94, 97 Raj. v. State, 1969 Cr. L. J. 94, 97 (Punjab); 1974 Pun.L.J. (Cr.) 167,

cepted and acted upon as a whole.3 The value of the evidence as to the confession depends on the reliability of the witness who gives the evidence.4 An extra-judicial confession is most often a very weak type of evidence but in certain circumstances it may be of more probative value than it usully is.5 It would be wrong to generalise that extra-judicial confession is a weak type of evidence because its probative value actually depends in the credibility of the witness who comes to prove it. So a confession made to a 2nd Class Magistrate though not under section 164, Criminal P.C. may be relied upon unless considered probable that it was tutored by police.6

It cannot be called a weak evidence if it withstands the following tests--

- (1) is the witness proving the confession generally credible;
- (2) is his relation with the accused such that the latter could confide in him;
- (3) is there any motive for the witness to implicate the accused falsely (the witness might be trying to save himself or someone else by laying the blame on the accused);
- (4) is the confessional statement consistent with other facts and circumstances brought on record.7

The attempt of prosecution to support its case by a false story adversely affects the credibility of the evidence regarding extra-judicial confession.8 Extrajudicial confession inconsistent with medical evidence should not be relied

3. In re Ramayce, A.I.R. 1960 M. 187; Shankar Pandit v. State of Rajasthan, 1970 W.L.N. (Part I) 744: 1971 Raj. L.W. 486 (when there is no other evidence against him); Padmeswar Phukan v State, Assam L.R. (1971) Assam 293: 1971 Cri. L.J. 1595.

4. State of Orissa v. Machindra, A.I.R. 1964 Orissa 100; Joseph v. State of Kerala, 1966 Ker, L. T. 649; 1966 M. L.J. (Cr.) 698; (1975) 2 Cri. L.T. 119 (H.P.) (and upon the facts and circumstances of each case); Santosh Kumari v. State, (1973) 3 Sim. L.J. (H.P.) 103; I.L.R. (1973) H.P. (1973) H.P. 1651 (When 211: 1973 Cri. L.J. the other evidence is scanty, contradictory and discrepant and the witness was a person whose antecedents and integrity were not free from doubt, confession held not proved) 1974 W.L.N. Hanuman v. State, 95: 1974 Raj. L.W 159; Shankar Pandit v. State of Rajasthan, 1970 W. L. N. (Part I) 744: 1971 Raj. L.W. 486 (When such confession was made to superior officers who were responsible military officers having no reason to tell a lie against the accused, it was relied upon).

5. State of M.P. Gangabai, 1971 M.

P.W.R. 443, 447; Jagta v. State of Haryana, 1974 Cri. L.J. 1010; 1974 Cri. L.R. (S.C.) 472: 1974 S.C.C. (Cri.) 657: (1974) 4 S.C.C. 747: (1975) 1 S.C.R. 165: A.I.R. 1974 S. C. 1545; State of Punjab v. Bhajan Singh, 1974 Pun. L.J. (Cri.) 399: 1974 Cri. L.R. (S.C.) 595: 1974 Cri. App. R. (S.C.) 254: 1974 U. J. (S.C.) 597: 1974 S.C. Cri. R. 384: (1974) 2 S.C.W.R. 563: 1975 Cri. L.J. 282: 1975 Cur. L.J. 52: (1975) 2 Cri. L.T. 36: A L.R. (1975) 2 Cri. L.T. 36; A.I.R. 1975 S.C. 256 (the evidence did not inspire confidence); Ismail Ibrahim v. State, 1975 Cri. L.J. 1335 (Goa); Sanatan Bindhani v. State, (1972) 38 Cut. L. T. 428 (may afford corroboration to evidence of witness).

6. Nika Ram v. State of H.P., 1971 Sim L.J. (H.P.) 190: 1972 Cri. L.

J. 204 (Him. Pra.).

7. Prabhakar v. State, 74 Bom. L.R. 299: 1972 Mah. L.J. 583: 1973 Crl. L.J. 246 (Bom.); A. I. R. 1966 S.C. 40 distinguished, and A.I.R. 1957 S.C. 381; A.I.R. 1959 S. C. 18 and A.I.R. 1971 S.C. 1872 18 and A.I.R. 1971 S.C. 1871 relied on).

8. Jagta Singh v. State of Haryana,

Supra.

upon as it would appear not to be true.8-1 Extra-judicial confession made to a person not in authority, if free from suspicion and having a ring of truth may be acted upon.9 Extra-judicial confession made by the accused (a constable of border security force) to the uncle and cousin of his wife, the inspector and the commandant of the force that he had stabbed his wife to death was relied upon by the Supreme Court; because confession was not made to a person in authority, it was free from legal infirmities and the evidence of the uncle and cousin of the wife was considered reliable in the circumstances of the case, although that was the only evidence against the accused.10 In Hardayal v. State of U. P.,11 the Supreme Court observed that extra-judicial confession if proved to have been made truly and voluntarily can be made the basis for conviction. Also in other cases,12 the Supreme Court has observed that if the Court believes the witness to whom extra-judicial confession has been made and is satisfied that confession was voluntary, conviction can be founded on that evidence also, and that the evidence of such confession is not to be treated as tainted evidence and if corroboration is needed it is only by way of abundant caution. Therefore, it is submitted that the cases in which a contrary view has been taken are no longer good law.

Extra-judicial confession are not usually considered with favour but that does not mean that such a confession coming from a person who has no reason to state falsely and to whom it is made in circumstances which tend to support his statement, should not be believed.18 A conviction can be based on an extra-judicial confession if it is found to be reliable and corroborated by other evidence.14 But as pointed out above, corroboration is only a rule of caution and in appropriate circumstances conviction can be founded on the reliable evidence of extra-judicial confession.15

For other cases; see the undermentioned cases. 10

8-1. Union Territory of Mizoram v. Vanalallawama, 1977 Cr. L. J. 1831.

9. Thimma v. State of Mysore, (1970)
2 S.C.C. 105; (1970) 2 S.C.W.R.
122; 1970 S.C. Cri. R. 565; (1971)
1 S.G.J. 721; 1971 Mad. L.J. (Cri.)
336; 1971 Cri. L.J. 1314; (1971) 1
S.C.R. 215; 1970 Cri. App. R. (S.
C.) 327; A.I.R. 1971 S.C. 1871.

10. Darshan Lal v. State of Jammu & Kashmir, (1975) 1 S.C.W.R. 391;
(1975) 4 S.C.C. 33; 1975 Cri. L.J.
774; 1975 S.C. Cri. R. 184; 1975
Cri. App. R. (S.C.) 146; 1975 Cri.
L. R. (S.C.) 1258; 1975 U.J. (S.
C.) 364; A.I.R. 1975 S.C. 898.

11. A.I.R. 1976 S.C. 2055; 1976 S.C.C.
(Cri.) 317; 1976 Cri. L.J. 1578;

(Cri.) 317: 1976 Cri. L.J. 1578;

(1976) 2 S.C.C. 812. 12. Maghar Singh v. State of Punjab, A. I.R. 1975 S.C. 1320; (1975) 1 S.C. W.R. 624; 1975 Cri. L.J. (S.C.) 365: 1975 S.C.C. (Cri.) 479: 1975 Cri. L.J. 1102: 1975 Cur. L.J. 484; Piara Singh v. State of Punjab, A.I. R.1977 S.C. 2274: 1977 Cr. L.J. 1941: (1977) S.C.C. (Cri.) 614: (1977) 4 S.C.C. 452.

13. Ram Singh, v. State of U.P., 1962

Supp. (2) S.C.R. 203: 1962 S.C.D. 733: 1962 (2) S.C.J. 136: 1962 A. L.J. 302: 1962 A.W.R. (H.C.) 230: 1967 Cr. L.J. 9: 1962 M.L.J. (Cr.) 429: A.I.R. 1967 S.C. 152, 154.

 Mangi Lal v. State of Rajasthan,
 1970 Raj, L. W. 1; Gangu Munda v. State of Orissa, 1975 Cut. L. R. (Cr.) 44: 37 Cut. L. T. 595: (1971) 1 Cut. W. R. 836.

15. Moba Singh v. State, 1975 W. L. N. 373 (Raj.) (Existence of dead body and other articles found in the field of accused on his pointing out, and the fact that deceased had visited the accused at the time he may have been done to death fully corroborate the confession); Dhoble v. State of Rajasthan, 1975 Raj. L. W. 279: 1975 W.L.N. 352 (Raj); Hanuman v. State, 1974 W. L. N. 95: 1974 Raj. L.W. 159. 16. Male Boroni v. State, Assam L.R.

(1971) Assam 59: 1971 Cri. L.J. 1263; Kalu v. State, 1973 Kash.L.J. 363: 1973 J. & K. L.R. 822: 1974 Cri.L.J. 839 (J. & K.); Karuna-karan, In re, 1974 M. L. W. 2. Scope and nexus of sections 24 to 30 and relevant provisions of Cr. P. C. In State of U. P. v. Deoman Upadhyaya, 11 their Lordships of the Supreme Court have analysed the scope and nexus of sections 24 to 30 as follows:

"Section 27 of the Evidence Act is one of a group of sections relating to the relevancy of certain forms of admissions made by persons accused of offences. Sections 24 to 30 of the Act deal with admissibility of confessions, i.e., of statements made by a person stating or suggesting that he has committed a crime. By section 24, in a criminal proceeding against a person, a confession made by him is inadmissible, if it appears to the court to have been caused by inducement, threat or promise having reterence to the charge and proceeding from a person in authority. By section 25, there is an absolute ban against proof at the trial of a person accused of an offence of a confession made to a police officer. The ban, which is partial under section 24 and complete under section 25, applies equally, whether or not person, against whom evidence is sought to be led in a criminal trial, was at the time of making the confession in custody. For the ban to be effective, the person need not have been accused of an offence when he made the confession. The expression 'accused person' in section 24 and the expression 'a person accused of any offence' have the same connotation, and describe the person against whom evidence is sought to be led in a criminal proceeding. As observed in Pakala Narayan Swami v. Emperor18 by the Judicial Committee of the Privy Council, section 25 covers a confession made to a police officer before any investigation has begun or otherwise not in the course of an investigation. The adjectival clause 'accused of any offence' is therefore descriptive of the person against whom a confessional statement made by him is declared not provable, and does not predicate a condition of that person at the time of making the statement for the applicability of the ban."

In Aghnoo Nagesia v. State of Bihar,19 the Supreme Court has observed:

"The law relating to confessions is to be found generally in sections 24 to 30 of the Evidence Act and sections 162 and 164 of the Code of Criminal Procedure. Sections 17 to 31 of the Evidence Act are to be found under the heading 'Admissions'. Confession is a species of admission, and is dealt with in Sections 24 to 30. A confession or an admission is evidence against the maker of it, unless its admissibility is excluded by some provision of law. Section 24 excludes confessions caused by certain inducements, threats and promises. Section 25 provides: 'No confession made to a police officer shall be proved as against a person accused of an offence.' The terms of section 25 are impera-

 L.R. 66 I.A. 66: I.L.R. 18 Pat, 234: 180 I.C. 1: A.I.R. 1939 P. C. 47.

⁽Cri.) 190: 1975 M, L. J. (Cri.) 106: (1975) 1 M. L. J. 209: 1975 Cri, L.J. 798; State of Orissa v. Jagadhar alias Raidhar Harijan, 1975 Cut. L. R. (Cri.) 433: I. L. R. (1975) Cut. 1557; Krishna Chandra Das v. State of Orissa. (1974) 40 Cut. L. T. 650; 1975 W.L.N. (U.C.) 235 (Raj.); 1972 Cut. L.R. (Cri.) 587 (Orissa); Ambika Dei v. State, (1974) 40 Cut. L. T. 1177; 1974 Cut. L. R. (Cri.) 334; Herbetus Oram v.

State, (1971) 37 Cut, L.T. 477: (1971) 1 Cut. W. R. 960; Mobasingh v. State, 1975 W. L. N. 373 (Raj.).

^{17.} A.I.R. 1960 S.C. 1125, 1129: (1960) 2 S.C.A. 371: 1960 A.L.J. 732: 1960 Cr. L.J. 1504: 1960 All. W.R. (H.C.) 568.

C. 47. 19. (1965) 2 S.C.A. 367; A. I. R. 1966 S.C. 119; 1965 M.W.N. 216; 1965

tive. A confession made to a police officer under any circumstances is not admissible in evidence against the accused. It covers a confession made when he was free and not in police custody, as also a confession made before any investigation had begun. The expression 'accused of any offence covers a person accused of an offence at the trial, whether or not he was accused of the offence when he made the confession. Section 26 prohibits proof against any person of a confession made by him in the custody of a police officer, unless it is made in the immediate presence of a Magistrate. The partial ban imposed by section 26 relates to a confession made to a person other than a police officer. Section 26 does not qualify the absolute ban imposed by Sec. 25 on a confession made to a police officer. Section 27 is in the form of a proviso, and partially lifts the ban imposed by sections 24, 25 and 26. It provides that when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved. Section 162 of the Code of Criminal Procedure forbids the use of any statement made by any person to a police officer in the course of an investigation for any purpose at any enquiry or trial in respect of the offence under investigation, save as mentioned in the proviso and in cases falling under sub-section (2), and it specifically provides that nothing in it shall be deemed to affect the provisions of section 27 of the Evidence Act. The words of Section 162 are wide enough to include a confession made to a police officer in the course of an investigation. A statement or confession made in the course of an investigation may be recorded by a Magistrate under section 164 of the Code of Criminal Procedure subject to safeguards imposed by the section. Thus, except as provided by section 27 of the Evidence Act, a confession by an accused to a police officer is absolutely protected under section 25 of the Evidence Act, and if it is made in the course of an investigation, it is also protected by section 162 of the Code of Criminal Procedure and a confession to any other person made by him while in the custody of a police officer is protected by section 26, unless it is made in the immediate presence of a Magistrate. These provisions seem to proceed upon the view that confessions made by an accused to a police officer or made by him while he is in the custody of a police officer are not to be trusted, and should not be used in evidence against him. They are based upon grounds of public policy, and the fullest effect should be given to them."

Section 151 of the Code of Criminal Procedure, 1973 provides for the recording of the first information. The information report as such is not substantive evidence. It may be used to corroborate the informant under section 157 of the Evidence Act or to contradict him under section 115 of the Act, if the informant is called as a witness. If the first information is given by the accused himself, the fact of his giving the information is admissible against him as evidence of his conduct under section 8 of the Evidence Act. If the information is a non-confessional statement, it is admissible against the accused as an admission under section 21 of the Evidence Act and is relevant.²⁰ But a confessional

All, W.R. (H.C.) 648: 1965 B.L. J.R. 865: 1966 M.P.L.J. 49: 1966 Mah.L.J. 113: 1966 M.L.J. (Cr.) 134.

^{20.} See Faddi v. State of Madhya Pradesh, Cri. Appeal, No. 210 of 1963 dated 24-1-64; A.I.R. 1964 S.

C. 1850: 1964 Jab L.J. 252: 1964 M. P.L.J. 609: 1964 Mah L.J. 519: 1964 (2) Cr. L.J. 744—explaining Nisar Ali v. State of U.P., A.I.R. 1957 S.C. 366 and Dal Singh v. King-Emperor. 44 J.A. 137; A. J. R. 1917 P.C. 25:

first information report to a Police Officer cannot be used against the accused in view of section 25 of the Evidence Act.

A proof of the confession being excluded by provisions of law, such as sections 24, 25 or 26 of the Act, the entire confessional statement, in all its parts, including the admissions of minor incriminating facts, must also be excluded, unless proof of it is permitted by some other section, such as section 27. Little substance and content would be left in sections 24 and 26, if proof of admissions of incriminating facts in a confessional statement were permitted.21

If the confession is caused by inducement, threat or promise, as contemplated by section 24, the whole of the confession is excluded by this section, which excludes proof of all the admissions of incriminating facts contained in a confessional statement.22 Similarly, sections 25 and 26 bar not only proof of admissions of an offence by an accused to a police officer or made by him while in the custody of a police officer, but also admissions, contained in the confessional statement of all incriminating facts relating to the offence.23

Sections 24 to 30 refer to the confessional statements as a whole, including not only the admissions of the offence but also all other admissions of incriminating facts relating to the offence. Section 27 partially lifts the ban imposed by sections 24, 25 and 26 in respect of so much of the information, whether it amounts to a confession or not, as relates distinctly to the facts discovered in consequence of the information, if the other conditions of the section are satisfied. Section 27 distictly contemplates that an information leading to a discovery may be a part of the confession of the accused and thus fall within the purview of sections 24, 25 and 26. Section 27 thus shows that a confessional statement admitting the offence may contain additional information as part of the confession. Again, section 30 permits the Court to take into consideration against a co-accused a confession of another accused affecting not only himself but the other co-accused. Section 30 thus shows that matter affecting other persons may form part of the confession.24

If the first information is given by the accused to a police officer and amounts to a confessional statement, proof of the confession is prohibited by section 25. The confession includes not only the admissions of the offence but all other admissions of incriminating facts relating to the offence contained in the confessional statement. No part of the confessional statement is receivable in evidence except to the extent that the ban of section 25 is lifted by Section 27.25

A confessional first information report given by an accused is not receivable in evidence against him. Even if a part of the report is properly severable from the strict confessional part, the severable parts cannot be tendered in evidence. The entire confessional statement is hit by section 25 and save and except as provided by section 27 and save and except the formal part identifying the accused as the maker of the report, no part of it can be tendered in evidence.1

Aghnoo Nagesia v. State of Bihar, (1965) 2 S.C.A. 367: A. I. R. 1966 S.C. 119; 1965 M. W. N. 216. 24. Ibid.

^{25.} Ibid. Ibid.

Section 27 applies only to information received from a person accused of an offence in the custody of a police officer. On the question, whether a person directly giving to police officer information which may be used as evidence against him may be deemed to have submitted himself to the custody of the police officer within the meaning of section 27, there is conflict of opinion.² But, if it can be held that the accused was constructively in police custody, the information contained in the first information report relating to the discovery of facts in consequence of the information, is admissible in evidence.³

Section 27 is founded on the principle that even though the evidence, relating to confessional or other statements made by a person, whilst he is in the custody of a police officer, is tainted and therefore inadmissible, if the truth of the information given by him is assured by the discovery of a fact, it may be presumed to be untainted, and is, therefore, declared provable in so far as it distinctly relates to the fact thereby discovered. Even though section 27 is in the form of a proviso to section 26, the two sections do not necessarily deal with evidence of the same character. The ban imposed by section 26 is against the proof of confessional statements. Section 27 is concerned with the proof of information, whether it amounts to a confession or not, which leads to discovery of facts. By section 27, even if a fact is deposed to as discovered in consequence of information received, only that much of the information is admissible as distinctly relates to the fact discovered. By section 26, a confession made in the presence of a Magistrate is made provable in its entirety.

Section 162 of the Code of Criminal Procedure also enacts a rule of evidence. This section prohibits but not so as to affect the admissibility of information to the extent permissible under section 27 of the Evidence Act, use of statements by any person to a police officer in the course of an investigation under Chapter XIV of the Code of 1898 (Chapter XII of the Code of 1973), in any enquiry or trial in which such person is charged for any offence, under investigation at the time when the statement was made.

On an analysis of sections 24 to 27 of the Act, and the relevant sections of the Code of Criminal Procedure, the following material propositions emerge:

- (a) Whether a person is in custody or outside, a confession made by him to a police officer or the making of which is procured by any inducement, threat or promise, having reference to the charge against him and proceeding from a person in authority, is not provable against him in any proceeding in which he is charged with the commission of an offence.
- (b) A confession made by a person, whilst he is in the custody of a police officer, to a person other than a police officer, is not provable in a proceeding in which he is charged with the commission of an offence, unless it is made in the immediate presence of a Magistrate.

See the observations of Shah, J. and Subba Rao J. in State of U.P. v. Deoman Upadhyaya, (1961) 1 S. C. R. 14; A.I.R. 1960 S.C. 1125; 1960 All, L.J. 733; 1960 Cri. L.J.

 ^{1504; 1960} All. W.R. (H.C.) 568.
 Aghnoo Nagesia v. State of Bihar, (1965) 2 S. C. A. 367; A. I. R. 1966 S.C. 119; 1965 M. W. N. 216.

- (c) That part of the information given by a person whilst in police custody, whether the information is confessional or otherwise, which distinctly relates to the fact thereby discovered but no more, is provable in a proceeding in which he is charged with the commission of an offence.
- (d) A statement, whether it amounts to a confession or not, if made by a person, when he is not in custody, to another person, such latter person not being a police officer, may be proved, if it is otherwise relevant.
- (e) A statement made by a person to a police officer in the course of an investigation of an offence under Chapter XIV of the Code of Criminal Procedure of 1898 (Chapter XII of the Code of 1973) cannot, except to the extent permitted by section 27 of the Indian Evidence Act, be used for any purpose at any enquiry or trial, in respect of any offence under investigation at the time when the statement was made, in which he is concerned as a person accused of an offence.

A confession made by a person, not in custody, is, therefore, admissible in evidence against him in a criminal proceeding, unless it is procured in the manner described in section 24, or is made to a police officer. A statement made by a person, if it is not confessional, is provable in all proceedings unless it is made to a police officer in the course of an investigation, and the proceeding in which it is sought to be proved is one for the trial of that person for the offence under investigation when he made that statement. Whereas information given by a person in custody is, to the extent to which it distinctly relates to a fact thereby discovered, made provable by section 27, yet by section 162 of the Code of Criminal Procedure such information given by a person, not in custody, to a police officer in the course of the investigation of an offence is not provable. This distinction may appear to be somewhat paradoxical. Sections 25 and 26 were enacted not because the law presumed the statements to be untrue, but having regard to the tainted nature of the source of the evidence, the law prohibited them from being received in evidence.

When a person not in custody approaches a police officer investigating an offence and offers to give information leading to the discovery of a fact, having a bearing on the charge which may be made against him, he may appropriately be deemed to have surrendered himself to the police. Section 46 of the Code of Criminal Procedure does not contemplate any formality before a person can be said to be taken in custody; submission to the custody by word or action by a person is sufficient. A person directly giving to a police officer, by word of mouth, information which may be used as evidence against him, may be deemed to have submitted himself to the "custody" of the police officer within the meaning of section 27 of the Indian Evidence Act. Exceptional cases may certainly be imagined in which a person may give information without presenting himself before a police officer who is investigating an offence. For instance, he may write a letter and give such information or may send a telephonic or other message to the police officer.

Legal Remembrancer v. Lalit Mohan Singh, I.L.R. 49 Cal, 167;
 A.I.R. 1922 Cal. 342; 22 Ct. L.J. 562; Santokhi Beldar v. King Em-

peror, I.I., R. (1933) 12 Pat. 241; A. I. R. 1933 Pat. 149; 34 Cr.L.J. 349; 142 I.C. 474.

The Deputy Superintendent of Customs and Excise is not a police officer within the meaning of section 25 post. A statement made by an accused to such an officer is not hit by that section and is admissible in evidence unless. the accused can take advantage of the present section.5

3. Principle of this section. The ground upon which confessions, like other admissions, are received, is the presumption that no person will voluntarily make a statement which is against his interest, unless it be true.6 But the force of the confession depends upon its voluntary character.7 The object of the rule, relating to the exclusion of confessions, is to exclude all confessions which may have been improperly procured, by the prisoner being led to suppose that it will be better for him to admit himself to be guilty of an offence which he really never committed.8 There is a danger that the accused may be led to incriminate himself falsely. The principle upon which confessions are excluded, is that it is, under certain conditions, untrustworthy testimony.9 Under certain stresses, a person, specially one of defective mentality or peculiar temperament, may falsely acknowledge guilt. This possibility arises wherever the innocent person is placed in such a situation that the untrue acknowledgment of guilt is, at the time, the more promising of two alternatives between which he is obliged to choose; that is, he chooses any risk that may be in falsely acknowledging guilt, in preference to some worse alternative associated with silence.10 The rule, excluding evidence of statements made by a prisoner when induced by hope held out or fear inspired by a person in authority is a rule of policy.11 A confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape, when it is to be considered as evidence of guilt, that no credit ought to be given to it.12 It is not that the law presumed such statements to be untrue, but from the danger of receiving such evidence, that Judges have thought it better to reject it for the due administration of justice. 13

Moreover, the admission of such evidence naturally leads the agents of the police, while seeking to obtain a character for activity and zeal, to harass

^{5.} Badku Joti Savant v, State of Mysore, (1966) 3 S.C.R. 698: (1966) 2 S.C.A. 77; (1967) 1 S. C. J. 701; (1966) 2 S.C.W.R. 154: 1967 M.L.J. (Cr.) 38; 1966 Cr. L. J. 1353; A.I.R. 1966 S.C. 1746, 1750; The Superintendent, Central Excise. Bangalore v. U. N. Malaviya, (1968) 1 Mys L.J. 17, 19; (1967) 10 Law Rep. 46; 1967 M.L.J. (Cr.) 509.

^{6.} Taylor, Ev., s. 865; Phillips and Arn., Ev., 401; Best. Ev., 524; Wills, Ev., 102; R. v. Turner, (1910) 1 K. B.

^{7.} Taylor, Ev., Ss. 872, 874 see remarks in R. v. Thompson, L. R. (1893) 2 Q.B. 12 at p. 15.

^{8.} Russ. Cr. 442; per Littledale, J., in R. v. Court, (1836) 7 C. & P. 486; but in R. v. Baldry, (1852) 2 Den., C. C. 430 Lord Campbell, C. J. said: "The reason is not that the law supposes what he will state will

be false but that the prisoner has made the confession under a bias, and that, therefore, it would be better not to submit it to the jury." But see also Lord Campbell's dictum, in R. v. Scott, (1856) 1 D. & B. 37, 48, and Taylor, Ev., S. 874: R. v. Nabadwip Goswami, (1868) 1 B. L. R. O. Cr. 15, 22, 25; R. v. Thomas, (1836) 7 C. & P. 345. 9. Wigmore, Ev., s. 822; Sukhan v. Emperor, 1929 Lah. 344 at 347;

I. L. R. 10 Lah, 283; 115 I. C. 6: 30 Cr. L. J. 414 (F.B.).

10. Wigmore, Ev., s. 822.

^{11.} Ibrahim v. King-Emperor, 1914 P. C. 155 at p. 160; 23 I. C. 678; 15 Cr. L. J. 326; 18 C. W. N. 705; 1 L. W. 989.

C. C. 263: 2 East P. C. 658.

13. Reg. v. Baldry. (1852) 2 Den. C.
C. R. 430: 21 L. J. M. C. 130: 5
Cox. C. C. 523: 16 Jur. 599.

and oppress prisoners, in the hope of wringling from them a reluctant confession.14

The reports show that many confessions are induced by improper means; and that innocent people often accuse themselves falsely without any apparent reason. Conspiracies to ruin people by false charges are not uncommon.15

- 4. Conditions for validity and admissibility of confessious. Confessions, like other admissions, are relevant and admissible, unless rendered inadmissible by some circumstance of an invalidating character declared by law, as, for instance, they are invalid or fall within the mischief of any of the Sections of this Act, or are hit by any other provisions of law. Thus, a confession is inadmissible, if-
 - (a) it is made by an accused person to a person in authority; and
- (b) it appears to the Court that it has been caused or obtained by reason of any inducement, threat or promise proceeding from the person in authority, and
- (c) the inducement, threat or promise has reference to the charge against the accused person, and
- (d) such inducement, threat or promise is, in the opinion of the Court, such that it appears to it that the accused in making the confession believed or supposed that he would, by making it, gain any advantage or avoid any evil of a temporal nature, in reference to the proceedings against him.16 They must be voluntary,17 and true,18 and they must not be the result of persuasion,19 Further they must not be made under any inducement etc. proceeding from a police officer or any other person in authority. A statement by accused, before arrest and investigation, to a Magistrate which is exculpatory but contains features which are in the naure of admissions, may be relied upon against the accused.20
- 5. Appears to the Court. The use of the word "appears" shows that this section does not require positive proof (within the definition of the third section) of improper inducement to justify the rejection of the confession; such word indicating a lesser degree of probability than would be necessary if "proof" had been required.21 A confession may appear to the Judge to have been the result of inducement on the face of it, apart from direct proof of that fact; or a Court might, in a particular case, fairly hesitate

^{14.} Taylor; Ev., s. 874.

^{15.} Queen-Empress v. Dada Ana, I. L.

^{15.} Queen-Empress V. Dada Ana, I. L.
R. 15 Bom. 452, 461.

16. Laxman v. The State, I. L. R.
1965 B. 648; A. I. R. 1965 B.
195: 67 Bom. L. R. 317, See also
Pyarelal Bhargava v. State of Rajasthan. (1963) 1 S. C. R. 689;
1963 S. C. D. 341; 1963 A. L. J.
459: 1963 A. W. R. (H.C.) 374;
1963 B. L. J. R. 407; 1963 (2) Cr. 1963 B. L. J. R. 407; 1963 (2) Cr. L. J. 178; A. I. R. 1963 S. C. 1094 at p. 1096; Rajkishôre Bhuyan v. State, (1969) 85 Cut. L. T. 513: 1969 Cr. L. J. 995: A. I. R. 1969 Orissa 190 at pp. 193, 194.

^{17.} Mulk Raj v. State of U. P., A. I. R. 1959 S. C. 902: 1959 Cr. L. J. 1219: 1960 All. W. R. (H.C.) 118. 18. In re Ramayee, A. 1. R. 1960 M.

^{187.} 19. Sri Manta v. State A. I. R. 1960 C. 519.

^{20.} In re Y. Narasimha, A. I. R. 1966 A. P. 131: (1965) 2 Andh. W. R. 344.

^{21.} R. v. Basvanta, 25 B. 168: 2 Bom. L. R. 761. On this and what follows see the able article by "Lex" in in 2 Bom. L. R. 157, as also an article by another contributor at p. 217.

to say that it was proved that the confession had been unlawfully obtained, and yet might be in a position to say that such appeared to it to have been the case.²²

The crucial word in the expression "if the making of the confession appears to the Court to have been caused by any inducement. " is "appears". The appropriate meaning of the word "appears" is "seems". Therefore, the test of proof, that there is such a high degree of probability that a prudent man would act on the assumption that the thing is true, is waived under this Section, and a lesser degree of assurance is laid down as the criterion. The standard of a prudent man is not completely displaced, but the stringent rule of proof is relaxed. Even so, the laxity of proof permitted does not warrant a court's opinion based on pure surmise. A prima facie opinion based on evidence and circumstances may be adopted as the standard laid down. In other words, on the evidence and the circumstances, in a particular case, it may appear to the Court that there was a threat, inducement or promise, though the said fact is not strictly proved. This deviation from the strict standards of proof seems to have been designedly accepted by the Legislature with a view to exclude forced or induced confessions, which, sometimes, are extorted and put in. It is not possible to lay down an inflexible standard for guidance of Courts, for, in the ultimate analysis, it is the Court which is called upon to exclude a confession by holding, in the circumstances of a particular case, that the confession was not made volun-. tarily.23 The word 'appears' imports a lesser degree of probability than proof of beating or pressure on the accused. He must, however, point out some evidence or circumstances on which a conjecture of pressure may be grounded or reasonably be based.24 A mere bald assertion by the accused that he was threatened, tutored or that inducement was offered to him, cannot be accepted as true without more.25

The section does not require proof as defined in Section 3. Well-grounded conjecture is sufficient. And if there is doubt, then the prosecution must satisfy the Court that the confession was voluntary. To reject a confession, it is not necessary that there should be positive proof to establish

^{22.} R. v. Basvanta, 25 B. 168; 2
Bom. L. R. 761; see also
Raggha v. R., 1925 All. 627; 89 I.
C. 903; 26 Cr. L. J. 1431; 23 All.
L. J. 821 (F. B.); Mst. Bhagan v.
State of Pepsu. 1955 Pepsu 33; Nazir
v. Emperor, 55 All. 91; 143 I. C. 67;
34 Cr. L. J. 489; 1932 A. L. J.
1125.

^{28.} Pyare Lal Bhargava v. State of Rajasthan, (1963) 1 S. C. R. 689: 1963 S. C. D. 341: 1963 A. L. J. 459: 1963 A. W. R. (H.C.) 374: 1963 B. L. J. R. 407: 1963 (2) Cr. L. J. 178: A. I. R. 1963 S. C. 1094, at p. 1095; State of Mysore v. D. C. Nanjappa, (1968) 1 Mys. L. J. 457, 462, confirmed in D. C. Nanjappa v. State of Mysore, 1971 S. C. Cr. R. 374.

^{24.} Roshan Lal v. Union of India, A.

I. R. 1965 Him. Pra. 1.

Hem Raj Devilal v. State of Ajmer, 1954 S. C. R. 1133; 1955 S. C. A. 50; 1954 S. C. J. 449; 1954 A. W. R. (Sup.) 49; (1954) 1 M. L. J. 694; (1954) 1 M. W. N. 468; 1954 Cr. L. J. 1313; A. I. R. 1954 S. C. 462; Harbans Lal v. State, 1967 Cr. L. J. 62; A. I. R. 1967 Him. Pra. 10.

R. v. Panchkari, 1929 Cal. 587;
 I. L. R. 52 Cal. 67; 86 I. C. 414;
 26 Cr. L. J. 782; 29 C. W. N. 300;
 Mst. Bhagan v. State of Pepsu, 1955
 Pepsu 33; Mst. Bhukhin v. Emperor, 1948 Nag. 344; I. L. R. 1948
 Nag. 147; 49 Cr. L. J. 561; 1948
 N. L. J. 489; sée, however, Krishna v. State, A. I. R. 1958 Pat. 166; 1958 Cr. L. J. 400.

that the confession has been obtained by use of threat, persuasions, etc. Anything from the barest suspicion to positive evidence would be enough for a confession being discarded.2 If circumstances create a probability in the mind of the Court that the confession was improperly obtained, it should exclude it from evidence.3 If it appears to the Court from the circumstances of a particular case, that the confession has not been made voluntarily, it must reject it as irrelevant. Such circumstances should be presumed to exist, in cases, where an accused person in police custody makes a confession.4

6. Burden of proof. Procedure in recording confessions. England, the case-law has not been uniform. On the one hand, it has been held that a confession is presumed to be voluntary, unless the contrary is shown,5 with the result that it is prima facie admissible, and can only be excluded, when it is proved or made to appear that the confession was not voluntary. On the other hand, it has been held that the material question is, whether a confession has been obtained by improper inducement; and the evidence on this point, being in its nature preliminary, is addressed to the Judge who should require the prosecutor to show affirmatively to his satisfaction, that the statement was not made under the influence of an improper inducement, and who, in the event of any doubt subsisting on this head, should reject the confession.6 In R. v. Thompson,7 the headnote of the report states the decision to be that in order that evidence of a confession by a prisoner may be admissible, it must be affirmatively proved that such confession was free and voluntary, and this view has been adopted in Roscoe on Criminal Evidence.8 No doubt, the Court stated that the test by which the admissibility of a confession may be decided was-had it been proved affirmatively that the confession was free and voluntary.9 But the proposition in the headnote appears, when the whole case is considered, to be too broadly laid down. In this case, it is stated; that there was ground for suspicion,10 and Cave, J., who delivered the judgment of the Court, says later on,11 "I prefer to put my judgment on the ground that it is the duty of the prosecution to prove, in case of doubt, that the prisoner's statement was free and voluntary."

In Ibrahim v. Emperor,12 their Lordships of the Privy Council reviewed the case-law, and observed:

"It has long been established, as a positive rule of English Criminal Law, that no statement by an accused is admissible in evidence against him unless

^{2.} Raggha v. Emperor, 1925 All. 627

at p. 635 (F.B.) per Mukherji, J.: 89 I. C. 903.

3. Nazir v. Emperor, 1933 All. 31; I. L. R. 55 All. 91: 143 I. C. 67; 34 Cr. L. J. 489: 1932 A. L. J. 1125; Emperor v. Thakurdas Malo, 1943 Cal. 625: I. L. R. (1943) 1 Cal. 487: 209 I. C. 550: 45 Cr. L. J. 487; 209 I. C. 550; 45 Cr. L. J.

The King v. Saw Min, 1939 Rang. 219: 182 I. C. 705: 40 Cr. L. J.

^{5.} R. v. Williams, 3 Russ. Cr. 497; see also R. v. Clewes, (1830) 4 C. & P. 221; R. v. Swathins, (1831) 4 C. & P. 548: Roscoe, Cr. Ev., 16th Ed., 47.

^{6.} R. v. Warringham, (1851) 2 Den. C. C. 447n where Parke B., said to counsel for the prosecution: "You are bound to satisfy me that the confession which you seek to use against the prisoner was not obtained from him by improper means." Taylor, Ev., s. 872.

^{7. (1893) 2} Q. B. 12.

^{8.} l6th Ed., p. 47. 9. R. v. Thompson, (1893) 2 Q. B. 12 at p. 17.

^{10.} Ib. at p. 17. 11. Ib. at p. 18. 12. 1914 P. C. 155: 1914 A. C. 599: 23 I. C. 678: 15 Cr. L. J. 326: 18 C. W. N. 705: 1 L. W. 989.

it is shown by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority. The principle is as old as Lord Hale. The burden of proof in the matter has been decided by high authority in recent times."

It seems settled that the question of voluntariness lies upon the prosecution to establish, and not upon the accused to negative, it being the duty of the prosecution to satisfy itself thereon before putting the statement in.13 The accused is entitled, at this stage, to give evidence in support of the objection.14 The decision of the judge is only as to its admission and not to its weight. Consequently, although admitted, the defence can cross-examine and give evidence about the matters not accepted by the Judge in order to destroy or minimise the weight of the confession.15

It has been said that this section was intended merely to reproduce the English Law, and that the word "appears" occurs in Art. 22 of Sir James Fitzjames Stephen's Digest of the Law of Evidence as it does in this section. However this may be the law of this country as contained in the present section, which must be fairly construed according to its language, in order to ascertain what that law is 16

As regards judicial confessions, the Criminal Procedure Code contains provisions as to the manner in which they should be recorded. Confessions of accused persons recorded by Magistrates are admissible in evidence subject only to the provisions of Secs. 164 and 364 of the Criminal Procedure Code of 1898 (sections 164 and 281 of the Code of 1973). The first of these sections provides that any Magistrate, not being a police officer, may record a confession made to him, while a case is under investigation by the police, or at any time afterwards before the commencement of the enquiry (preliminary to committal to the Court of Session) or trial. Such confessions must be recorded and signed in the manner provided in Sec. 364 of the Code of 1898 (section 281 of the Code of 1973). The Magistrate referred to in Sec. 164 is a Magistrate other than the Magistrate by whom the case is to be inquired into or tried.17 If the confession is made before a competent Magistrate who is making the preliminary enquiry, it is sufficient if the provisions of Sec. 364 (Section 281 of New

R. v. Thompson, (1893) 2 Q. B.
 R. v. Rose, 18 Cox. 717; Ibrahim v. R., 1914 P. C. 155.
 R. v. Cowell, (1940) 2 K. B. 49; and see R. v. Hammond, (1941) 3 All. E. R. 318; R. v. Baldwin, (1931) 23 Cr. App. R. 62, is not an authority to the contrary.

R. v. Murray, (1951) 1 K. B. 391.
 Queen-Empress v. Basvania, I. L. R. (1900) 25 Bom. 168, 172; 2 Bom.

I. R. 761.

17. R. v. Jetoo, (1875) 23 W. R. Cr. 16; In re Behari, (1879) 5 C.L.R. 239; Krisho v. R., (1880) 6 C. L.

R. 289; R. v. Anuntram, 5 C. 954. (F.B.) followed in R. v. Yakub, (1883) 5 A. 253; the provisions of S. 164, however, have no application to statements taken in the course of a police investigation in the town of Calcutta; R. v. Nilmadhub, (1888) 15 C. 595; followed in R. v. Vishram. (1896) 21 B. 495. A Deputy Magistrate should not act as Magistrate in a case in which he is himself the prosecutor and takes confessions of prisoners before himself, R. v. Boidnath, (1865) 3 W. R. Cr. 29.

Code) are complied with.18 But a record is unnecessary, when a confession is made in Court to the officer trying the case at the time of trial where the accused can be convicted on the plea of guilty.19 It is important that a Magistrate, before recording the confession of an accused person then in custody of the police, should ascertain how long the accused has been in custody. If there is no record of that fact the Sessions Judge, before holding the confession relevant under the twenty-fourth section, should send for the Magistrate and satisfy himself on the point.20 The duty of every Court is to inquire very carefully into all the circumstances which led to the making of the confession, and the length of time during which an accused person is in police custody before he makes his confession is an important element for the consideration of the Court in reference to the admissibility of the confession.21 Prolonged custody preceding the making of the confession is sufficient, unless it is properly explained, to stamp the confession as involuntary.22

The general procedure followed in Madras and other States for regular recording of confessional statements, to assure voluntariness and ensure admissibility is as follows:

- (1) An accused desiring to make a confessional statement is produced before a competent Magistrate preferably in the court-house and during working hours by the police escort, if he had not been remanded already, or from the sub-jail on police requisition to record confessional statement.23
- (2) The court-house is cleared of all Police Officers and the co-accused and the hand-cuffs are got removed and a calm atmosphere is ensured. Though all the accused expected to confess must normally be sent up together, their confessions should be recorded one after another and without interval and when the statement of one accused is recorded the other accused should not be present. Brief examination by the Magistrate to assure himself that (i) the accused wants to make a statement, and (ii) bears on his person no marks of ill-treatment, and (iii) has no complaint to make of pressure, inducement, etc., then takes place. Then the Magistrate warns the accused that he is not bound to make a confessional statement and that if he does so it might be used in evidence against him later and if there is more than one accused in the case it is not intended to take him as an approver and that time will be given to him to reflect over the matter. The Magistrate then and there makes a note of what he had done. The warning in terms of Sec. 164 (2), Cr.P.C. is mandatory.24

nal Rules of Practice, Madras (193)

24. See Rules 85 (1). Criminal Rules o

Krishna v. R., (1880) 6 C. L. R. 289; R. v. Anuntram, 5 C. 954; R. v. Yakub, (1883) 5 A. 253.

^{19.} In re: Chumman. (1878) 3 G. 756.

R. v. Narayan, (1901) 25 B. 543.
 Emperor v. Bhagwandas Bisesar, 1941 Bom. 50, 52; I. L. R. 1941 Bom. 27; 192 I. C. 671; 42 Bom. L. R. 938.

Nathu v. State of U. P., 1956 Cr. L. J. 152; A. I. R. 1956 S. C. 56, 59; Abdul Rajak Murtaja Dafadar v. State of Maharashtra, (1970) 1 S. C. R. 551; (1970) 1 S. C. J. 870;

¹⁹⁷⁰ A. W. R. (H.C.) 43: 72 Bom, L. R. 646: 1970 M. P. L. J. 931: 1970 M. L. J. (Cr.) 862: 1970 Mah. L. J. 747: 1970 Cr. L. J. 373: A. I, R. 1970 S. C. 283 286; Abdul Subhan v. Emperor 1940 All. 46; 186 I. C. 192; 1939 A. L. J. 966; Hari Ram v. State 1972 Cr. L. J. 961 (J. & K.). 23. See Rules 84 and 85 of the Crimi

- (3) The accused is remanded to the sub-jail with instructions to the Sub-
- il Superintendent who is generally the Stationary Sub-Magistrate himself to ep the prisoner separate from other prisoners and cut off all access to the plice investigating the case25 and normally one day's time is given for reflection.
- (4) On the appointed day, when the accused is produced after the interval Court and during working hours, the Magistrate once again asks him if he ishes to make a confessional statement and if the accused says 'yes', he is ace again warned that he is not bound to make a confessional statement and nat if he does so it might be used as evidence against him and that it is not stended to take him as an approver and if the accused still states that he rants to make a statement, the Magistrate puts to him the questions set out 1 the Criminal Rules of Practice of the Madras High Court1 and similar rders of other High Courts and records the questions and answers. If the fagistrate is satisfied both from the answers and the demeanour of the acused that the statement of the accused is going to make will be a voluntary nd not a tutored or enforced one, the Magistrate records this satisfaction of is in continuation thereof and proceeds to take down the statement in the parrative form; see Rule 85 of the Criminal Rules of Practice. The quesions, assurances and the answers may conveniently be appended to the memoandum prescribed by Sec. 164 (4), Criminal Procedure Code.2 The confesions must be recorded in the language in which it is received, or if that is ot practicable in the language of the Court, or in English.
- (5) After recording the statement the Magistrate reads it and if necesary gets it interpreted to the accused and if it is admitted by him to be corect, his thumb-impression or signature is got affixed thereto. The Magisrate then signs the record and certifies it as prescribed and appends the memoandum prescribed under Sec. 164, Criminal Procedure Code, to the foot of the statement. The entire record will thus consist of (i) note regarding the warning given to the prisoner and the time given for reflection on his first production in pursuance of requisition to record confessional statement; (ii) note regarding the warning given to prisoner when produced after interval, the questions put to him and the answers given by him; (iii) the note of the Magistrate that he is satisfied that the confession was going to be made voluntarily; (iv) the confessional statement in the narrative form; (v) the certification of the deposition; and (vi) the memorandum appended to the foot of the statement. The accused who has either made a confessional statement or eclined to make one should be returned to the jail and not sent back to olice custody.

These rules, which at first sight may appear complicated and grandotherly, are based upon sound reasons, as has been pointed out in the casew on the subject. Jeremy Bentham has pointed out: "If the laws were nstantly accompanied by a commentary of reasons they would be more

^{25.} R. 86, Criminal Rules of Practice, Madras (1931 Ed.).

^{1.} Rule 85 (1) and (2).

^{2.} Rule 85 (2) latter part, Criminal Rules of Practice, and S. 281 (1), Criminal Procedure Code.

pleasantly stated, more easily known, more constantly retained, more cordially approved": we shall briefly set out the reason for these rules as expounded by our courts. The rule that the prisoner should not be produced at unusual hours and outside court-premises is based upon the anxiety of the police to get the statement of the accused recorded even at late hours in the night and in the houses and muzafar bungalows occupied by Magistrates, might be consistent with their being nervous that, by the morning or given time, the accused might go back on his promise to make a clean breast of the affair. It may indicate shock tactics on the part of the police which must be severely discouraged, as confessions to be of value must be both voluntary and stuck to and not obtained by unfair methods".3 The precaution about all the accused expected to confess having to be sent up together and the confession of each being recorded one after another without interval and in the absence of the other co-accused is based upon the fact that, if confessions of the accused who have all been apprehended are recorded piece-meal and separated by time, this may raise a strong suspicion that pressure was being exerted on the subsequent accused confessing to follow the example of the previous accused confessing, and if confessions are recorded with a number of persons crowded in the place, it would not be conducive to a calm atmosphere, and, what is more, such crowding together would lead to corroborations in minor details of confessions which would not otherwise be the case.4 Similarly, the precaution of removing the hand-cuffs is based upon the fact that otherwise the accused could not really believe that he was making a voluntary confession.5 It is enjoined by Prag v. Emperor,6 that the first thing that a Magistrate has to tell the prisoner is that he is in the presence of a Magistrate. This is to make the prisoner, who wants to make a statement, feel that he is under the strong protection of the Magistrate and that the police would not be able to molest him whatever he might say or decline to say. Time is given for reflec tion, because, if, after reflection, a man makes up his mind to make a confessional statement, there is far more likelihood of its being voluntary and his sticking to it at the later stages and would also be more precise. There is no statutory period of time for reflection and normally 24 hours are to be given.7 The time should be sufficient to enable one to feel that the accused was no longer suffering from the effect of police or other influence to confess. The time, therefore, to be given for reflection, will depend upon the circumstances of each case and normally 24 hours should be given after production from custody.8 Also see the undernoted case.9 This precaution about the accused being sent to jail custody, and not to police custody at any stage, after

7. See Rule 85 (3) of the Madras Criminal Rules of Practice.

Naidu Budhia v. State of Orissa, 1975 Cr. L. J. 564 (Orissa).

Emperor v. Jamuna Singh, I., L. R
 Pat. 612: A. I. R. 1947 Pat. 305; Jahana v. Emperor, 166 I.C. 1003: A. I. R. 1937 Lah. 98 and Kishan Chand v. Emperor, A. I. R.

¹⁹³⁸ Pesh, 5; 174 I. C. 449. 4. Kuruba Linga and Kuruba Mahadeva v. Emperor, (1930) Mad. Cr. C. 270; Bhagwan Din v. Emperor, 149 I. C. 195: A. I. R. 1934 Oudh 151: Bhimappa Saibana Talwar v. Emperor, 222 I. C. 143; A. I. R. 1945 Bom. 484.

Neharoo Mangtu Satnami v. Emperor. A. I. R. 1937 Nag. 220; I. L. R. 1937 Nag. 268; 168 I. C. 962.

^{6.} A. I. R. 1930 Oudh 449; 128 I. C. 215.

Sarwan Singh v. State of Punjab. A.
 R. 1957 S. C. 637 at 644: 1957 Cr. L. J. 1014: 1957 All. W. R. Sup. 99: 1957 M. P. C. 781: (1957) 1 M. L. J. (Cr.) 672: I. L. R. 1957 Punj. 1602: Public Prosecutor v. Rajuapati Basayya, 1937 M. W. N. 993: 1937 Cr. C. 370 and Chavadappa v. Emperor, A. I. R. 1945 Bom. 292: 221 I. C. 86.

his production for the confessional statement being recorded, and the Magistrate seeing that the investigating police in the case have no access to the accused person in the jail, are all intended to prevent unfair practices and pressure being brought on the accused to confess.10

In regard to the questions to be put, the Madras High Court and other High Courts have, after consideration, evolved a questionnaire which would seem to ensure the object in hand. The Magistrate should not merely repeat mechanically the questions but most intelligently follow the spirit and make sure that the person confessing fully understands that the confession will be given in evidence against him and that there was no intention, if there were more than one accused, of taking him as an approver and that he has not in any way been induced, threatened or promised and that he has a real motive like, contrition, having no choice in the face of the overwhelming evidence against him but to confess. In recording the confessional statement in the narrative form, oath should not be administered to the confessing accused. But the illegality is, however, a curable one.11. The accused giving a confessional statement may be questioned, so far as may be necessary, to enable the Magistrate to elicit from him whatever facts he is willing to state to understand exactly what his meaning is and how far he intends his confession or admission to go.12 If the statement contains any ambiguity, it is the duty of the Magistrate to question the accused and give the accused a chance to make his statement intelligible.13 If a confession is of great length, it can be recorded piece-meal.14 In the course of questioning by a Magistrate, if the accused complains that he was beaten by the police, the Magistrate must examine his body; otherwise not.15 If, in the later stages of recording the confessional statement, the accused starts complaining of ill-treatment by the police, the Magistrate must pursue this matter and satisfy himself afresh about the voluntariness of the statement.16

The question of the admissibility of confessions, irregularly recorded, has been much simplified by the provisions of Sec. 533 of the Criminal Procedure Code, 1898 (S. 463 of New Code). That section provides for remedying defects in recording confessions under Sec. 164, and statements under Sec. 364 (Sec. 281 of Cr. P. C., 1973). But every defect cannot be remedied under that section. Whenever an irregularity is alleged to have been committed in recording a confession, the Court should consider the nature of the irregularity alleged, and decide whether the same can be cured by examining the Magistrate under Sec. 533 of the Code of 1898 (Section 463 of the new Code). If the Magistrate has not acted, or not even purported to act, under Sec. 164, when it was applicable, Sec. 533 of the old Code (Sec. 463 of the new Code) cannot

^{10.} Bhagwan Din v. Emperor, A. I. R. 1934 Oudh 151 and Gurubaru v. The King, A. I. R. 1949 Orissa 67:

I. L. R. 1949 Cut, 207.

11. Karam Hahi v. Emperor, A. I. R. 1947 Lah. 92: 225 I. C. 544.

12. Neharoo Mangtu Satnami v. Emperor, A. I. R. 1947 Lah.

Neharoo Mangtu Satnami v. Emperor. A. I. R. 1937 Nag. 220: I. L. R. 1937 Nag. 268: 168 I. C. 962.
 Abdul Jalali Khan v. Emperor, A. I. R. 1930 All. 746: 128 I.C. 593.

Nil Madhab Choudhury v. Emperor, (1926) 5 Pat. 171; A. I. R. 1926 Pat. 279; 96 I. C. 509.
 Chavadappa v. Emperor, A. I. R. 1945 Bom. 292; 221 I. C. 86.
 Barhma v. Emperor, 228 I. C. 21; A. I. R. 1947 Oudh 95; Battu Musalayya v. The State. 1953 M. W. N. Cr. 251 at p. 256 (Ramaswami. J.).

be invoked to render the Magistrate's evidence admissible.17 Any defect, in recording a statement which had been duly made, can be cured under Sec. 533 of the old Code (Section 463 of the new Code), by calling further evidence to prove that it had been duly made. This section is not in any way controlled by the provisions of Sec. 91, Evidence Act, and therefore, even if, in a case, where a statement is required by law to be reduced to the form of a document, and it has not been done, evidence can be given in proof of that statement. This would meet a case, where although Sec. 164 or Sec. 364 (Section 281 of the new Code) requires that certain things should be recorded by a Magistrate, and he has omitted to do so, the Court can admit the statement by calling oral evidence to prove that the statement had in fact been "duly made". But there is a safeguard in the section and a statement which has not been recorded in accordance with law cannot be taken in evidence, if the error has injured the accused as to his defence on the merits.18

If the defects in the record cannot be cured under Sec. 533 of the old Code (Section 463 of the New Code) no secondary evidence can be given of a confession under Sec. 164.19 Section 533 of the old Code (Section 463 of the New Code) will not render a confession taken under Sec. 164 admissible, where no attempt has been made to conform to the provisions of the latter section.20

Under Sec. 80 of this Act, whenever any document is produced before any Court purporting to be a statement or confession by any prisoner or accused person taken in accordance with law and purporting to be signed by any Judge or Magistrate, the Court shall presume that the document is genuine, that any statements as to the circumstances under which it was taken, purporting to be made by the person signing it, are true and that such evidence, statement or confession was duly taken. But, in order to bring the section into operation, the Magistrate must have had jurisdiction to record a confession, and he could have no jurisdiction, if the provisions of Sec. 164, Cr. P. Code, had not been complied with.21 The presumption under Sec. 80 would obviously not arise, if the statement or confession had not been "taken in accordance with law."22 A confession recorded by Magistrate, without conforming to the provisions of Sec. 164 or Sec. 364 (New Section 281) of the Code of Criminal Procedure is inadmissible in evidence.23 All that Sec. 80 says is that the Court will presume

17. Rangappa v. State, 1954 Bom. 235: I. L. R. 1954 Bom. 484: 56 Bom. L. R. 115.

Cr. L. J. 1720. 19. R. v. Viran, (1886) 9 M. 224; Jai

dissented from in R. v. Visram, (1896) 21 B. 495, 501.

21. Emperor v. Kommoju, 1940 Pat. 163: I. L. R. 19 Pat. 301: 188 I. C. 57, per Meredith, J., followed in Punia Mallah v. Emperor, 1946 Pat. 169: I. L. R. 24 Pat. 646: 228 I. C. 51; but see Emperor v. Jamu-na Singh. 1947 Pat. 305; I. L. R.

25 Pat. 612.

22. Mohammad Ali v. Emperor, 1934
All. 81: 56 All. 302: 147 I. C. 390
(F.B.); Bakshan v. Emperor, 1936
Lah. 247: I. L. R. 16 Lah. 912:

161 I. C. 339.

23. In re Thothan, 1956 Mad. 425; State of Orissa v. Jayadhar, 1975 Cut. L. R. (Cri.) 433; Shital Singh v. State, 1975 Cri L. J. 699; State v. Lohsang Sharap, 1973 Cri. L. J. 85 (Him. Pra.).

^{18.} Mohammad Ali v. Emperor, 1934 All. 81: I. L. R. 56 All. 302: 147 I. C. 390 (F.B.); see also Baliram Singh v. Emperor. 1939 Nag. 295: 184 I.C. 274: 1939 N. L. J. 442; Nga Thein Maung v. Emperor, 1936 Rang. 350: 164 I. C. 162; Ranjit Singh v. State. 1952 H. P. 81: 1952

Narayan v. R., (1886) 9 M. 224; Jan Narayan v. R., (1890) 17 C. 862. 20. Nazir Ahmad v. Emperor, 1936 P. C. 253 (2): 63 I. A. 372: I. L. R. 17 Lah, 629: 163 I. C. 881; see also Bala Majhi v. State of Orissa, 1951 Orissa 168: I. L. R. 1951 Cut, 65 (F.B.); R. v. Viran, supra; Jai Narayan v. R., supra: latter case

he confession was recorded were such as have been set down in the record nade by the Magistrate. It says nothing about there being any presumption egarding the voluntariness of the confession.²⁴ The certificate recorded by a Magistrate at the foot of the confession is not conclusive, and facts may be proved which may lead the Court to think that the confession was not coluntary.²⁵

A confession duly recorded by the Magistrate, with the prescribed certificate appended to it, may be presumed to be voluntary and as such admissible, out this admissibility is subject to the restrictions contained in Sec. 24, Evilence Act.1 Having regard to the wording of Sec. 24 of the Evidence Act and ilso to the presumption attaching to certain recorded confessions, and arising inder Sec. 80 of the Act, the true and generally recognized view is, that a conession duly recorded by a Magistrate with the proper certificate appended to it vill be admitted in evidence subject to the provisions and restrictions contained n Sec. 24; that, under the latter section, a well-grounded conjecture, reasonably based upon circumstances disclosed in the evidence, is sufficient to exclude the confession, because it would be idle to expect the accused to prove the inducement, threat or promise, for, in most cases, such proof cannot be availıble.2 Where a Sessions Judge was, having regard to all the evidence, of opinion that a confession had been induced by torture but left it to the jury for consideration telling them that in his opinion it was worthless, it was held, that the Sessions Judge misunderstood the effect of the provisions of Sec. 80, and that it was a patent error of law to leave the confession for the jury's consideration.3

It is the duty of the Magistrate to satisfy himself that the confession is not excluded by this section.⁴ But it appears to have been the opinion of Sir

Emperor v. Thakur Das. 1943 Cal.
 625, 627: I. L. R. (1943) 1 Cal.
 487: 209 I. C. 550: 45 Cr. L. J.

 Nar Singh v. Emperor, 1922 Oudh 302: 73 I. C. 257: 24 Cr. L. J. 561.

Naveb Shahana v. Emperor, 1934
 Cai, 636; I. L. R. 61 Cal. 399:
 152 I. C. 44: 35 Cr. L. J. 1479; 38
 C. W. N. 659.

Emperor v. Panchkari Dutt. 1925
 Cal. 587; I. L. R. 52 Cal. 67; 86 I.
 C. 414: 26 Cr. L. J. 782; 29 C. W.
 N. 300.

 Based Sheikh v. King, 1950 Cal. 331: 51 Cr. L. J. 1282: 85 C. L. J. 93.

4. R. v. Narayan, (1901) 25 B. 543; R. v. Jadub, 27 C. 295; 4 C. W. N. 129; R. v. Baswanta, (1900) 2 Bom, L. R. 761; see Circular of Bombay High Court (Bombay Govcomment Gazette, 1900; Part I, p. 919); R. v. Cunna, 22 Bom.L.R. 1247 requiring Magistrates before record-

ing confessions to satisfy themselves by all means in their power including the examination of the bodies of the accused, that confessions are voluntary; see R. v. Gunesh. (1865) 4 W. R. Cr. 1 where the prisoner retracted his statement when read over to him and said that he was compelled to make it, and the Sessions
Judge without making any inquiry or taking evidence upon the point submitted the prisoner's statement to the jury as a confession, it was held that the Judge was wrong in so doing and that he should rather have charged the jury not to accept the prisoner's statement as a confession, As regards the Sessions Court it has been held that it is not necessary for a Sessions Judge to read out to prisoners confessions made by them before a Magistrate and ask them if they have any objection to the reception of their confession; R. v. Misser, 14 W. R. Cr. 9.

Michael Westropp in R. v. Kashinath,5 that not only the committing Magistrate, but also the trying court, ought to make needful enquiries, where allegations are made in a regular and proper manner to the Sessions Court that a confession before a Magistrate was improperly induced, a procedure which was followed in the English Courts so far back as the 12th century.6

It is to be feared, however, that such certificates are often not worth much as evidence of the absence of inducement. Assuming that a prisoner has been induced to confess, he will not unlikely assure the recording Magistrate that his confession is quite voluntary, knowing that he will leave the Magistrate's presence in the custody of the police, and remain in their charge for many days to come.7

In the case of extra-judicial confessions, there is no such prima facie evidence as that afforded by the certificate. In both cases, however, there is to be considered the effect of the word "appear" in this section. This, as already stated, does not connote strict "proof". Still, although very probably a confession may be rejected on well-grounded conjecture, there must (unless the onus lies upon the prosecution) be something before the Court on which such conjecture can rest.8 The mere bald assertion by the prisoner that he was threatened, tutored or that inducement was offered to him, cannot be accepted as true without more.9 It is not the law that an extra-judicial confession is of inferior category. Its probative value is high when it is made voluntarily by the accused immediately after the crime with every token of truthfulness and repentance, even if it be momentary.10 But it is subject to one infirmity that the actual words are not preserved; the only medium is recollection.11 If it be reduced to writing, the rule is that the Court may act upon it even if it be resiled from, if, in its opinion, its general trend is substantiated by some evidence which would tally with what is contained in it.12 An extra-judicial confession cannot, however, be relied upon, where made in the presence of a person who subsequently turns approver. As an approver is no better than an accomplice, his testimony on the extra-judicial confession needs independent corroboration.13

Question may arise, does the onus lie upon the prosecution, in all cases to prove that a confession is voluntary, before it can be used in evidence? If this be the law in England, which is doubtful, it has been held that such a rule does not prevail in this country. In the absence of evidence, it is no

^{5. 8} Bom, H.C.R. 126: 138 Cr. C.

^{6.} Poullock and Maitland, History of English Law, Book II, pp. 650, 651; see also R. v. Narayan, 25 B. 543; 3 Bom. L. R. 122; Rangappa v. State, 1954 Bom. 285: I. L. R. 1954 Bom. 484: 1955 Cr. L. J. 887: 56 Bom. L. R. 115.

^{7.} See remarks of Westropp, C. J. in R. v. Kashinath, 8 Bom. H. C. R.

^{8.} R. v. Baswanta. (1900) 2 Bom. L.

R. 761, 765. Hemraj v. The State of Ajmer 1954 S.C. 462: 1955 Cr. L. J 1313: 1954 S. C. J. 449: (1954) M. L. J. 694: 1954 M. W. N. 468

¹⁰ Ramayee, In re. A. I. R. 1960 Mad

^{11.} Chinnasami, In re, A. I. R. 196 Mad. 462.

Angnu v. State, 1960 All. L. J. 28
 The State v. Debnu, A. I. R. 195 Him. Prn. 52: 1957 Cr. L. J. 695

to be presumed that a statement objected to on the ground of its having been induced by illegal pressure is inadmissible.14

The discussion of the question whether the prosecution has to adduce formal proof of voluntariness of the confession or the defence is to adduce formal proof of the involuntariness of the confession is, as pointed out by Horwill, J., in Boya Chinna Papanna v. Emperor,15 an academic one. In order to make a confession irrelevant under section 24 of the Evidence Act, it must appear to the court to have been caused by inducement, threat or promise, etc. It is for the Judge to decide the voluntariness of a contession, and, in given cases, it is for him to direct the jury as to its truth. The word 'appears' indicates a lesser degree of probability than the word 'proof' as defined in section 3 of the Act. It was designedly used by the Legislature in the interest of the accused who is often in custody. In such cases, it is well nigh impossible for him to adduce positive proof in support of inducement, promise or threat offered to him by the police. Therefore, it has been repeatedly held that a well-grounded suspicion based on facts and surrounding circumstances is enough to exclude the confession from consideration. It is entirely for the court to decide whether the confession was voluntarily made or not.16 This conclusion is arrived at by the Judge on a full consideration of all the circumstances of the evidence of a given case, and is dependent on the action and reaction of the efforts of both sides to make a confession appear one way or the other.

The remarks of Horwill, J. in Boya Chinna Papanna v. Emperor,17 are pertinent:

"The Indian Evidence Act does not put the matter in the same way. Section 21 makes admissions relevant and says that they may be proved as against the person who makes them. Section 24 deals with an admission which amounts to a confession and adds a proviso to the ordinary rule. The wording of Sec. 24 suggests that unless it appears to a Court that an inducement, threat or promise was held out by a person in authority, a confession would be relevant under Sec. 21, Evidence Act, without any formal proof of the voluntary nature of the statement. It has certainly not been the practice of the Courts of this Presidency to require from the prosecution formal evidence that the statement was voluntary. There is always cross-examination on this point and the accused is always questioned by the Court about his confession. It is customary for the Court to consider the suggestions made in cross-examination and the statement of the accused and for the Court then to decide whether there is anything in those suggestions or in the

^{14.} R. v. Balvant, (1874) 11 Bom. H. C. R. 137, 138; R. v. Dada. (1889) 15 B. 452, 480; R. v. Bhairon. (1880) 3 A. 338, 339. A prisoner alleging that a confession was unduly extorted should offer some proof of his statements to the Courts. So. an accused retracting a confession alleging that it was caused by illtreatment by the police, has, it is

held, the onus of establishing such ill-treatment or other inducement; R. v. Kabili, 22. C. W. N. 809 (S.C.): 19 Cr. L. J. 959.

A. I. R. 1942 Mad. 49; 43 Cr. L. J. 846: 198 I. C. 295.

Bhagan v. State of Pepsu, A. I. R. 1955 Pepsu 33: 1955 Cr. L. J. 537.
 A. I. R. 1942 Mad. 49: 43 Cr. L.

I. 346; 198 I. C. 295.

evidence which would lead it to suspect that the confession was not voluntary. The discussion whether formal proof by the prosecution of the voluntary nature of the confession is necessary is an academic one since the prosecution sets out the circumstances under which the accused was questioned."

In this connection, the observation of Jagannadhadas, J. (as he then was) in Bala Majhi v. State of Orissa, 18 may be referred to:

"The terms in which Sec. 25, Evidence Act, is couched seem to indicate that in the case of an ordinary confession, there is no initial burden on the prosecution to make out the negative, viz., that the confession sought to be proved or admitted is not vitiated by the circumstances stated in the section. It is the right of the accused to have the confession excluded and equally the duty of the Court to exclude it even suo motu, if the vitiating circumstances 'appear' The position is that confessions other than what may be called police-confessions are admissible subject to their being excluded by the "appearance" of vitiating circumstances mentioned in Sec. 24..... A magisterial confession can be proved only by the record of that confession and that the record cannot go in against the accused at the trial, unless it is one that is made in substantial compliance with the provisions of Sec. 164, Cr. P. C., including the fair belief of the recording Magistrate as to the voluntary character of the confession, arrived at on a judicial approach. But once the record goes in, it is for the accused to make out or for the Court to find the appearance of vitiating circumstances mentioned in Sec. 24 in order to exclude it. It is also to be noticed that even in the matter of finding whether or not there has been substantial compliance with the terms of section 164, prosecution has the initial advantage of relying on the presumption of Sec. 80, Evidence Act and of the remedying provisions of Sec. 533, Cr. P. C. of 1898 (Section 463 of the Code of 1973).

- 7. Evidentiary value of confessions. Confessional statements may be classified into—
 - (a) made by persons not in custody, and
 - (b) made by persons in custody.

Confessional statements made by persons not in custody are admissible in evidence against such persons in criminal proceedings unless—

- (a) they are procured in the manner described in this Section, or
- (b) made to a police officer.

Confessional statements made by persons in custody, except those in the presence of a Magistrate, are not provable except to the limited extent permitted by Section 27 of the Act, viz., so much of the information, whether confessional or otherwise, which distinctly relates to a fact thereby discovered and no more.¹⁶

A. I. R. 1951 Orissa 168; 53 Cr.
 L. J. 1743 (F.B.); I. L. R. 1951
 Cut. 65.

Punja Mava v. State of Gujarat, A.
 R. 1965 Guj. 5; relying on State

of U. P. v. Deoman Upadhyaya. (1961) 1 S. C. R. 14: A. I. R. 1960 S. C. 1125: 1960 All L. J. 733: 1960 Cr. L. J. 1504: 1960 A. W. R. (H, C.) 568.

Hasty confessions made to persons having no authority to examine are the weakest or most suspicious of all evidence. Words are often misreported through ignorance, inattention or malice, and they are extremely liable to misconstruction. Moreover, this evidence is not, in the usual course of things, to be disproved by that sort of negative evidence by which proof of plain facts may be confronted.20 Such confessions are spoken to by persons who have a motive to implicate the accused. It is dangerous to the extreme to act on a confession put into the mouth of the accused by a witness who had strong motive for implicating someone else in the crime and uncorroborated from any other source.21 Some material corroboration should be required to such confessional statements if the Court holds them to be voluntary and true.22 Subject to the above, the confession of an accused person is substantive evidence and a conviction can be based thereon.23 If a confession is not hit by sections 24, 25, 26 or 27 of this Act, or by section 164, Criminal P. C. it would be admissible in evidence and if believed, good enough to form the basis of conviction on any charge.24 However, the Court must be satisfied that the makers of confession were not influenced by pressure, threat, promise or inducement.25

Confessional statement of a co-accused cannot be treated as substantive evidence but can be used to confirm the conclusion regarding the guilt of the accused arrived at upon other evidence.1

An extra-judicial confession is usually subject to infirmities. The evidentiary value of such confession depends upon the particular facts and circumstances of each case.2 Once the offence is established by the prosecution by independent evidence, the confession can be taken into consideration to find out who the offender is. In the circumstances of a case it may not be safe to rely on the judicial and extra-judicial confessions.3

Slight variations in the description, etc., do not affect the evidentiary value of a confession.4

The confessional statement of an accused person must be put to him in his examination under section 342, Cr. P. C., 1898 (Section 313 of the New Code). If this is not done and there is no other evidence against the accused person, his conviction cannot be sustained in law.5

20. In re Muthukarunga Konar, A. I.

R. 1959 M. 175.
21. Harold White v. The King, A. I.
R. 1945 P. C. 181.

22. Ratan Gond v. State of Bihar, 1959 S. C. R. 1336: I. L. R. 37 Pat. 1409; A. I. R. 1959 S. C. 18: 1959 Cr. L. J. 108: 1959 B. L. R. 1: 1959 All. L. J. 35: 1959 M. P. C. 46: 1959 M. L. J. (Cr.) 109. 23. State v. Balchand. A. I. R. 1960 Raj. 101.

24 Nika Ram v. State of H. P., 1971 Sim, L. J. (H.P.) 190; 1972 Ori, L. J. 204 (Him. Pra). 25. 1973 Cut. L. R. (Cri.) 402

1. 1972 Cut. L. R. (Cri.) 554 (Orissa); In Re Balan Balusami Mudali, 1973 L. F. 91

Cri. L. J. 1311 (Mad.); I. L. R. (1974) 2 Delhi 706; Nika Ram v. State of H. P., 1972 Cri. L. J. 204 (Him. Pra.); Jogindra Nath v. State of Assam, 1977 Cri. L. J. 1309; Md. Yunus v. State of Bihar, 1977 Cri. L. J. 1243 (Pat.).

2. In Re Chinnasami, A. I. R. 1960

M. 462.

3. Kandasamy v. State, 1968 M. L. J. (Cr.) 291: 1968 M. L. W. (Cr.) 36: (1968) 1 M. L. J. 372 at pp. 374,

In re Bandi Murugulu, I. L. R. (1961) 1 A. P. 123; A. I. R. 1963 A. P. 87.

5. Ramavatar Harijan v. State, 1960 Assam L. R. 89, 91

If a confession, which has 8. Retraction of confession, effect of. been previously made, whether judicially or extra-judicially, is not retracted at the trial, there appears to be little or no reason why it should not be accepted without any proof being given of its voluntary character. The law does not require that the confession of an accused person should be corroborated before it is acted upon. It is for the Court to say whether the confession is to be believed or not. This is, however, not so, where, as is frequently the case, the confession is retracted at the trial. In a very large percentage of Sessions cases the prisoners will be found to have made elaborate confessions shortly after coming into the hands of the Police; not infrequently these confessions are adhered to in the Committing Magistrate's Court; they are almost invariably retracted when the proceedings have reached a final stage and the prisoner is at the Bar of the Sessions Court. These recurrent phenomena, peculiarly suggestive in themselves, can scarcely fail to attract the anxious notice of Judges who regard the efficient administration of justice as a matter in which they are directly and personally implicated, not as a mere routine work mapped out for them in the higher tribunals.6 The retraction of confession is, as was said by Straight, J., in R. v. Babu Lal,7 "an endless source of anxiety and difficulty to those who have to see that justice is properly admini-

In R. v. Thompson,8 Cave, J. said: "I would add that for my part I always suspect these confessions, which are supposed to be the offspring of penitence and remorse, and which nevertheless are repudiated by the prisoner at the trial, It is remarkable, that it is of very rare occurrence for evidence of a confession to be given, when the proof of the prisoner's guilt is otherwise clear and satisfactory; but when it is not clear and satisfactory, the prisoner is not infrequently alleged to have been seized with the desire, born of penitence and remorse, to supplement it with a confession, a desire which vanishes as soon as he appears in a Court of Justice." Were it not for the presumption raised by Sec. 80 of this Act, the rule, which should be followed in all cases of retracted confessions, is to throw the onus on the prosecution of affirmatively proving the vuluntary character of the confession. No doubt, abstractedly considered, the mere fact that a confession is retracted raises no inference of improper inducement.9 Such retraction may be due to the fear of punishment for an offence, which has been the subject of a true and voluntary confession. Having regard, however, to the notorious fact that confessions are frequently extorted in this country,10 retraction might not improperly be held to cast upon the prosecution the onus of showing that the confession was a voluntary one. When a prisoner has confessed and afterwards pleads not guilty, the truth and voluntariness of the confession is denied by implication. When a prisoner

facie) voluntary character. 10 Mst. Bhagan v. State, 1955 Pepsu 33, see cases cited, post.

^{6.} Queen-Empress v. Baswanta, 2 Bom. L. R. 761.

^{7. (1884) 6} A. at p. 543 referred to in

R. v. Dada. (1889) 15 B. 452, 461 8. L R. (1893) 2 Q. B. 12, 18 cited with approval in the Deputy Legal Remembrancer v. Karuna, (1894) 22 C. 164 at 172.

^{9.} Pharho Shahwali v. Emperor, A. I. R. 1932 Sind 201; 141 I. C. 392; Emperor v. Bhagwandas, 1941 Bom. 50; I. L. R. 1941 Bom. 27: 192 I. C. 671: 42 Bom. L. R. 938; Abdul

Gafoor v. Emperor, 1941 Nag. 145; I. L. R. 1941 Nag, 169; 193 I. C. 265; 42 Cr. L. J. 368; 1941 N. L. J. 345. So in Sheo Prasad v. R., 1919 Pat. 322: 52 I. C. 50: 20 Cr. L. J. 562 it was held that the fact of retraction would not (necessarily) deprive a confession of its (prima

says he has been force to confess, the Judge is put upon judicial inquiry, and that inquiry, it me the neged, should precede the admission of the confession and any expectation into its truth. As, however, the law now stands, provided it was printarily made, the confession of a prisoner before a Magistrate is admissible in evidence against the prisoner, even though the confession be retracted by the Sessions Judge. A mere subsequent retraction of a confession which is deer recorded and certified by a Magistrate, is not enough in all cases to make it appear to have been unlawfully induced.18 presumption is that it was freely made and the burden of showing it to be inadmissible lies upon the accused.14 Where the confession is voluntary mere retraction is not sufficient to render it inadmissible.15

9. Corroboration, necessity of. It is a general rule of practice that it is unsafe to rely upon a confession, much less a retracted confession, unless the Court is satisfied that (1) the retracted confession is true and voluntary and (2) has been corroborated in material particulars. A finding that there is such corroboration is one of fact,16 it is now well settled that though a conviction based on a retracted confession, whether judicial or extra-judicial, is not strictly

11. Queen-Empress v. Baswanta, 2 Bom.

L. R. 761.

12. Mst. Khuban v. Emperor, 1930
All. 29: 120 I. C. 257: 37 Cr. L.
J. 26; Pharho Shahwali v. Emperor, A.I.R. 1932 Sind 201; Emperor v. Bhagwandas, 1941 Bom. 50; Abdul Gafoor v. Emperor, A. I. R. 1941 Nag. 145; I. L. R. 1941 Nag. 145; I. L. R. 1941 Nag. 169; R. v. Mongola, (1886) 6 W. R. Cr. 81; R. v. Jama, (1867) 8 W. R. Cr. 40; R. v. Balvant, (1874) 11 Bom. H. C. R. 137; R. v. Petta, (1865) 4 W. R. Cr. 19 (when) prisoners confess in the most circumstantial manner to having committed a murder, the finding committed a murder, the finding of the body is not absolutely essential to a conviction, R. v. Badduru-ddeen, (1886) 11 W. Cr. 20; a Judge held to have and a pro-per discretion in not passing sentence of death in case in which the dead body was not found; R. v. Bhuttun, (1869) 12 W R. Cr. 49 (the properly attested confession of a prisoner before a Magi trate is sufficient for his conviction a bout corroborative evid no and a withstanding a subsequent conial before the Source Court, by where there was anduct of the police, it was held that the prisoners could not strely be convicted on their own retracted statements without R., (1878) 2 G. 1. R. 132; see also Sheopras I v. R., 20 Cr. L. J.

13. R. v. Jasvanta, (1900) 25 B. 168; Emperor v. Kabili Katoni, 1918 Cal. 72: 47 I. C. 811; 22 C. W. N. 809; 19 Gr. L. J. 959.

14: Pharho Shahwali v. Emperor, A. I. R. 1932 Sind 201; 141 I. C. 392.
15. 1974 Punj. L. J. (Cri) 167.
16. Pyare Lal Bhargava v. State of Rajasthan. (1963) 1 S. C. R. 689: 1963 S. C. D. 341; 1967 A. L. J. 459; 1963 A. W. R. (H.C.) 374: 1963 B. L. J. R. 407; (1963) 2 Cr. L. J. 178: A. I. R. 1963 S. C. 1094, 1097; Puran Singh v. State of Punjab, A. I. R. 1953 S.C. 459; Hem Raj Devi Lal v. State of Ajmer. A. I. R. 1954 S. C. 462; Balbir Singh v. State of Punjab, A. I. R. 1957 S. C. 216; Ram Chandra Prasad Sharma v. State of Bihar, 1966 B. L. J. R. 920 (S.C.); Gurdev v. State, 70 Punj. L. R. 363 365 (strong and fullest corrobora-365 (strong and fullest corroboration as to factum of crime and as to identity); Mangar Nagabanshi Munda v. State of Bihar, 1969 P. L. Munda v. State of Bihar, 1969 P. L. J. R. 195, 201; Himat Singh Budhar Singh v. State of Gujarat. I. L. R. 1964 Guj. 804; (1964) 5 Guj. L. R. 897; (1965) 2 Cr. L. J. 753; A. I. R. 1965 Guj. 302; Devi Prasad v. State, 1967 Cr. L. J. 134; A. I. R. 1967 All. 64 (the authorities, Pyara Lal Bhargava v. State of Rajasthap. Supra: Subramania of Rajasthan, supra; Subramania Goundar v. State of Madras. A. I. R. 1958 S. C. 66 and Balbir Singh v. State of Punjab, A. I. R. 1957 S. C. 216 do not go to the extent of saying that a retracted confession cannot be used even for the pur pose of corroborating other evidence against co-accused in the case because it comes from a tainted source): Sher Singh v. State, (1969) 71 Punj. L. R. D) 198, 200. illegal, still it is a rule of prudence to base a conviction on it only if the same has been corroborated by other independent evidence.

The rule of prudence does not require that each and every circumstance mentioned in the confession must be separately and independently corroborated; nor is it essential that the facts and circumstances discovered after the confession should corroborate it. The rule would be meaningless, inasmuch as the independent evidence itself would afford sufficient basis for the conviction and it would be unnecessary to call in aid the confession.¹⁷ Apart from the general rule of prudence, if the circumstances of a case make the genuineness of a confession suspect, it is sufficient to require corroboration for conviction.¹⁸

Corroboration is of two kinds:

- (1) general corroboration and
- (2) corroboration in material particulars.

The latter requires independent evidence which in some way reasonably connects or tends to connect the accused with the crime. In the case of a retracted confession, however, general corroboration is sufficient. The Court has to be satisfied that the reasons given for the retraction are untrue. The Supreme Court in a later decision has pointed out that a retracted confession must be looked upon with great concern unless the reasons for having made it in the first instance (not for retraction as erroneously stated in some cases) are on the face of them false. 20

If the confession is proved to be true by a reference and recourse to other facts and circumstances, then the confession can be accepted.²¹

Usually and as a matter of caution, courts insist that there should be some material corroboration to an extra-judicial confession made by the ac-

18. Muthu Swami v. State of Madras, 1953 S. C. J. 619: 1954 Cr. L. J. 236; A. I. R. 1954 S.C. 4.

1144.

20. Haroon Haji Abdulla v. State of Maharashtra, (1968) 2 S. C. R. 641. 648: 1968 S. C. D. 391: (1968) 2 S. C. J. 534: (1968) 1 S. C. W. R. 243: 70 Bom. L. R. 540: 1970 M. P. L. J. (S.C.) 537: 1968 Cr. L. J. 1017: 1968 M. L. J. (Cr.) 591: 1968 M. L. W. (Cr.) 116: A. I. R. 1968 S. C. 832, see Bharat v. State of U. P., (1971) 2 S. C. Cr. R. 158, 161 (the reasons for making the confession as well as retracting it must be weighed to determine whether the retraction affects the voluntary nature of the confession or not); Nika Ram v. State of H.P., 1972 Cr. L. J. 204. 21. In re Ramaswamy Konar, 1954 Mad. 1006, 1007: 1955 Cr. L. J. 1945: 1954 Mad. W. N. 463 (2) relying on Puran v. State of Punjab, 1953 S.C. 459: 1954 Cr. L. J. 1925; Sudhir Chandra v. State, 1971 Cri. L. J. 86.

^{17.} Balbir Singh v. Punjab State, A.
I. R. 1957 S. C. 216: 1957 Cr. L.
J. 328. See also Srinivasulu. In re,
(1957) 2 Andh. W. R. 63: A. I. R.
1958 A. P. 37; Noor Muhammad v.
State, A. I. R. 1959 Ker. 46: 1959
Cr. L. J. 187; State of Orissa v.
Kevalananda Patnaik, 1969 Cr. L.
J. 1174, 1176, (case of extra-judicial confession); Kali Ram v.
State, (1973) 3 Sim. L. J. 195
(H.P.).

^{19.} Sreenivasan v. State, (1957) 2 Andh, W. R. 63: A. I. R. 1958 Andhra Pradesh 37. See also Krishna v. State, A. I. R. 1958 Pat. 166, Subramania Goundan v. State, 1958 S. C. R. 428; A. I. R. 1958 S.C. 66; Akhal Ali v. State, 1970 Cr. L. J. 781 (Assam); Uggappa Shetty v. State, (1970) 1 Mys. L. J. 149; Sami Kissan v. State, 32 Cut. L. T.

cused which connects the accused with the crime in question.22 As against a co-accused, a retracted confession cannot form the basis of a confession without substantial corroboration both as to the crime and the criminal.23 A retracted confession should be corroborated in material particulars even to fasten guilt on its maker.24

An extra-judicial confession may be corroborated not only by the other evidence but also by the statement made by the accused before the committing court which constitutes evidence under section 287, Cr. P. C., 1898. When so corroborated, a conviction may be well founded on the extra-judicial confession.25

If a confession made by an accused is unequivocally admitted in the Committing Magistrate's Court but is retracted at the trial in the Sessions Court, the retraction will not carry any weight.1

A confession, which is retracted and is not corroborated by other evidence, cannot be made the foundation of a conviction.2

It is not an invariable rule that the witness to whom an extra-judicial confession has been made, should give the actual words used by the accused; the court may accept the evidence of the witness even if he gives the substance.3

Oral confessions which are not reduced to writing must be carefully assessed before they can be acted upon; the voluntary nature of the confession must also be carefully considered.4 It is necessary to check by independent investigation the truth or otherwise of the confession where it is the sole evidence against the accused,5

The extra-judicial confession made by a wife to her husband is a corroborative piece of evidence against the accused-wife.6

25. Mingura Malik v. The State, 32

State v. Tomeiran Maringni, 1970 Cr. L. J. 549. 551 (Manipur).
 Bhulakiram Koiri v. State. I. L. R. (1969) 1 Cal. 39: 73 C. W. N. 467: 1970 Cr. L. J. 403, 411.
 Mulk Raj v. State of U. P., 1960 A. W. R. (H.C.) 18: 1959 Cr. L. J. 1219; A. I. R. 1959 S.C. 902, 905; Iqbal Miru v. State, 1969 Cr. L. J. 1186, 1189 (Punj.).
 Veeral, In re, 1969 M. L. W. (Cr.) 231: 1970 Cr. L. J. 1020; A. I. R.

231: 1970 Cr. L. J. 1020: A. I. R. 1970 Mad. 298, 301. 5. Padmeswar Phukan v. The State,

(1971) Assam L. R. 293: 1971 Cr. L. J. 1595

6. State v. Tomeiran Maringni, 1970 Cr. L. J. 549, 552 (Manipur).

^{22.} Ratan Gond v. State of Bihar, 1959 S. C. R. 1336; 1959 S. C. J. 222; I. L. R. 37 Pat. 499; 1959 A. L. J. 35; 1959 A. W. R. (H.C.) 108; 1959 M. P. C. 46; 1959 M. L. J. (Cr.) 109: A. I. R. 1959 S. C. 18 at p. 22; Guramma v. State of Mysore, (1967) 1 Mys. L. J. 541, 544; Latu Mukhi v. State, 35 Cut. L. T. 94, 95: 1969 Cr. L. J. 1172; Joseph v. State of Kerala, 1966 Ker. L. T. 649: 1966 M. L. J. (Cr.) 698; Meher Singh v. The State, 72 Punj. L. R. 861, 863.

^{23.} Subodh Kumar Dhar v. State, 1966
Cr. L. J. 332 (2): 337 (Cal.).
24. Himachal Pradesh Administration v.
Shiv Devi, A. I. R. 1959 Him.
Pra. 3 at p. 8; Harbans Lal v.
State, 1967 Cr. L. J. 62; A. I. R.
1967 Him. Pra. 10, 13; see also Noor Muhammad Abdul Samad v. State, A.I.R. 1959 Ker. 46 at p. 50.

Cut. L. T. 1011. See also Palau Munda v. State, (1966) 32 Cut. E. T. 1170, 1177; Abdul Khader, In re. 1968 M. L. J. (Cr.) 682: (1968) 2 M. L. W. 515: 1969 Cr. L. J.

Section 25 post rests upon the principle that it is dangerous to depend upon a confession made to a Police Officer for such a confession is open to the suspicion that it was caused by coercion or enticement.7 The observation in the last cited case, that a confession made to other persons though in the presence of a police officer, may fall outside the orbic of section 25, is, it is apprehended, not correct. An extra-judicial confession made in the presence of a Police Officer cannot be considered voluntary and is therefore inadmissible.8 Simply because the record of an extra-judicial confession made to certain individuals was handed over to the police, that confession does not become inadmissible in evidence.9

In Subramania Goundan v. Madras State,9-1 the Supreme Court observed:

"A confession of a crime by a person, who has perpetrated it, is usually outcome of penitence and remorse and in normal circumstances is the best evidence against the maker. The question has very often arisen whether a retracted confession may form the basis of conviction if believed to be true and voluntarily made. For the purpose of arriving at this conclusion the court has to take into consideration not only the reasons given for making the confession or retracting it but the attending facts and circumstances surrounding the same. It may be remarked that there can be no absolute rule that a retracted confession cannot be acted upon unless the same is corroborated materially. It was laid down in certain cases, one such being In re Kesava Pillai,10 that if the reasons given by an accused person for retracting a confession are on the face of them false, the confession may be acted upon as it stands without any corroboration. But the view taken by this court on more occasions than one is that as a matter of prudence and caution which has sanctified itself into a rule of law, a retracted confession cannot be made solely the basis of conviction unless the same is corroborated, one of the cases being Balbir Singh v. State of Punjab,11 but it does not necessarily mean that each and every circumstance mentioned in the confession regarding the complicity of the accused must be separately and independently corroborated nor is it essential that the corroboration must come from facts and circumstances discovered after the confession was made. It would be sufficient that the general trend of the confession is substantiated by some evidence which would tally with what is contained in the confession. In this connection it would be profitable to contrast a retracted confession with the evidence of an approver or an accomplice. Though under Sec. 133 of the Evidence Act, a conviction is not illegal merely because it proceeds on the uncorroborated testimony of witnesses, illustration (b) to Sec. 114 lays down that a court may presume that an accomplice is unworthy of credit unless he is corroborated in material particulars. In the case of such a person, on his own showing, he is deprived and debased individual who having taken part in the crime tries to exculpate himself and wants to fasten the liability on another. In such circumstances it is absolutely necessary that what he has deposed must be corroborated in material particulars. In contrasting this with the statement

In re, Zahirali, 1966 M. L. J. (Cr.) 313: A. I. R. 1966 Mys. 199, 201.
 Bhulakiram Koiri v. State, 73 C. W. N. 467: 1970 Cr. L. J. 403,

^{9.} Bhagwan Das v. State, 1968 Cr. L. I. J. A. I. R. 1968 All. 8, 14.

^{9-1.} A. I. R. 1958 S.C. 66: 1958 S. C. R. 428: 1958 Cr. L. J. 238: 1958 All Cr. R. 261.

^{10.} I. L. R. 53 Mad. 160: A. I. R. 1929 M. 837.

^{11.} A. I. R. 1957 S.C. 216: 1957 Cr. L. J. 481.

of a person making a confession who stands on better footing, one need only find out when there is a retraction whether the earlier statement, which was the result of remorse, repentance and contrition, was voluntary and true, or not, and it is with that object that corroboration is sought for. Not infrequently, one is apt to fall in error in equating a retracted confession with the evidence of an accomplice and, therefore, it is advisable to clearly understand the distinction between the two. The standards of corroboration in the two are quite different. In the case of the person confessing, who has resiled from his statement, general corroboration is sufficient, while an accomplice's evidence should be corroborated in material particulars. In addition, the court must feel that the reasons given for the retraction in the case of a confession are untrue."12

Although in law, the Court can convict an accused on his confession, though it be retracted, nevertheless, the Courts require some corroboration. What amount of corroboration would be necessary would depend on the circumstances of each case.13 In cases, where corpus delicti is not traceable and what remains is only a confession which, however, is retracted, it would be unsafe to base a conviction for murder, especially when the time, place and manner in which the offence was committed, indicated by the confession could not be relied upon.14 In Hem Raj v. State,15 the Supreme Court has finally settled the law in this regard. It has held that a confession need not be corroborated by evidence discovered by the Police after a confession had been made; that any material that is already in their possession can be put in evidence, that a confession can be made even during a trial and the evidence already recorded may well be used to corroborate it, that it may be made in the Court of the Committing Magistrate, and that the materials already in the possession of Police may be used for corroboration.

Where a prisoner adheres at the trial to a previous judicial or extra-judicial confession, it may, if the court believes it, be acted upon without there being any corroboration of it. In the same manner, a plea of guilty is sufficient by itself to support a conviction, though followed by a sentence of death. But a retracted judicial or extra-judicial confession stands on a different footing, and is an endless source of anxiety and difficulty to those who have to see that justice is properly administered.16 Retraction is a common phenomenon in India.17 When a retracted confession is given in evidence against

J. 699: 59 Bom. L. R. 945: (1957)

2 M. L. J. (S.C.) 87.

14. Ramachandra v. State, A. I. R. 1957 S. C. 381: 1957 Cr. L. J. 559.

15. A. I. R. 1954 S. C. 462: 1954 S. C. J. 449: 1954 S. C. R. 1133: (1954) 1 Mad. L. J. 694: 1954 All. W. R. (Sup.) 49: 1954 Cr. L. J. 1313: (1954) 1 Mad. W. N. 468.

16. Per Straight, C. J. in Queen-Empress v. Babu Lal, (1884) 6 All. 509.

Bhubhoni Sahu v. The King, 1949 M. W. N. 444: A. I. R. 1949 P.C, 257: 76 I. A. 147.

^{12.} This is erroneous; the reasons are not for the retraction but for having made the confession in the first evidence; see Haroon Haji Abdulla v State of Maharashtra, (1968) 2 S. C. R. 641, 648: 1968 S. C. D. 391: (1968) 2 S. C. J. 534; (1968) 1 S. C. W. R. 243; 70 Bom. L. R. 540; 1970 M. P. L. J. (S.C.) 537; 1968 Cr. L. J. 1017; 1968 M. L. J. (Cr.) 591; 1968 M. L. W. (Cr.) 116; A. I. R. 1968 S.C. 832, 837. 13. Sarwan Singh v. State of Punjab, A. I. R. 1957 S.C. 637; 1957 S. C. I. 699; 59 Bom. L. R. 945; (1987)

a prisoner, the court has first to determine whether the confession is admissible. When the confession has been held to be admissible, the Court has then to consider what weight should be given to this piece of evidence. The admissibility of a confession depends upon its having been made without any such inducement, threat or promise as is mentioned in Sec. 24 of the Evidence Act, and it has been remarked more than once that the mere fact that a confession has been retracted does not show that it was not voluntary but was made in consequence of some inducement, threat or promise.18 From the point of view of admissibility alone, therefore, the mere fact that a confession has been retracted is immaterial and especially if the reasons given by an accused for withdrawing his confession are palpably false19 and where the alleged tutoring and enforcing is not complained about at the earliest point of time. There may, however, be other circumstances in the case, which may cast a doubt on the voluntary character of the confession, and where there are such other circumstances, the fact that the confession has been retracted will strengthen the inference that the confession was not voluntary, and the confession will then have to be excluded altogether from evidence. But if the court holds the confession to be voluntary, its admissibility is established, and there is nothing in the law to prevent the court from basing a conviction on a retracted confession alone, if it believes it to be true.20

When the relevancy of a confession has been established the use to be made of it is not a matter of law but of prudence, and depends upon the circumstances of each case, upon the circumstances under which the confession was made, the circumstances under which it was retracted, the reasons given for the retraction and the delay in retracting. Though, as a matter of pure law, there may be nothing to prevent a court from convicting on a retracted confession alone, such confession is a highly suspicious piece of evidence, and the courts have emphasised the grave danger of making such piece of evidence alone as a basis for conviction. They have, therefore, as a matter of prudence, consistently declined to record a conviction on a retracted confession alone and have required the prosecution to give some independent evidence in corroboration of the confession.21 It is a settled rule of evidence that unless a retracted confession is corroborated in material particulars, it is not

Venkata Subbaiah. In re, A. I. R. 1955 Andhra 161.

^{18.} Pharho v. Emperor. 141 I. C. 392;
A. I. R. 1932 Sind 201; Mohar Singh v. Emperor, (1926) 27 Cr.
L. J. 983; Emperor v. Dewan Kahar, (1923) 24 Cr. L. J. 497; 72 I.C. 961; A. I. R. 1923 Pat. 13; Sheo Prasad Koeri v. Emperor, (1919) 20 Cr. L. J. 562; 52 I.C. 50; A. I. R. 1919 Pat. 322; Queen-Empress v. Basvanta, (1900) 25 Bom. 168. Bom. 168.

Kesava Pillai v. Emperor, (1929) M. W. N. 901; A. I. R. 1929 M. 837; In re Rajagopal, 1943 M. W.

N. 793: A. I. R. 1944 M. 117: I. L. R. 1944 M. 308: 211 I. C. 367: In re Rajagopal, 1943 M. W. N. 793; Shyamo v. Emperor, A. I. R. 1932 M. 391: 137 I. C. 9: (1532) M. W. N. 305: 55 Mad, 903

⁽F.B.); Kuttiappa Chetty v. Emperor, (1929) M. W. N. 791; Kesava Pillai v. Emperor, (1929) M. W. N. 901: A. I. R. 1929 M. 837; Lakshmayya v. Emperor, (1930) M. W. N. 785; Edigakanchappa v. Emperor, 1936 Mad. Cr. C. 255; Emperor, 1936 Mad. Cr. C. 255; Obigadu v. Emperor, 1935 M. W. Obigadu v. Emperor, 1935 M. W. N. 824; Sarwan Singh v. State of Punjab, A. I. R. 1957 S. C. 637: 1957 S. C. J. 699; Maddapeda Brahmayya, In re, 1949 M. W. N. 281; A. I. R. 1949 M. 817.

21. Harold White v. The King, 1945 M. W. N. 560; A. I. R. 1945 P. C. 181; Phuboni Sahu v. The King, (1949) M. W. N. 444; A. I. R. 1949 P.C. 257; Gopisetti Chinna Venkata Subbaiah. In re. A. I. R.

prudent to base a conviction in a criminal case on its strength alone.22 Also see note 1 (h) ante. It is the duty of a court that is called to act upon a retracted confession to inquire into all the material points and surrounding circumstances and satisfy itself fully that the confession cannot but be true. The mere fact that a prisoner puts in a plea of not guilty and denies having made the confession, or explains having made it by improper inducement of police is enough in itself to put the Judge upon inquiry.28

On the question as to what will constitute sufficient corroboration of a retracted confession in a particular case, no rule is laid down by the authorities, except that the corroboration must be on some material particular connecting the accused with the offence. The production of property, the object of the offence or some other article connected with the commission of the offence, will be sufficient corroboration. The truth of a confession may be sufficiently indicated also by the character of the confession itself and the circumstances in which it was made.24 Where a confession is wanting in those natural particulars which one could expect in a free and voluntary confession, it would naturally excite court's suspicion.25 A confession should not be relied upon where it is inconsistent with the other evidence in the case. Evidence of motive alone is not sufficient corroboration. It is not essential that the corroboration must come from facts and circumstances discovered after the confession was made. It would be sufficient if the general trend of confession is substantiated by some evidence which would tally with what is contained in the confession. It is, however, not necessary that the corroborative evidence should itself be sufficient for conviction. It should be of the Rex v. Baskerville1 type.2

The law, as it stands at present, may thus be summarized:

(a) In the case of a judicial confession recorded in the manner prescribed by the Criminal Procedure Code, the confession is to be held prima facie to be voluntary until the contrary is shown.

22. Puran v. State of Punjab, 55 P. L. R. 158; A. I. R. 1953 S. C. 459; 1953 Cr. L. J. 1925; see Muthuswami v. State of Madras, A.I.R. 1954 S.C. 4: V. State of Madras, A.I.R. 1954 S.C. 4: 1954 Cr. L. J. 236: 1953 S. C. J. 619: Ramaswamy Konar, in re, (1954) M. W. N. 463 (2): 1954 M.W.N. (Cr.) 131 (2): 35 Cr. L. J. 154: A. J. R. 1954 Mad. 1006; R. v. Lalit, (1911) 38 Cal. 559 (F.B.).

v. State of Punjab, 1957 Cr. L. J. 481: A.I.R. 1957 S.C. 216; Hemraj v. State of Ajmer. A. I. R. 1954 S.C. 462; Kalawati v. State of H. P., A. I. R. 1953 S. C. 131: 1953 S. C. A. 660: 1953 S. C. J. 144. 24. Jehangiri Lal v. Emperor, 150 J.C. 1056: A.I.R. 1935 Lah, 230; Queen

Empress v. Maiku Lal.

All. 133.

Mst. Parwati v. Emperor, (1926) 37

Cr. L. J. 821 (Nagpur).
(1916) 2 K. B. 658.

Muthuswami v. State of Madras, A.
I. R. 1954 S. C. 4: 1954 Cr.L.J.
236: 1953 S. C. J. 619; Subramania
Goundan v. State of Madras, 1958
S. C. R. 428: A. I R. 1958 S. C.
66: 1958 Cr. L. J. 238: (1958) 1

Mad. L. J. (S.C.) 130: 1958 All W.
R. Sup. 78: In re Muthukarunga
Konar, A.I.R. 1959 Mad. 175: 1959

Cr. L. J. 603 Cr. L. J. 603

⁽F.B.).

23. Emperor v. Thakur Das, I. L. R. (1943) 1 C. 487; 209 I. C. 550; A. I. R. 1943 Cal. 625; Puran v. The State of Punjab, 55 Punj.L.R. 158; A. I. R. 1953 S. C. 459; 1953 Cr. L. J. 1925; Arjun Lal v. The State, A. I. R. 1953 S. C. 411; Pangambam v. The State of Manipur, 17 Cut. L. T. 1: 1953 Cr. L. J. 163; 1951 All. W.R. (Sup.) 38; 1956 Cr. L. J. 126; A.I.R. 1966 A.C. 9; Balbir Singh

- (b) Both in the case of judicial and extra-judicial confessions the onus is upon the accused of showing that under this section a confession he has made is irrelevant.
- (c) While the mere fact of retraction is not in itself sufficient to make it appear to have been unlawfully induced, in ordinary cases as a general rule corroborative evidence of the truth of the confession and, by implication, of its voluntariness is required.

Where a Sessions Judge came to the conclusion that the confession must be taken to be voluntary and true, because there was no evidence of ill-treatment by the police and the confessions had been repeated before the Committing Magistrate nearly a month after they had been made and recorded, the Court said: "There is undoubtedly a great deal of force in that reasoning, but where a confession is retracted, it is, we think, the duty of Court that is called to act upon it, especially in a case of murder, to enquire into all the material points and surrounding circumstances, and satisfy itself fully that the confession cannot but be true."3 In other cases, the Court is not at liberty to act upon mere conjecture, and its rejection of a confession must be based upon the nature of the confession, the facts disclosed by the evidence for the prosecution or adduced in proof of his plea of not guilty by the accused. If from the evidence given by the prosecution, it appears doubtful, whether the confession was voluntary, the onus will of course lie upon the prosecution to affirmatively establish that the confession was voluntary and that it is admissible. If in such cases, this be not established, or if it appears, upon the evidence adduced by the prosecution or the accused, that the confession was not voluntary, it must be rejected under the terms of this section. Section 27 not only qualifies Secs. 25 and 26, but also Sec. 24.4

Reference may also be made to two cases. In In re A. M. M. Sathakathullah,5 it was said that where a confession is retracted in the trial Court, it is necessary that there must be some material to corroborate the statement in order to satisfy the Court that the statement made could be acted upon. And in Narbahadur v. State,6 it was said that it is not safe to act upon a retracted confession unless it is corroborated by other circumstances in material particulars. A confessional statement, if retracted though voluntary, cannot be acted upon without corroboration.7

10. "By an accused person". The word "accused" in Secs. 24 to 26 includes any person who subsequently becomes accused provided that at the time of making the statement criminal proceedings were in prospect.8 Even when a confession is made before a report was made to the police and before

^{3.} R. v. Durgaya (1901) 3 Bom. L.R.

^{4.} Amiruddin v. Emperor, A.I.R. 1918 Cal. 88: I.L.R. 45 C. 557; 44 I.C.

A.I.R. 1965 Mad. 94: (1964) 1 M.L. J. 239. A.I.R. 1965 Assam 89.

^{7.} Parasuraman v. State of Madras,

¹⁹⁶⁹ M.L.W. (Cr.) 68, 70; Kali. Ram v. State, (1973) 3 Sim. L. J. 195 (H.P.).

^{8.} Smith v. R. 1918 Mad. 111: 43 I.C. 605; Emperor v. Cunna. 1920 Bom. 270; 59 I.C. 324; 22 Bom. L.R. 1247 (F.B.) per Shah, J., Abdul Ghani v. Emperor. 1931 Lah. 763: 133 I. C. 55.

the person confessing was accused of an offence by others, the confession must be regarded as one made by an accused.9

The expression "accused person" describes the person against whom evidence is sought to be led in a criminal proceeding.10 The Section refers to a person who is not only an accused at the time when he makes a confession, but also to one who becomes an accused subsequently The Section refers to the status of the person, not at the time when he makes the confession but at the time when the confession is being considered by the Court, and when he is undoubtedly an accused person.11

A customs officer conducting an inquiry under section 107 or section 108 of the Customs Act is not a 'police officer' and the person against whom the inquiry is made is not 'accused person' and a statement made by such a person in that inquiry is not a statement by 'a person accused of any offence'. The statement is therefore not hit by the present section nor by section 25 post.12

11. "Caused by any inducement, threat or promise".- A confession does not become inadmissible because it was made before a 'person in authority'. It is inadmissible only when it is brought about under any "inducement, threat or promise" and the court is of opinion that the accused had reason to believe that he will get some advantage or avoid some evil by making such a confession.13 The test of admissibility of a confession is its voluntary nature and not its falsity or truth.14 A confession which is voluntary is not necessarily true, and vice versa.15 A confession by an accused is "voluntary" if it is not obtained from him either by fear of prejudice or hope of advantage, exercised or held out by a person in authority.16 It is not voluntary, if it appears to have been caused by any inducement, threat or promise. It is difficult to lay down any hard and fast rule as to what constitutes an inducement, a term which of course includes torture. The question is one for the decision of the Judge, and his decision will vary in each particular case. A statement is inadmissible under this section only, if the Court considers it to have been made

In re Ahmed. 1950 Mys 82.
 State of U. P. v. Deoman Upadhya-ya. (1960) 2 S.C.A. 371; A.I.R. 1960 S.C. 1125; 1960 A.L.J. 783; 1960 Cr.L.J. 1504; 1960 All.W.R. (H.C.)

^{11.} Viran Wali v. State. A.I.R. 1961 J.

^{12.} Ramesh Chandra Mehta v. State of West Bengal, (1969) 2 S.C.R. 461: (1970) 2 S.C.A. 174: 72 Bom. L.R. 787: 1970 Cr. L.J. 863: A.I. R. 1970 S.C. 940; Illias v. Collector of Customs, Madras, (1969) 2 S. C. R. 613: (1970) 2 S.C.A. 165: (1970) 1 S.C.J. 701: (1970) 1 Andh. W.R. (S.C.) 133: 1970 Cr.L.J. 998: (1970) 1 M.L.J. (S.C.) 133: 1970 M.L.J. (Cr.) 325: Percy Rustomii Basta v. State of 325; Percy Rustomji Basta v. State of Maharashtra, A.I.R. 1971 S.C. 1087:

^{(1971) 1} S.C.C. 847.

13. In re Pyarelal Bhargava, (1963) 1 S. C.R. 689; 1963 S.C.D. 341; 1963 A. L. J. 459; 1963 A. W. R. (H. C.) 374; 1963 B. L. J. R. 407; 1963 (2) Cr. L.J. 178; A.I. R. 1963 S. C. 1094, 1096; Sudra Harres V. State 1968 Cr. L.J. 697 Hansa v. State, 1968 Cr. L.J. 697 (Orissa); Raj Kishore Bhuyan v. State, 35 Cut. L.T. 513, 521; A.I.R. 1969 Orissa 90; I.L.R. (1976) 2 Punj. 364; 1975 Punj. L. J. (Cr.)

Emperor v. Panchkari, 1925 Cal.
 587: I.L.R. 52 Cal. 67: 86 I.C. 414.

Kasimuddin v. Emperor, 1934 Cal. 853: 39 C.W.N. 27.

^{16.} Ibrahim v. Emperor, 1914 P.C. 155; 23 I.C. 678: 18 C.W.N. 705.

in consequence of "any inducement, threat or promise." The question has however to be examined from the angle of the confessing accused to see how the inducement, threat or promise would affect the working of his mind. If a commandant of BSF after having failed to obtain confessional statement through another agency, himself succeeded in obtaining confessional statements, it could be inferred that there was some hope generated in the mind of the accused of receiving support of a person in authority.18-19 If any coercion or inducement was used, the accused was the person to make the complaint. From mere denial of the confession by the accused when questioned about it, it cannot be said that any coercion or inducement was used.20 The burden is on the accused to place sufficient material upon which the court may consider the confession to have been obtained by inducement, etc., sufficient to invoke a hope in his mind.21 Confession obtained on promised immunity from further action is not admissible.22

12. Relevancy, question of law. The relevancy of the confession is to be determined by the Court, that is the Judge or the Magistrate and not by the jury.23 The Section, whilst requiring the inducement to be offered by a person in authority, leaves it entirely to the Court to form its own opinion as to whether the inducement, threat or promise was sufficient to lead the prisoner to suppose that he would derive some benefit or avoid some evil of a temporal nature by confessing.24 Thus the voluntary character of a confession is a mixed question of law and fact.25

It is for the Judge to decide for himself, whether prima facie the confession of the accused appears to him to have been induced by threat or promise and for that reason to be inadmissible. If he comes to the conclusion that it is inadmissible, he must exclude it from the consideration of the jury. It is not the province of jury to decide the question of admissibility of evidence. On the other hand, if the Judge considers the confession admissible, it is his duty to point out to the jury that the fact that he considers the evidence as admissible does not necessarily mean that it is true, and it is for jury to make up their minds whether they should accept the confession, and, in doing so, they should naturally be guided to a large extent by their opinion on the question, whether the confession was voluntary or not.1 It is possible that the

Cr.L.J. 1335 (Goa).

18-19. Satbir Singh v. State of Punjab, (1977) 2 S.C.C. 263: 1977 Cr. L.J. 1985: (1977) S.C.C. (Cr.) 333: A.

I.R. 1977 S.C. 1294. Abdul Razak Murtaza Dafedar v. State of Maharashtra, (1970) 1 S.C. R. 551: (1970) 1 S.C.A. 535: (1969) 2 S.C.J. 870: 1970 S.C. Cr. R. 241: 1970 A.W.R. (H.C.) 43: 72 Bom. L.R. 646: 1970 Cr. L.J. 373: 1970 M.P.L.J. 931: 1970 M.L.J.

(Cr.) 862: 1970 Mah. L.J. 747: A. I.R. 1970 S.C. 283, 286.

21. Raghunath Naik v. State, 41 Cut. L.T. 1085.

Devappa v. State, (1972) 1 Mys.
 L. J. 499: 1972 Mad.L.J. (Cr.) 374.
 R. v. Hannath Moore, 21 L.T. Mg.

Ca. 199; R. v. Sleeman, (1853) Dears. & Bell 249; R. v. Navroji, (1872) 9 Bom, H.C.R. 358, 367. 24. R. v. Navroji, (1872) 9 Bom, H.C.R. 358 at p. 367: per Sargent, C.J., see

also S. 28 post.

25. Government of Bombay v. Dashrath Ram Nivas, 1945 Bom. 265: I.L.R. 1945 Bom, 614; 220 I.C. 182 (F.B.).

1. Baldeo v. Emperor, 1933 Cal. 187: 142 I.C. 639; Suker Dusadh v. Emperor, 1941 Pat. 303: I.L.R. 20 Pat. 547; 192 I.C. 888.

^{17.} R. v. Balvant, (1874) 11 Bom, H. C.R. 137, 138; Saraswathi Dasarathan v. State of Mysore, (1966) 8 Law Rep. 80 at page 88: 1967 M.L. J. 30 (statement of Savings Bank Counter Clerk to the Senior Superintendent of Post Offices held made under inducement, threat or promise); Ismail Ibrahim v. State, 1975

Judge may admit it in evidence after holding that it was voluntary, and the jury may think it was not voluntarily made, and therefore attach little or no weight to it. Whether the jury thought so, or not, cannot be known because no reasons are to be given for the verdict. The Judge cannot tell the jury that it was no part of their duty to consider whether the confession was made voluntarily or not. That would amount to a misdirection, as held in Badan Ali v. Emperor.2 At the same time, the Judge cannot ask the jury to decide whether the confession was voluntary, and then to decide whether it was true. The jury has not to consider only the volitional character of the confession, as detached from its credibility as the Judge has to do, but it has primarily to determine its truth and, as a part of it, to consider whether it was voluntary. To ask the jury to detach the two aspects, and decide whether it was true, if and after they are satisfied that it was voluntary, amounts to a misdirection, because a confession may be involuntary and still true.3 It is not inconsistent that the Judge should take upon himself, as Sec. 298 (1) (c), Cr. P. C., 1898 requires him to do, the decision, for the purpose of admitting a confession into evidence, that it was voluntarily made, while at the same time leaving it to the jury for the purpose of determining what weight should be given to it to decide both whether it was true and whether it was voluntary.4

In scrutinizing a case from the point of view of this Section, the Court will have to perform a threefold function. It will have, as a Court, to determine the sufficiency of the inducement, threat or promise as affording certain grounds; it will have again to clothe itself with the mentality of the accused to see whether the grounds would appear to the accused reasonable for a supposition that is mentioned in the section; lastly, it will have to judge, as a Court, if the confession appears to have been caused in consequence of the inducement, threat or promise.5

If a confessional statement in a case of murder does not relate to the deceased but gives the name of another person and it is not shown that the deceased had another name, it is irrelevant and must be excluded from consideration.6

13. Confession to whom. It is immaterial to whom a confession, obtained by undue influence, is made. Thus, a confession so tainted is relevant whether made to the Sessions Judge,7 or Magistrate,8 or any police officer9 or any other person, e.g., the Traffic Manager of a Railway10 or the Master of a vessel,11 or a Customs Officer.12 It is also immaterial whether the confession

Orissa 156, 158.

^{2.} I.L.R. 63 Cal. 833: 165 I.C. 127: 37 Cr.L.J. 1084.

^{3.} Government of Bombay v. Dashrath Ram Nivas, 1945 Bom. 265: I.L.R. 1945 Bom. 614: 220 I.C. 182 (F.B.).

^{4.} Suker Dusadh v. Emperor, 1941 Pat, 303, 305. See also the cases cited therein.

Emperor v. Panchkari, 1925 Cal. 587.
 Chenia v. State, I.L.R. 1966 Cut. Chenia v. State, I.L.R. 1966 Cut. 168: 1966 Cr. L.J. 789: A.I.R. 1966

R. v. Luchoo, (1873) 5 N.W.P. 86.
 Ibid., R. v. Rama Birapa (1878) 8

B. 12; R. v. Asghar, (1879) 2 A. 260; R. v. Uzeer, (1884) 10 C. 775.

^{9.} R. v. Luchoo, supra; R. v. Rama

Birapa, supra. 10. R. v. Navroji. (1872) 9 Bom. H.C. R. 358.

^{11.} R. v. Hicks. (1872) 10 B.L.R. App.

^{12.} Vallabhdas v. Assistant Colletor, A. I.R. 1965 S.C. 481: (1965) . S.C. J. 208: 66 Bom, L.R. 482: 1964 Mah L.J. 641: 1965 M.P.L.J. 25: 1965 Mad. L.J. Cr. 98: 1965 (1) Cr. L.J. 247.

be made to the same person who has used undue influence13 or whether it be made to a person other than the one who has held out the inducement, threat or promise.

14. Confession after prolonged custody. Prolonged custody immediately preceding the making of the confession, is sufficient, unless it is properly explained, to stamp it as involuntary.14 Confessions made some days after arrest may also often be true, but such confessions will, in many instances, not have been made voluntarily, but have been extorted maltreatment, or induced by promises of pardon on being made a witness for the Crown.¹⁵ Confessions obtained after illegal detention by the police must be regarded with grave suspicion.16 Confessions in this country are often obtained by undue influence, especially by the police, and this fact has been the subject of frequent judicial and public comment.17 Many confessions are induced by improper means; and innocent people often accuse themselves falsely.18 A confession, extracted by persistent questioning by the police, cannot be admitted as a voluntary confession, and even if it is admissible under Sec. 27, it is of little evidential value.19 This applies also, when the confessing accused is in police custody and after recording of the confession is again handed over to the police custody, even if the Magistrate had given him 31 hours' time to think over.20

When a confession has been received, and it afterwards appears from other evidence, that an inducement, threat or promise was held out, the

R. v. Hicks. (1872) 10 B.L.R. App.
 R. v. Rama Birapa, (1878) 8 B.
 R. v. Asghar, (1879) 2 A. 260;
 R. v. Uzeer, (1884) 10 C. 775.
 Nathu v. State of U.P. 1956 Cr. L.

J. 152: A. I. R. 1956 S.G. 56, (prolonged custody of the accused for a fortnight not even attempted to be explained); Abdul Razak Murtaza Dafedar v. State of Maharashtra, (1970) 1 S.C.R. 551; (1969) 1 S.C.A. 535; (1969) 2 S.C.J. 870; 1970 A.W.R. (H.C.) 43; 72 Bom. L. R. 646; 1970 Cr. L.J. 373; 1970 M.P.L.J. 931; 1969 M.L.J. (Cr.) 862; 1970 Mah. L.J. 74; A.I.R. 1970 S.G. 283; Abdul Subhan v. Em-1970 S.G. 283; Abdul Subhan v. Emperor, 1940 All. 46: 186 I.G. 192; see also Abdul Munim Khan v, State of Hyderabad, 1953 Hyd. 145: I.L. R. 1951 Hyd. 805; Vidyamati v. The State, 1951 H.P. 82: 1953 Cr. L.J. 33; Kartar Singh v, State of V.P. 1952 V. P. 42: 1953 Cr. L. J. 986; Hari Ram v. State, 1972 Cr.L.J. 961. 15. R. v. Gobardhan, (1887) 9 All. 528, 566. per Brodhurst, J. 16. Ibid; R. v. Madar. (1885) A. W. N. 59; R. v. Behary, (1867) 7 W.R. Cr. 3, (exposition of a police officer's powers of arrest and detention with a view to the see also Abdul Munim Khan v. State

detention with a view to the suppression of torture); R. v. Sagal. (1895) 21 C. 642.

17. See Mst. Bhagan v. State, 1955 Pepsu 33; R. v. Kohdai, (1866) 5 W.R. Cr. 6; R. v. Behary, (1867) 7 W.R. Cr. 3; R. v. Nityo, (1875) 24

W.R. Cr. 80; R. v. Babu Lal, (1884) 6 A. 509, 542, 543; R. v. Gobardhan, (1887) 9 A. 528, 566; R. v. Dada, (1889) 15 B. 452, 461. "It appears to be well known that the police are in the habit of extorting confessions. confessions by illegal and improper means. They find that no inquiry is made of them as to the truth of such charges, but they are merely told they must obtain convictions," per Petheram. C. J., in R. v. Ramanand, (1885) All. W.N. 221: Stephen. Hist. of Criminal Law p. 442 : First Report of Indian Law Commission and the report of the late Police Commission. Sec. 163, Cr. P.C. 1898 (Section 163 of the new Code) expressly forbids any such inducement, as mentioned in this section, being offered.

R. v. Dada, (1889) 15 B. 452, 461, per Jardine. J.
 Emperor v. Taduturu Poligadu,

1940 Mad, 12: 41 Cr. L.J. 242: 1939 M.W.N. 873: 185 I.C. 829; Chinna Papiah, In re 1940 Mad. 136: 186 I. C. 484: (1940) 2 M.L.J. 35: 1939 M.W.N. 1134; Public Prosecutor v. Munigan, 1941 Mad, 359 : I.L.R. 1941 Mad. 503; 195 I.C. 76; 42 Cr. L.J. 664; (1941) 1 M.L.J. 227; 52 L.W. 942; 1940 M.W.N. 1272.

20. The State v. Debnu, A. I. R. 1957 Him. Pra. 52. See also Amrut Soma v. State of Bombay, A.I.R. 1960 Res 489; V. L. P. 1960 R. 664

1960 Bom, 488; I.L.R. 1960 B, 664.

proper course for the Judge is to strike the confession out of the record and to tell the jury to pay no attention to it.21 A Magistrate acts without due discretion when, as a prosecutor, he holds out promises to prisoners as an inducement to confess.22 A police officer acts improperly and illegally in offering an inducement to an accused person to make any disclosure or confession.28

In order to ensure complete freedom of the mind of the accused from police influence, the effective way is to send him to jail custody and give him adequate time to consider whether he should make a confession at all. No hard and fast rule as to the time can be laid down but generally speaking at least 24 hours should be given to the accused to decide whether or not to make a confession.24 But there can be no inflexible rule as to the time required.25 Therefore, each case must be governed by its facts. Thus, where the accused was in police custody for a very short time and when produced before the Magistrate was given three hours' time for deliberation and the confession was made thereafter after due caution and warning was given twice, the confession recorded by the Magistrate as enjoined in section 164, Cr. P. C., 1978 was considered voluntary.1 If the accused was in police custody for about nine days and thereafter in judicial custody for four days before making the confession, he was considered to have freed himself from the influence of the police, if any.2 In Abdul Razak Murtaza Dafedar v. State of Maharashtra,3 the Court held that the accused had spent four hours in judicial custody and he was not under the influence of the investigating agency for at least four days. He was again given 24 hours to think after he was told by the Magistrate that he was not bound to make any confession and if he made one, it would be used against him. The confession made on the next day was held to be voluntary.4

The words 'in custody' are not to be found in the section; they denote only surveillance or restrictions on the movements of the person concerned, which may be complete as in the case of an arrested person, or may be partial. The question whether a person was in custody at the time of a confession arises only for the purpose of finding out whether that confession "appears to the court to have been caused by inducement, threat or promise" within the

 Babu Singh v. State of Punjab, 1963 S.C.R. 749 (long police custody and the time given insufficient and unsatisfactory).

1. Subodh Kumar Dhar v. State, 1966 Cr. L.J. 323 (2) (Cal.).

Jai Singh v. State. 69 P.L.R. (D) 100, 102; A. I. R. 1967 Delhi 14.

the material facts and the ratio were different.

R. v. Garner, 1 Den. C. C. 329.
 R. v. Ramdhun. (1864) 1 W.R. Cr.

^{23.} R. v. Dhurum, (1867) 8 W.R.Cr.

R. v. Dhurum, (1867) 8 W.R.Cr.
 13. Cr. Pro. Code, S. 163.
 24. Sarwan Singh v. State of Punjab,
 1957 S.C.J. 699; I.L.R. 1957 Punj.
 1602; 1957 A.W.R. (Sup.) 99; 1957
 M.P.C. 781; (1957) 1 M.L.J. (Cr.)
 672; 1957 Cr. L.J. 1014; A.I.R.
 1957 S.C. 637 at p. 643; (held, enough time was not given to the
 accused The Magistrate gave him only accused. The Magistrate gave him only half an hour after accused was in police custody for more than five

^{100. 102:} A. I. R. 1967 Delhi 14.
3. (1970) I S.C.R. 551: (1970) I S.C.
A. 535: 1970 S.C.Cr.R. 241: (1969) 2
S.C.I. 870: 1970 A.W.R. (H.C.)
43: 72 Bom, L.R. 646: 1970 M.P.
L.J. 932: 1970 M.L.I. (Cr.) 862:
1970 Mah.L.J. 747: 1970 Cr. L. J.
373: A.I.R. 1970 S.C. 283, 286.
4. Sarwan Singh v. State of Punjab,
1957 S.C.J. 699: 1957 A. W. R.
(Sup.) 99: 1957 M.P.C. 781: (1957)
I M.L.J. (Cr.) 672: I.L.R. 1957
Punj. 1602: 1957 Cr.L.J. 1014: A.
I.R. 1957 S.C. 637 distinguished as
the material facts and the ratio were

terms of the section. The mere fact that there may be some restriction on the movements of the accused or that he may be under some sort of surveillance at the time when he makes a confession, will not ipso facto vitiate the confession as being involuntary.5

The fact that the accused was kept in the custody of the police for a period of nine days before he was produced before a Magistrate for recording his confession, is not, by itself, a sufficient ground for holding that the confession is not voluntary.6 In another case a delay of seven days before the accused was produced before a Magistrate was held to be not satisfactorily explained and the confession was considered to be not voluntary.7 Where apart from prolonged custody and the failure of the prosecution to explain the delay, the Magistrate failed to disclose his identity before recording the confession, it lost its force.8

In a case from Rajasthan the words 'if you tell the truth, you will be released' were spoken by the police to the accused. Further, the accused had been kept in police custody for ten days and tortured before the alleged confession. It was held that the confession was not voluntary but was brought about by inducement and threat.9 But if a Postal Inspector, a person in authority, conducting an inquiry against a subordinate, a branch Postmaster, tells the subordinate that he would be excused if he divulged the truth, it does not amount to extortion of confession on promise.10

When the atmosphere of the court is not free from police influence and the accused had reason to believe that he was produced in the presence of a police officer and not a Magistrate, the confession carmot be said to be voluntary.11

A statement by an employer, the first accused in a case of adulteration, before a Food Inspector that the alleged adulterated milk belonged to him and that it was he who had entrusted it to his employee, the second accused, is hit by this section for in the circumstances it must be presumed that the statement was not voluntary and was made by inducement, threat or promise.12

15. Presumption about voluntariness. The term "voluntary" is wider in meaning than the terms of section 24. If a confession is not voluntary, in the wider sense of the term, ex hypothesi the person who made it did not do so from any desire to tell the truth. This fact in itself introduces an element of suspicion. In such circumstances, if facts are proved which sug-

Harbans Singh Sardar v. State. 71
 Bom. L.R. 599: 1970 Cr. L.J. 325:
 A.I.R. 1970 Bom. 79; but see Jairam Ojha v. The State, 34 Cut. L.
 T. 141: 1968 Cr. L.J. 765: A.I.R.
 1968 Orissa 97, 98 (such a confession) 1968 Orissa 97, 98 (such a confession is hit by section 26 post).

Jai Singh v. State, 69 Punj. L.R.
 (D) 100: 1967 Cr.L.J. 628: A.I.R.

¹⁹⁶⁷ Delhi 14, 16.
7. A.N.T.O. Thaba v. State, 1967 Cr.
L. J. 1023: A.I.R. 1967 Manipur

^{8.} Bhaskara Nair v. State of Kerala,

¹⁹⁷⁰ Ker, L.T. 11; In re Antappa. A.I.R. 1959 Mys. 250.

Tejumal v. State of Rajasthan,
 1968 Raj, L.W. 604, 606.
 Madhusudan Swain v. State, 33 Cut.

L.T. 660, 668.

Adinath Chakraborty v. The State, 1967 Cr. L.J. 125: A.I.R. 1967

Tripura 1 at pp. 5, 6.

12. C.B. Xavier v. Food Inspector, 1967

Ker, L.J. 887: 1967 M.L.J. (Cr.)

901: 1968 Cr. L.J. 347: A.I.R. 1968 Ker. 66, 68.

gest that an inducement of some kind, although outside the terms of this section, was in fact given, the Court may well refuse to accept the confession as true.13 The frequent assumption, that a person would not make a confession of his guilt, which will be prejudicial to his interest, unless some pressure is exerted on him, is not wholly correct.14 The mere fact of a person being in custody is not a good basis for a presumption that any confession he has made was caused by an inducement, threat or promise, having reference to the charge against him, proceeding from some police officer, and sufficient to make him believe that he would be benefited in the trial by making it.15 The fact that a confession is more elaborate than necessary or that it contains more particulars than are required at the particular stage, does not necessarily show that the confession was not voluntary.16 Conversely also the absence in the confession of the details in extenso is not enough to discredit it, if the statement therein is supported by the oral evidence in the case.17

The circumstances, that the confession was not retracted in the Court of the committing Magistrate but was retracted in the Sessions Court at a late stage, goes strongly in favour of the confession being held to be voluntary.18 A plea, that as no question under Sec. 342, Cr. P. C. 1898 (Section 313 of the Code of 1973), has been put in before the committal Court with regard to the confession, would not entitle the accused to point out in the Sessions Court that it was not voluntary.19 Nevertheless, his long detention in police custody coupled with the fact, that, on the very first occasion when he was called by the Magistrate, he denied having committed any offence, raises some doubt about the voluntary character of the confession.20

In determining whether a confession is admissible or not under this section, it is necessary to consider (a) the character of the person alleged to have exercised undue influence (such person must be a "person in authority"), and (b) the nature of the inducement, threat or promise (such inducement must (i) have reference to the charge; and (ii) be sufficient, etc.). It must, however, be established both that a confession is voluntary and that it is true. For the purpose of ascertaining both, it is necessary to examine the confession and compare it with the rest of the prosecution evidence and the probabilities of the case.21

^{13.} Kalijiban Bhattacharjee v. Emperor. 1936 Cal. 316, 321; I.L.R. 63 Cal. 1053; 163 I.C. 41; 37 Cr. L.J. 775;

⁶³ C.L.J. 232. 14. Nathu Ram v. State, 1951 H.P. 1,

^{14.} Nathu Ram v. State, 1951 H.P. 1, 10: 52 Cr. L.J. 50.

15. Dabi Lodhi v. Emperor, 1926 Nag. 368, 369: 95 I.C. 59.

16. In re Madda Pedda Brahmayya, 1949 Mad. 817; 51 Cr. L. J. 8; (1949) 1 M.L.J. 386: 1949 M.W. N. 281. But see Sivarajan v. State I.L.R. 1959 Ker. 319; Kuttappan v. State (1960) 2 Ker. L.R. 222: 1960 Ker. L.T. 829.

^{17.} Subramaniya Goundan v, 1958 S.C.R. 428; A.I.R. 1958 S.C.

^{66; (1958) 1} Mad. L.J. (S.C.) 130: 1958 M.L.J. (Cr.) 292: 1958 All. W. R. (Sup.) 78.

Findal v. State, 1954 H.P. 11: 1954
 Cr. L.J. 1900.

^{19.} Subramaniya Goundan v. State, 1958 S.C.R. 428: 1958 S.C.J. 321: 1958 A.W.R. (Sup.) 78: (1958) 1 Andh. W.R. (S.C.) 130: (1958) 1 M L.J. (S.C.) 130: 1958 M.L.J. (Cr.) 292: A.I.R. 1958 S.C. 66.

^{20.} State v. Girasia Bachubha. 1954 Sau. 39, 41: 1955 Cr. L.J. 561.

^{21.} Sarwan Singh v. State, A.I.F. 1957 S.C. 637; see also Krishna v. State, A.I.R. 1953 Pat. 166.

Where a confession is made by an accused after due warning and time for reflection, and the accused is kept in judicial lock up both before and after the making of the confession, and no circumstance is pointed out to draw the inference of police pressure, and the confession is found also to be true on comparison with the prosecution evidence and the probabilities of the case, it can be acted upon even though subsequently retracted.22

16. "Person in authority". The expression 'person in authority' is not defined in the Act. He is 'someone engaged in the detention, examination or prosecution of the accused or someone acting in the presence and without the dissent of such person, or perhaps by someone erroneously believed by the accused to be in authority.28 Such a person must be in fact a person in authority. The mere belief of a confessing accused is not enough. But who is such a person?24 No definition or illustration is given of this expression. "It is an expression well known to English Lawyers on questions of this nature; and although, as all rules of evidence which were in force at the passing of the Act are repealed, the English decisions on the subject can scarcely be regarded as authorities, they may still serve as valuable guides."25 Generally speaking, a "person in authority" within the meaning of this Section is one who is engaged in the apprehension. detention or prosecution of the accused or one who is empowered to examine him. But, a Tahsildar who has no interest in the prosecution of an accused person, other than the interest which every citizen has in the maintenance of law and order, is not a person in authority and a confession made to him is admissible in evidence.1 If the inducement, etc., proceeds from a person who has no power to interfere in the matter under inquiry, the accused cannot reasonably suppose that he will benefit by making a confession.2 A too restrictive meaning should not be placed on these words.8 "The test would seem to be, had the person authority to interfere in the matter, and any concern or interest in it? If he had, would that be held sufficient to give him that authority, as in R. v. Warringham,4 where Parke. B., held that the wife of one of the prosecutors and concerned in the management of their business was a person in authority and the rule is so laid down in Archbold's Criminal Practice?"5 Accordingly, a travel-

^{22.} Roshan Lal v. Union of India, A.I.

R. 1965 H.P. 1.
Phipson, 11th Edn. (1970) para, 798, pp. 354, 355.
See R. v. Ganesh, 1923 Cal, 458; I.
L.R. 50 Cal, 127: 74 I.C. 264: 24 Cr. L. J. 760; Emperor v. Kutub Bux, 1930 Cal. 683 : I.L.R. 57 Cal. 488 : 126 I. C. 547: but see Emperor v. Panchkari, 1925 Cal. 587: I.L.R. 52 Cal. 67: 86 I.C. 414: 26 Cr. L.J. 782: 29 C.W.N. 300.

^{25.} R. v. Navroji, (1872) 9 Bom H.C. R. 358 368, per Sargent, C. J.

Santokhi Beldar v. Emperor. A.I.R. 1933 Pat. 149: I.L.R. 12 Pat. 241:

¹⁴² I.C. 474: 34 Cr.L.J. 349: 14 P.L.T. 82 (S. B.). Santokhi Beldar v. Emperor. 1933 Pat. 149: I.L.R. 12 Pat. 241: 142 I.C. 474: 34 Cr. L.J. 349: 14 P.L. T. 82 (S.B.).

^{3.} Nazir v. R., (1905) 9 C.W.N. 474: 2 Cr.L.J. 255; see also Viranwali v. State, A.I.R. 1961 J. & K. 11. See however Nannhu v. State, A.I.R.

¹⁹⁶⁰ M.P. 182. 4. 2 Den.C.C. 447. 5. R. v. Navroji (1872) 9 Bom. H.C. R. 358, 369, per Sargent, C.J. "The inducement and authority must all be understood in relation to the prosecution; that is to say, a person is deemed to be in authority within the meaning of this rule, only if he stands in certain relations which are considered to imply some power of control or interference in regard to the prosecution." Wills, Ev. 210; Smith v. Emperor, 1918 Mad, 111; 43 I.C. 605; 19 Cr. L.J. 189 (the expression has a wider meaning than the actual prosecutor)

ling auditor in the service of a Railway Company has been held to be a "person in authority", within the meaning of this section.6 The members of a panchayat, which sat to consider whether two persons should be ex-communicated from caste for having committed a murder, were held not to be "in authority" within the meaning of this section.7 In a later case, the Court, though not deciding the question, was disposed to think that where a panchayat was assuming an authority and leading the accused to believe that he had that authority, he came within the section.8 A police patel,9 lambardar, a collecting and assistant panchayat,10 a police constable,11 Superintendent of Excise,12 Customs officer,13 Military officer,14 a Magistrate,15 Mukhia and Chowkidar16 and a Sessions Judge16-1 are "persons in authority" as are also the master of a vessel,17 the prosecutor18 or his wife19 or his attorney,20 the master or mistress of the prisoner, if the offence has been committed against the person or property of either, but otherwise not21 the Chief Secretary of a State Government,22 Pradhan, ex-officio member of Gaon Panchayat,22 District Cooperative Officer with respect to member of a Co-operative Society,24 Postal

6. R. v. Navroji, (1872) 9 Bom.H.C.

7. R. v. Mohan, (1881) 4 A. 46, 8. Nazir v. R. (1905) 9 C.W.N. 474: 2 Cr. L.J. 255, followed in R. v. Jasha, (1907) 11 C.W.N. 904. 9. R. v. Rama Birapa, (1878) 3 B. 12; Fakira v. R., 1915 Bom. 249; (1915) 40 B. 220: 33 I.C. 309.

40 B. 220: 33 I.C. 309.
10. R. v. Ganesh, 1923 Cal. 458: I.L.R. 50 C. 127: 74 I.C. 264.
11. R. v. Luchoo, (1873) 5 N.W.P. 86; R. v. Shepherd, (1836) 7 C. & P. 579; R. v. Pountney, (1836) 7 C. & P. 302; R. v. Laugher, (1846) 2 C. & K. 225; R. v. Millen, (1849) 3 Cox. G.C. 507: as to private persons arresting, see 3 Russ, Cr. 464, and note: Roscoe, Cr. Ev., 16th Ed. 43: The wife of a constable is not a person in authority: R. v. Hardwick,

person in authority: R. v. Hardwick, (1911) 1 C. & P. 98 (n).
Rokun Ali v. R., 1918 Cal. 138.
Vallabhadas Liladhar v. Assistant Collector of Customs, (1965) 1 S.C. J. 208: (1964) 1 S.C.W.R. 411: 1965 M.P.L.J. 25: 1965 M.L.J. (Cr.) 98: 1964 Mah. L.J. 641: (1965) 2 Cr. L.J. 490: A.I.R. 1965 S.C. 481; State of Rajasthan v. Budhram, I.L.R. (1968) 18 Raj. 962; 1968 Cr. L.J. 311; A.I.R. 1969 Raj. 48, 49. 14. Smith v. R., 1918 Mad. 111; 43 I.C.

 R. v. Asghar, (1879) 2 A, 260; R. v. Uzeer, (1884) 10 C, 775; R. v. Clewes, (1830) 4 C. & P. 221; R. v. Cooper, (1833) 5 C. & P. 535; R. v. Parker, (1861) L. & C. 42; R. v. Ramdhun, (1864) 1 W. R. Cr. 24 (Honorary Magistrate acting as prosecutor); also it has been held in England, the Magistrate's clerk: R. v. Drew (1837) 8 C. & P. 140; but see R. v. Fakira, (1915) 40 B. 220, which it was questioned whether a statement made before a committing Magistrate is governed by the Criminal section or by

Procedure Code, 1898, Sec. 287.
Dhukaram Mian v. State of Bihar, 1971 B.L.J.R. 641: 1971 P.L.J.R. 165, 169 and 170.

R. v. Asghar Ali, 2 A. 260; R. v. Vzeer, 10 C. 775.

17. R. v. Hicks. (1872) 10 B.L.R. App. 1; but see also R. v. Moore, (1852) 2 Den., C.C. 522 explaining

(1852) 2 Den., C.C. 522 explaining R. v. Parrott, (1831) 4 C. & P. 570.

18. Ashotosh v. R., 1921 Cal. 458: 68 I.C., 413: 26 C.W.N. 54; Ganga Prasad v. Emperor, 1945 Cal. 360: 221 I.C. 24: 79 C.L.J. 149; R. v. Jenkins, (1882) R. & R. 492; R. v. Jones, (1809) R. & R. 142.

19. R. v. Warringham, (1852) 2 Den. C.C. 447 (n); R. v. Upchurch, (1836) 1 M.C.C. 465; R. v. Taylor. 8 C. & P. 733; R. v. Moore, (1852) 2 Den. C.C. 522; R. v. Sleeman, (1853) 2 Dears, 249.

20. R. v. Croydon, (1846) 2 Cox. 67.

R. v. Croydon, (1846) 2 Cox. 67. R. v. Moore, (1852) 2 Den. C. C. 20.

Pyare Lal Bhargawa v. State of Rajasthan, (1963) 1 S.C.R. 689: 1963 S.C.D. 341: 1963 A.L.J. 459: 1963 A.W.R. (H.C.) 374: 1963 B. L.J.R. 407: 1963 (2) Cr. L.J. 178: A.I.R. 1963 S.C. 1094, 1096.

23. Lallen v. State, 1969 A.W.R. (H. [C.) 377.

Purushottam v. State of Gujarat, (1966) 7 Guj. L. R. 86; Reg v. Navroji Dadabhai, (1872) 9 Bom. H.C.R. 358; Emperor v. Appayya. I.L.R. (1916) 40 nom. 220.

Inspector in relation to Branch Postmaster²⁵ and generally any person engaged in the arrest, detention, examination, or prosecution of the accused.1 Instances of a person not in authority are Gountia,2 Pradhan of a village,3 Sarpanch or Naib Sarpanch⁴ and Tahsildar having no interest in prosecution other than that of an ordinary citizen.5 But in the undernoted case,6 Sarpanch of a Gram Panchayat was 'held to be a "person in authority" and confession made as a result of harassment by such person was held involuntary.

The threat, inducement or promise must proceed from a person in authority. It is a question of fact in each case, whether the person concerned is a man of authority or not.7 Unless the threat emanates from 'a person in authority' the section can have no application. In a case before the Supreme Court, a person summoned under section 108, Customs Act, 1962, was under the statute itself under a compulsion to speak the truth. Though the compulsion may amount to a threat, it was held that the threat did not emanate from 'a person in authority' but from the provisions of the statute itself.8 Similar is the position of statement under Section 171-A, Sea Customs Act, which is not equivalent to confession.9 Mere warning of the possibility of prosecution for perjury if truth was not stated is not a threat which could have reasonably caused the person making the statement to suppose that he would thereby gain any advantage or avoid any evil of a temporal nature in reference to proceeding against him for smuggling.10

If a confession to Mukhia, who is a 'person in authority', is induced by a promise to release the maker, it is not a voluntary one.11

The Section requires that the statement must be made by the accused person to the person in authority on account of any inducement, etc. If the statement is made to the person in authority without any inducement, etc., the confession does not fall within the mischief of the section. Thus, where

25. Madhusudan Swain v. State, 33 Cut.

L.T. 650, 668.

Mandara Majhi v. State, 32 Cut, L. T. 980.

4. Ludra Honsa v. The State, 1968 Cr. L.J. 697 (Orissa); Sadananda Bissoi v. State. 35 Cut. L.T. 422, 447.

5. Santokhi Beldar v. Emperor, A.I.R.

Kistoori v. State of Rajasthan, I. L.

R. (1965) 15 Raj. 143: 1964 Cr. L. J. 518; A.I.R. 1967 Raj. 98.

8. Percy Rustomji Basta v. State of Maharashtra. A.I.R. 1971 S.C. 1087. 1092: (1971) 1 S.C.C. 847; Hazari Singh v. Union of India, A. I. R. 1973 S.C. 62.

9. Hira H. Advani v. State of Maharashtra, (1970) 2 S.C.A, 10; (1970) 1 S.C.R. 821: (1970) 2 S.C.J. 192: 1971 Cr. L.J. 5: 73 Bom. L.R. 112: 1970 Mad L.J. (Cr) 490; A.I.R. 1971

10. Veera Ibrahim v. The State of Maharashtra, 1976 Cri. L.R. (S.C.) 165: (1976) 2 S.C.C. 302: 1976 S.C.C. (Cri.) 278: 1976 Cr. A.R. (S.C.) 140: 1976 S.C. Cr. R. 235: (1976) 3 S.C.R. 672: 1976 Cri. L.J. 860: 1976 Cri. L. 1976 Chand. L.R. Cri. A.I.R. 1976 S.C. 1167. (S.C.) 134:

Dukharan Mian v. State of Bihar, 1971 B.L.J.R. 641: 1971 P.L.J.R. 165, 169 and 170.

See Taylor Ev., ss. 873, 874; Roscoe, Cr. Ev., 16th Ed., 43; Phipson, Ev., 11th Ed. 354; Wills, Ev., 310; R. v. Moore, (1852) 2 Den. C.C. 522, 526.

^{2.} Loknath v. State, 32 Cut. L.

T. 402: 1966 Cr. L. J. 1180: A.
I.R. 1966 Pat. 205; Palau Munda
v. State, I. L. R. 1966 Cut. 635:
32 Cut. L. T. 1170, 1176.

¹⁹³³ Pat. 149, 150.
6. 1972 Raj. L. W. 437.
7 Pyare Lal Bhargava v. State of Pajasthan (1963) 1 S.C.R. 623: 1968 S.C.D. 341: 1963 A.L.J. 459: 1968 S.W.R. (H.C.) 374: 1963 B. L.J.R. 407: 1965 (2) Cr. L.J. 178: A.I.R. 1968 S.C. 1094, 1096; Mst.

THREAT OR PROMISE, WHEN IRRELEVANT IN CRIMINAL PROCEEDINGS

the statement is made by the accused person before the customs officers, who can be taken to be persons in authority, it is not vitiated if it is not made on account of any inducement, etc., and is not rendered inadmissible under this section.12

A person in authority, within the meaning of this section, should be one who, by virtue of his position, wields some kind of influence over the accused, but not necessarily have authority to interfere in the matter of the charge against the accused.13 Thus, the superior officer of the accused is a person in authority, in relation to the accused.14

Even when a confession is made before a report was made to the police and before the person confessing was accused of an offence by other, the confession must be regarded as one made by an accused.

For a confession to be inadmissible under this section, it is enough if it was extorted by threat from the person by a person who, in the opinion of the accused, had sufficient authority to put him in the imminent fear of his life or at any rate to seriously injure him, unless he confessed his crime. 15

It has been held in England not to be necessary that the promise or threat should be actually uttered by the person in authority, it being regarded sufficient if it was uttered by someone else in his presence and tacitly acquiesced in by him so as to appear to have his confirmation and authority.16 A confession made to, but not induced by, a person in authority is admissible,17 while conversely a confession induced by, though not made to, such a person will be rejected.18 A confession not procured by inducement is not inadmissible merely because it was made by the accused under a mistaken belief that he would gain some advantage by making it.19 Confessions procured by inducements proceeding from persons having no authority are admissible,20

17. Inducement, etc., must have reference to the charge. The inducement, threat or promise must have reference to the charge against the accused person, that is, the charge of an offence in a Criminal Court.21 It must have been made for the purpose of extorting a confession of the offence, the subject of that charge.22 It must reasonably imply that the prisoner's position with reference to the charge will be rendered better or worse accord-

^{12.} Vallabhdas v. Assistant Collector, (1965) 1 S.C.J. 208: A.I.R. 1965 S.C. 481: 66 Bom, L.R. 482; 1964 Mah. L.J. 641; 1965 M.P.L.J. 25: 1965 M.L.J. (Cr.) 98: 1965 (1) Cr. L. J. 490.

Nannhu v. State of M.P., A.I.R.
 1960 M.P. 132: 1959 M.P.L.J. 1211.

Viran Wali v. State, A.I.R. 1961
 J. & K. 11.

^{15.} Sanatan v. State, 1953 Orissa 149; I.L. R. 1952 Cut. 620.

^{16.} R. v. Laugher, (1846) 2 C. & K. 225; R. v. Taylor, (1839) 8 C. & P. 726: Quaere-Whether the section by the use of the words "proceeding from" enacts a different rule. It is

submitted not.

^{17.} R. v. Gibbons, (1823) 1 C. & P. 97; R. v. Tayler, (1823) 1 G. & P. 129.

^{18.} R. v. Boswell, (1842) Car. & M. 584; R. v. Blackburn, (1853) 6 Cox.

Public Prosecutor v. Chandaya, 1929 Mad. 92.

See Roscoe, Cr. Ev., 44.
 See R. v. Mohan, (1881) 4 A. 46.
 R. v. Hicks, 10 B. L. R. App. 1 a confession under threat, made for purpose other than to extort confession was held to be inadmissible, but the correctness of this ruling is doubtful,

ing as he does or does not confess.28 If the inducement be made to one charge, it will not affect a confession as to a totally different charge.24 But the House of Lords has laid down that where a statement has been induced by a threat or promise it is inadmissible even though the threat or promise does not relate to the charge but to some other matter.25 An inducement relating to some collateral matter, unconnected with the charge, will not exclude a confession.1 Thus, a promise to give the prisoner a glass of spirit2 or to strike off his handcuffs3 or let him see his wife4 will not be a bar to the admissibility of the confession. The inducement need not be express, but may be implied from the conduct of the person in authority, the declarations of the prisoner, or the circumstances of the case.5 Nor need it be made directly to the prisoner; it is sufficient if it may reasonably be presumed to have come to his knowledge provided, of course it might have induced the confession.6 Administering an oath to a witness cannot be said to be tantamount to a threat to the person under oath that, if he does not speak the truth, he will be punished for it.7 'In deciding whether an admission is voluntary, the Court has been at pains to hold that even the most gentle threat or slight inducement will taint a confession.'8 As some accused are not reasonable men or women but are very ignorant and terrified by the predicament in which they may find themselves, it may have been right to err on the safe side.9

18. The advantage to be gained or the evil to be avoided. The inducement must, in the opinion of the Court, be sufficient (see next paragraph), and the advantage to be gained, or the evil to be avoided, must be of a temporal nature. Any inducement, having reference to a future state of reward or punishment, does not affect the admissibility of a confession. Thus, a confession will not be excluded, if it has been obtained from the accused

24. R. v. Warner, (1832) 3 Russ. Cr. 542 (n); unless where two crimes being charged, both form parts of the same transaction; R. v. Hearn. (1841) 1 Car. & M. 109.

25. Phipson, 11th Ed. 356, citing Com-

missioners of Customs and Excise v. Harz, (1967) 1 A.C. 760 (H.L.): 51 Cr. App. R. 123 (H.L.).

7. In re Pariti Narayana Murti, 1942 Mad. 654; 203 I.C. 479; (1942) 2 M. L.J. 112.

Per Lord Parker C. J., in R. v. Smith, (1959) 43 Cr. App. R. 121, 126 cited in Phipson, 11th Edn., 357.

9. See the observations of Lord Reid in Commissioners of Customs and Excise v. Harz. (1967) 1 A.C. 760 (H.L.): 51 Cr. App. R. 123 (H.L.), 158, regarding the last cited quotation from R. v. Smith, supra.

R. v. Garner, (1848) 2 C. & K. 920: Phipson, Ev. 11th Ed., 356; Taylor, Ev. ss. 879-881: 3 Russ Cr. 42, 43; Steph. Dig. Art. 22; Wills, Ev., 210: ibid. 3rd Ed. 308: 'the threat must be a threat to prosecute or take some step adverse to the defendant's interests connected therewith i.e. the prosecution, and the promise must be a promise to forbear from some such course.

Cr. App. R. 123 (H.L.).

1. Taylor, Ev., s. 880.

2. R. v. Sexton, 1822, cited in Joy on Confession. Probably not good law Taylor. Ev. s. 880: 3 Russ, Cr. 445: Roscoe, Cr. Ev. 16th Ed. 42.

3. R. v. Green (1834) 6 C. & P. 655.

4. R. v. Ilyod, (1834) 6 C. & P. 393.

5. Phipson, Ev., 11th Ed. 356: R. v.

Gillis, (1866) 17 Ir. C.L. 512. cited. 6. Ibid: Taylor, Ev., s. 885. but a promise or threat to one prisoner will not exclude a confession made by another who was present and heard the inducement: R. v. Jacobs, (1849) 4 Cox. 54; and see R. v. Bate (1871) 11 Cox., 686, where a confession by a prisoner was received although an inducement had been held out to an accomplice which might have been communicated to the prisoner; but see R. v. Harding, (1842) 1 Arm. M. & O. 320.

by moral or religious exhortation, however urgent, whether by a Chaplain¹⁰ or others,11 e.g., "Be sure to tell the truth,"12 "I hope you will tell because Mrs. G can ill afford to lose the money,"18 "you had better, as good boys, tell the truth,"14 "Kneel down and tell me the truth in the presence of the Almighty;"15 "if you have committed a fault, do not add to it by saying what is untrue;"16 "don't run your soul into more sin, but tell the truth."71 Further, the advantage or evil must have reference to the proceedings against the accused;18 as for instance, that by confessing he will not be sent to jail,19 or that nothing will happen to him,20 or that steps will be taken to get him off,21 or "that if he confessed to the Magistrate he would get off,"22 or that he will be pardoned,23 or that he would be let off, if he disclosed everything,24 or the like. A promise or threat as to some purely collateral matter does not exclude the confession.25

19. "Sufficient to give the accused grounds". As the admission or rejection of a confession rests wholly in the discretion of the Judge, it is difficult to lay down particular rules, a priori, for the Government of that discretion, and the more so, because much must necessarily depend on the age, experience, intelligence and character of the prisoner, and on the circumstances under which the confession was made. Language sufficient to overcome the mind of one, may have no effect upon that of another; a consideration which may serve to reconcile some contradictory decisions, where the principal facts appear similar in the reports, but the lesser circumstances, though often very material in such preliminary enquiries, are omitted.1

10. R. v. Gilham. (1828) 1 Moo, C.C. 186 (in this case the gaol Chaplain told a prisoner that, as the minister of God, he ought to warn him not to add sin by attempting to dissem-ble with God, and that it would be important for him to confess his sins before God, and to repair, as far as he could, any injury he had done; the prisoner after this made two con-

the prisoner after this made two confessions to the gaoler and Mayor which were held to be admissible).

11. R. v. Jarvis. (1867) L.R. I C. C. R. 96: R. v. Reeve. (1887) L.R. I C. C.R. 362; Emperor v. Akhileshwar Prasad, 1925 Pat. 772; I.L.R. 4 Pat. 646: 89 I.C. 961.

12. R. v. Court. (1836) 7 C. & P. 486; R. v. Holmes. I Cox. 9: "as a universal rule an exhortation to speak

13. R. v. Lloyd, (1834) 6 C. & P. 393.

R. v. Reeve, (1867) L.R. 1 C.C.R.

15. R. v. Wild, 1 Moo C.C. 452.

16. R. v. Jarvis. (1867) L.R. 1 C.C.R. 96.

R. v. Sleeman. (1853) 2 Dears. 249. 18. Thus in R. v. Mohan Lal, 4 A, 46

the evil threatened (ex-communication for life), had no reference to the Criminal proceedings against the prisoners. The case of R. v. Hicks. 10 B.L.R. App. 1, is also open to the objection that it is not in accord with this portion of the

section. 19. R. v. Navroji, (1872) 9 Bom. H.C.

R. 258. R. v. Luchoo, (1873) 5 N.W.P.

R. v. Rama Birapa, (1878) 3 B. 12. R. v. Ramdhan, (1864) 1 W.R. Cr. 24.

R. v. Asghar, (1879) 2 A. 260; R. v. Radhanath, (1867) 8 W.R. Cr. 53; Bishoo v. R. (1868) 9 W.R. Cr. 16 (promises of immunity by the policy) R. v. Jeset (1804) 22 G. 50 v. R., (1904) 1 All, L.J. 110; Tara v. R., (1924) 45 A. 633; 74 I.C. 529; A.I.R. 1924 A. 72 (A confession, however, made under promise of pardon, may be admissible under S. 308 Cr.P.C., 1973). R. v. Asghar, supra; R. v. Hanmanta. (1877) 1 B.

24. R. v. Ganesh, 1923 Cal. 458; I.I. R. 50 C. 127.

v. ante.

1. Roscoe, Cr. Ev., 40; see cases there cited.

versal rule, an exhortation to speak the truth ought not to exclude confession" per Erle, J., in R. v. Moore, (1852) 2 Den. C.C. 522, 523; see also in re Karumuri China Mallayya. 1948 Mad, 324; (1947) 2 M.L.J. 359: 60 L.W. 693.

Inducement, threat or promise would, in the opinion of the Court, be sufficient to give the accused person grounds which would appear to the accused person (and not the Court) reasonable for supposing that by making the confessions he would gain an advantage or avoid an evil of a temporal nature contemplated in the section. It will be seen, therefore, that the mentality of the accused has to be judged rather than that of the person in authority. That being so, not merely actual words, but words accompanied by acts or conduct as well on the part of the person in authority, which may be construed by the accused person, situated as he then is, as amounting to an inducement, threat or promise, will have to be taken into account. A perfectly innocent expression, coupled with acts or conduct on the part of the person in authority, together with the surrounding circumstance may amount to inducement, threat or promise.2

The reported cases in which statements by prisoners have been held inadmissible are very numerous. Various expressions have been held to amount to an "inducement". But the principle has been thus broadly stated: "It does not turn upon what may have been the precise words used, but, in each case, whatever the words used may be, it is for the Judge to consider, before he admits or rejects the evidence, whether the words used were such as to convey to the mind of the person addressed an intimation that it will be better for him to confess that he committed the crime, or worse for him if he does not."3 "It is not because the law is afraid of having the truth elicited that these confessions are excluded, but it is because the law is jealous of not having the truth."4

Confessions induced by mere moral or religious exhortation are admissible. Mere exhortation to speak out the truth in the name of God does not amount to an inducement.⁵ At one time almost any invitation to make a disclosure was held to imply some threat or promise, but a sounder practice has since prevailed, and the words used are construed in their natural sense, so that many of the older decisions are no longer safe guides.6 Such expressions, therefore, as "what you say will be used as evidence against you," or "for or against you" will not exclude a confession,7 for such language imports a mere caution.8 Nor does the expression, "I must know more about it" amount to a threat.9 There is, however, one form of inducement namely: "you had better tell the truth" and equivalent expressions, which are regarded as having acquired a fixed meaning in this connection, as if a technical term, and are always held to import a threat or promise.10 Thus, "you had better pay

^{2.} Emperor v. Panchkari, 1925 Cal, 587. 590: I.L.R. 52 Cal. 67: 86 I.C. 414.1

R. v. Garner, (1848) 2 C. & K. 920, 925, per Erle J.

R. v. Mansfield, (1881) 14 Cox. C.
 C. 639. 640, per Williams. J.
 Chaman Lal v. State, 1976 Cr. L.J.

^{1310 (}J. & K.). G. Wills Ev., 2nd Ed., 212, 303, see judgment of Parke, B., in R. v. Baldry, (1852) 2 Den. 430 at p. 445. R. v. Baldry, (1852) 2 Den. 430,

overruling several earlier cases,

^{8.} R. v. Jarvis. (1867) L.R. 1 C.C.R. 96: Wright's case. 1 Law 48. and see R. v. Long. (1833) 6 C. & P. 179,

Phipson. Ev., 11th Ed., 365.

9. R. v. Reason, (1872) 12 Cox. 228.

10 Wills. Ev. 2nd Ed., 212, 303

The words you had better seem to 10 have acquired a sort of technical meaning" per Kelly, C.B. in R. v. Jarvis, supra, see also per Field, J., in R. v. Uzeer, (1884) 10 C. 775, 776; and per Sargent, C.J. in R. v. Navroji, (1872) 9 Bom. H.C.R. 358;

the money than go to jail" constitute an inducement.11 The terms of the inducement constantly involve both threat and promise, a threat of prosecution, if disclosure is not made, a promise of forgiveness if it is. The follow ing, for instance, have been held to be such statements when made by persons in authority: "If you don't tell the truth, I will send for the constable to take you;"12 "if you tell me where my goods are I will be favourable to you;"18 "if you confess the truth, nothing will happen to you;"14 "if you don't tell me. I will give you in charge of the police till you do tell me;"15 "if you are guilty, do confess; it will perhaps save your neck; you will have to go to prison; pray tell me if you did it;16 "I only want my money; if you give me that you may go to the devil;"17 "unless you give me a more satisfactory account, I will take you before a Magistrate;"18 "the watch has been found, and if you do not tell me who your partner was, I will commit you to prison;"19 "if I tell the truth, shall I be hung?"20 "No, nonsense, you will not be hung;" "tell me what really happened, and I will take steps to get you off;"21 "if you confess to the Magistrate you will get off;"22 "it is no use to deny it, for there are the man and boy who will swear they saw you do it;"23 "I shall be obliged if you would tell me what you know about it; if you will not, of course, we can do nothing for you;"24 "I will get you released if you speak the truth",25 "you had better split not and suffer for all of them." A confession made under a promise of pardon is inadmissible.2 The threat or promise need not be an express term, if the intention is still clear, as in the case of a following statement: "If you (the person in authority) forgive me, I (the prisoner) will tell you the truth." Reply: "Anne, did you do it?"3 "If you don't tell

> R. v. Fennell, (1881) 7 Q.B.D. 147; R. v. Hatts, 49 L.T. 780; R. v. Walkley, (1833) 6 C. & P. 175; but this construction will not prevail if such a statement is accompanied by other words which indicate that it was not intended in this sense; as if "you had better as good boys, tell the truth;" R. v. Reeve. (1872) L. R. 1 C.C.R. 362: "I dare say you had a hand in it, you may as well tell me all about it," is an inducement; R. v. Croydon, (1846) Cox. 67.

R. v. Navroji, (1872) 9 Bom, H.C. R. 358.

^{12.} R. v. Hearn. (1841) 1 Car. & M. 109; Wills, Ev., 212. ibid 2nd Ed., 303; R. v. Richards, (1832) 5 C. &

R. v. Cass, (1784)
 Lea. 293 note.
 R. v. Mst. Luchoo, (1873)
 N.W.

R. v. Luckhurst, (1853) Dears, C.C. 245.

^{16.} R. v. Upchurch. (1836) 1 Moo C. C. 465.

R. v. Jones. (1809) R. & R. 142.

^{17.} R. v. Jones, (1809) R. & R. 114. 18. R. v. Thompson, (1783) 1 Lea. 291.

^{19.} R. v. Parrott, (1831) 4 C. & P. 570. 20. R. v. Winsor, (1865) 4 F. & F. 366.

^{21.} R. v. Rama Birapa, (1878) 3 B. 12.

R. v. Ramdhun Singh, (1864) 1 W.

R. Cr. 24. R. v. Mills. (1833) 6 C. & P. 146. R. v. Partridge, (1836) 7 C. & P. 23.

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^{25.} R. v. Dhurum, (1867) 8 W.R. Cr. 13; Dinanath v. R., 60 I.C. 1006; A.I.R. 1921 B. 70; (1921) 45. B. 1086; see Zeta v. R., 37 I.C. 314, where the statement was held admissible.

^{1.} R. v. Thomas, (1834) 6 C. &. P. 353.

R. v. Asghar, (1879) 3 A. 260; R. v. Radhanath, (1867) 8 W.R. Cr. 53, and as to confession induced by knowledge that reward and pardon had been offered, see R. v. Black-burn, (1853) 6 Cox, 333; R. v. Boswell, (1842) 1 Car. & M. 584: R. v. Dingley, (1845) 1 C. & K. 537; R. v. Anant, 32 C.L.J. 204: 60 I.C. 417.

R. v. Mansfield, (1881) 14 Cox. 639; Wills Ev., 2nd Ed. 12 and 303.

me, you may get yourself into trouble and it will be the worse for you."4 But a promise or threat must be imported. Thus, the following statements have been held not to exclude the confession: "I must know more about it;"5 "now is the time for you to take it (the stolen property) back to the prosecutrix."6

A confession induced by a promise of pardon7 or of being made an approver8 is inadmissible. Where there are more than one accused, and there are reasonable grounds for supposing that the confession of an accused might have been made with the inducement that the person confessing would be taken as an approver and escape punishment, omission to warn him that it was not intended to take him as an approver, is fatal to the admissibility of the confession, as it causes a great doubt as to the voluntary nature of the confession.9 But, if the effect of the promise had worn off by the time the confession was made then under Sec. 28 the confession is admissible.10 The effect of a promise is not worn off by the Magistrate merely going through the form of telling the accused that he was not to allow any inducement to operate upon his mind in making the confession.11

Unless the expectation that the confession is the only way for safety, under which the accused makes a confession, is shown not to have been the result of any inducement, threat or promise as specified in Sec. 24, a confession otherwise voluntary does not cease to be so simply because the accused person on his own believes that to confess his guilt would be the only way of saving himself.12 An accused may wish to earn pardon by turning an approver but that fact alone is not sufficient to show that any inducement was held out to him to make a confession.18 When an approver has been tendered a pardon under Sec. 337 (1) (Section 306 (3) Cr. P. C., 1973), and he has accepted the tender, his statement can be recorded under Sec. 164 (S. 164 Cr. P. C., 1973) on affirmation; and it will be admissible in evidence against him at a subsequent trial, after forfeiture of the pardon, even for the offence in respect of which the pardon was tendered. It is not a confession but a statement made by a person who was not an accused but was to be, examined as a witness.14

R. v. Coley, (1868) 10 Cox, 536.
 R. v. Reason, (1872) 12 Cox. 228; Phipson, Ev. 11th Ed. 370.

^{6.} R. v. Jones, (1872) 12 Cox. 241.
7. Chandan v. The Crown, 1951 Punj.
399: 52 Cr. L.J. 917; Nanak Chand
v. Emperor, 1932 Lah. 73: 133 I.C. 545.

State v. Babulal, I.L.R. (1956) 6
 Raj. 359: 1956 Raj. 67; Khetal v. Emperor, 1923 All. 352; I.L.R. 45 All. 300; 73 I.C. 62; Tara v. Emperor, 1924 All. 72; I.L.R. 45 All. 633; 74 I.C. 529.

9. In re Madhithati Venkata Reddi,

¹⁹⁵¹ Mad. 331, 333; I.L.R. 1951 Mad. 544; (1950) 2 M.L.J. 298; 1950 M.W.N. 896.

^{10.} Sit Ro Saw v. Emperor, 1936 Rang.

^{455; 165} I.C. 319. 11. Faiz Ahmad v. Emperor, 1936 Lah, 855; 165 I.C. 880.

Kesavan Gopalan v. State, 1954 T.
 C. 456: 1954 Cr. L.J. 1468; see also Samiuddin v. Emperor, 1928 Cal. 500: 109 I.C. 225: 32 C.W.N. 616.

Ram Singh v. Emperor. 1943 Oudh 269: 205 I.C. 514; Emperor v. Sher Singh. 1933 Lah. 388; 143 I.C. 499; Nilmadhab v. Emperor, 1926 Pat. 279: I.L.R. 5 Pat. 171: 96 I.C. 509; Emperor v. Hari Piari, 1926 All.

^{737:} I.L.R. 49 All. 51: 97 I.C. 44. 14. Ram Bharose v. Emperor, 1944 Nag. 105: I.L.R. 1944 Nag. 274: 212 I C. 449 (F.B.).

- 20. (a) Partial rejection of a confession; (b) Confession contradicted by confession; and (c) Confession contradicted by medical evidence. These three allied topics may be dealt as follows:
- (a) Partial rejection of a confession. The Allahabad High Court in Balmurund v. Emperor15 came to the conclusion that where there is no other evidence than a confession to show affirmatively that any portion of the exculpated element in the contession is talse, the court may accept or reject the confession as a whole and cannot accept only the inculpated element while rejecting the exculpated element as inherently incredible. Flowing from this decision, the same court held, in *Emperor* v. *Nanua*, 16 that if any part of a confession is relied upon by a court and there is no evidence to disprove another part of it, the whole confession must be accepted by the court. But this is not so, when a part of it is proved false by other evidence. In such a case, the court can rely on one part, discarding the other part. Similarly, the Madras High Court has held in In re Santhanakrishna Chetty17 that the confession of the accused being the only evidence against him, it must be taken as a whole and nothing can be read into it which is not contained therein. But, in some other cases, it has been held, that the contention, that where a confessional statement is put in it must go in as a whole and all parts of it must be accepted as true unless they are impossible of belief or are shown to be untrue, is putting a proposition too strongly and is not a correct statement of the law. To say that if the court believes the confession it must also accept the circumstances alleged by the accused in extenuation, however impossible, is to go much too far A confession is like any other piece of evidence. The court can believe that part of it which tells against the accused and reject that which tells in his favour. The whole confession is left to the court to say whether the facts asserted by the accused in his favour are true.18 In Emperor v. Etwa,19 the court said that it is true that if an accused person makes a confession the whole of the confession must be placed before the court and received in evidence. But, there is no rule of law which compels belief in the statement of the accused. The Court, if it comes to the conclusion that the statement in its essential particulars is true, is entitled to disregard statements which it may hold in the circumstances are not true. Relying on Hanumant Govind v. State of M. P.,20 it was held in Para Kinkar v. Tripura State,21 that there is no doubt that, in cases, where there is no other evidence except the confession, the rule, that a confession must be used either as a whole or not at all, applies with full force. But in cases, where there is other evidence also, the entire confession can be examined in order to find out which part of it is correct. But, the absence in the confession of elaborate details put forward by the prosecution, cannot brand it as false if there is nothing in the confession contrary to the oral evidence.22 If a confession is found to be

^{15.} A.I.R. 1931 All. 1: 52 All. 1011; 129 I.C. 258, F.B.

^{16.} A.I.R. 1941 All, 145: 42 Cr. L.J.

^{17.} A.I.R. 1983 Mad. 888 (2): 65 M.

L.J. 837: 147 I.C. 46. 18. Murugesan v. Emperor, 1934 M.W. N. 13 (Cr.); S. Lakshmayya v. Emperor, 1930 M.W.N. 785. 19. A.I.R. 1938 Pat, 258: 39 Cr. L.J.

^{554 - 175} I.C. 300.

^{20.} A.I.R. 1952 S.C. 343: 1952 S.C.J. 509: 1954 Cr. L.J. 129: (1952) 2 Mad. L. J. 681: 1952 All. W.R.

^{21.} A.I.R. 1955 Tripura 19: 1956 Cr. L.J. 1292.

Subramania Goundan v. State o. Madras, A.I.R. 1958 S.C. 66: 1958 Cr. L.J. 238: (1958) 1 Mad. L.J. S.C. 130: 1958 M.L.J. Cr. 292: 1958 A.W.R. Sup. 78.

false in part, namely, as to the justifying motive for an oftence, it does not follow that the rest of it relating to the commission of the offence must be rejected. Where the entire statement of a person has gone in evidence any part of it may be contradicted by the prosecution and, if sufficient grounds exist, the court may accept the incriminatory and reject the exculpatory portions. Their Lordships of the Supreme Court have approved the observations of the Full Bench in Bal Mukund v. Emperor,23 and Palvinder v. State of Punjab.24

The rule deducible from all these decisions is that the inculpatory and exculpatory elements in a confession must be equally weighed, and that, if part of the confession is relied upon by the court and there is no evidence to disprove another part of it, the whole confession must be accepted by the court and that this is not the case when part of it is seen to be false by the other factors in the case. In such a case the court can act upon the acceptable inculpatory part and reject the unacceptable self-exculpatory part. The acceptability or unacceptability will naturally depend upon the circumstances of each case.25

In a decision of the Supreme Court¹ it was observed that the proposition that a statement, which contains any admission or confession, must be considered as a whole and the court is not free to accept one part while rejecting the rest, is too widely stated. The authorities establish that-

- (a) where there is other evidence, a portion of the confession may in the light of that evidence be rejected while acting upon the remain der with the other evidence; and
- (b) where there is no other evidence and the exculpatory element is not inherently incredible, the court cannot accept the inculpatory element and reject the exculpatory element.

Applying the aforesaid principles the Supreme Court distinguished its previous decisions2 and held that in a case where the exculpatory part of a confessional statement is not only inherently improbable but is contradicted by other evidence including the statement of the accused himself under section 313, Cr. P. C., 1973, there is enough evidence to reject the exculpatory part and the court acts rightly in accepting the inculpatory part and piecing the same with the other evidence, and concluding that the accused was responsible for the crime. See also Section 17, Note 5, and Section 24, Note 1 (b) ante.

^{23.} A.I.R. 1931 All. 1.

^{24.} A.I.R. 1952 S.C. 354: 1953 Cr. L.J. 154: 1953 All. L.J. 18: 1953 All. W.R. (Sup.) 19: 1953 M.W.N. 418: I.L.R. 1953 Punj. 107: 1 B.L.J. 30.

^{25.} See Bhima v. State, A.I.R. 1956

Orissa 177.

1. Nishi Kant Jha v. State of Bihar, (1969) 2 S.C.R. 1083: I.L.R. 48
Pat. 9: (1969) 1 S.C.A. 587: (1969) 1 S.G.C. 347: (1969) 1 S.C.J. 844: (1969) 1 S.C.W.R. 1149: 1969 A.L.

J. 638: 1969 A.W.R. (H.C.) 549: 1969 B.L.J.R. 731: 1969 M.P.W. R. 590: 1969 M.L.J. (Cr.) 458: A.I.R. 1969 S.C. 422,

Hanumant Govind v. State of Madhya Pradesh, A. I. R. 1952
 C. 343 and Palvinder Kaur v. State of Punjab, A.I.R. 1952 S.C. 354, also referring to Narain Singh v. State of Punjab, A.I.R. 1959 S.C. 484.

- (b) Confession contradicted by confession. In Balbir Singh v. State of Punjab³ the approach in such cases has been set out.
- It has been said that where confessions are retracted subsequently, each confession is to be considered as a whole on its merits and used against the maker thereof, provided the Court is in a position to come to an unhesitating conclusion that the confession was voluntary and true.
- (c) Confession contradicted by medical evidence. In Harold White v. Kings it has been pointed out that confessions are not always true and they must be checked, more particularly in murder cases, in the light of the whole evidence on the record in order to see if they carry conviction. The Court should attach great importance, for instance, to the existence of contradictions between confessions and medical testimony.

Where the contradictions between the confessional statement and the medical testimony are graring and irreconcilable, the medical evidence will be fatal to the acceptance of the confession. Such a case was Jagmal v. Emperor,5 wherein one of the accused confessed that he had strangulated the deceased with a dhe ti but the medical examination found no marks of strangulation. Where the accused stated having given only two kulhari blows, but the doctor found five incised wounds, one bruise and tour abrasions on the body of the deceased, this discrepancy coupled with the discrepancy in time of murder as given by the accused and as stated in prosecution case, was found vital enough to affect the voluntary nature of the confession.6

Where the accused minimises the injuries inflicted by him in his confessional statement and the medical evidence gives a full picture of all the injuries inflicted, the probative value of a confessional statement will be affected, but it will not be a case of the medical testimony being fatal to the acceptance of a confession. Such a case was Sultan v. Emperor.7 But the medical testimony has to be carefully scrutinised, because the probative value of expert evidence is largely dependent upon the competency of the medical man, and on the care and attention which he has bestowed in the examination under consideration. In Mohan Lal v. State,8 it has been pointed out that the court should not adopt the easy course of throwing away the prosecution case on account of the alleged discrepancies between the medical evidence and that of eye-witnesses. Sometimes, medical officers also do not bestow sufficient attention while performing examinations, and their opinions may not be properly formed on account of inadequate, or defective examination or lack of complete knowledge. Medicolegal work may not be well done. The proper approach is, that the court should not surrender its own opinion to that of the medical men, who are called before it, but with such help as the medical men can afford, the court should form its own opinion on the subject on hand. The acceptability of the doctor's

A.I.R. 1957 S.C. 216: 1957 Cr.

L.J. 481. 4. A.I.R. 1945 P.C. 181: 47 Cr. L.J.

A.I.R. 1948 All. 211: 49 Cr. L.J.

^{243,}

^{6.} Sunder Singh v. State of Rajasthan, 1976 Raj. Cr. C. 214.

A.I.R. 1945 Lah. 91.
 A.I.R. 1961 Rajasthan 24.

evidence depends upon the grounds and cogency of his reasons. The evidence of the medical man should be scrutinised, sifted and tested, like that of any other witness. It is the duty of the court to do so, for medical men like other witnesses are liable to make mistakes.

The difficulty in preferring medical evidence to confessional statements will be solved, if medical men would bear in mind certain principles laid down by Mr. Glaister. These are: Study the case and be conversant with the facts and the literature on the subject; always have adequate reasons for your opinions; be fair and unbiased, concede points which should be conceded; answer "I do not know" when you do not know; never express an opinion on the merits of the case that is the function of the Judge or the jury as the case may be; do not sit on the fence. A doctor who will not commit himself to an opinion is not worth calling as a witness.

Medico-legal work may not be well done. The court should carefully evaluate both the confessional statements as well as the medical evidence before rejecting the one or the other, in case there are discrepancies between them.

21. Magistrate not following precautions under Sec. 164, Cr. P. C. Where a Magistrate records a confession, without following the precautions mentioned in Sec. 164 of the Criminal Procedure Code, the confession is not a proper one. No evidence can be given regarding such a confession and it cannot be taken into consideration even though it was made by the accused independently of the police investigation.9

The act of recording a confession under Section 164, Cr. P. C., is a very solemn act and, in discharging his duties under the said section, the Magistrate must take care to see that the requirements of sub-section. (3) of section 164 are fully satisfied.10

- 22. Judicial confession, admission of. The confessional statement of an accused recorded by a Magistrate can be admitted in evidence and made an exhibit without the recording Magistrate being examined in court.11
- 25. Confession to police officer not to be proved. No confession made to a police officer. 12 shall be proved as against a person accused of any offence.

officer investigating a case, see Cr. P.C., S. 162.

Noor Uddin v. State. A.I.R. 1965
 A. 40; Shital Singh v. State, 1975 Cr.

A. 40; Shital Singh v. State, 1975 Cr.
L.J. 699 (All.); State v. Lobsang
Sharap, 1973 Cr. L. J. 85 (H.P.).

10. Sarwan Singh v. State of Punjab,
1957 S.C.J. 699: 1957 A.W.R.
(Sup.) 99: 1957 M.P.C. 781: (1957)
1 M.L.J. (Cr.) 672; I.L.R. 1957
Punj. 1602: 1957 Cr. L.J. 1014:
A.I.R. 1957 S.C. 637, 643; Pingal
Khadia v. The State, I.L.R. 1969
Cut. 809: 1969 Cr. L.J. 1255: A.
I.R. 1969 Orissa 245: State v. Bansi-I.R. 1969 Orissa 245; State v. Bansidhar Panda, 1974 Cut.L.R. (Cri.) 475.

Bisipati Padhan v. State, 35 Cut. L.
 T. 362: 1969 Cr. L.J. 1517: A.I.
 R. 1969 Orissa 289. 292; Kashmira Singh v. State of M.P., 1952 S.C.R.
526; 1952 S.C.J. 201: 1952 A. W.
R. 64; 1952 Cr. L.J. 572: (1952) 1
M.L.J. 724: 1952 M.W.N. 402;
A.I.R. 1952 S.C. 159, 163 [endorsing the remarks of the Privy Council in Nazir Ahmad v. Emperor. A.I.R. Nazir Ahmad v. Emperor, A.I.R., 1936 P.C. 253 (2), at p. 2581.

12. As to statements made to a police

SYNOPSIS

Principle.
 Scope and applicability.
 Construction of the section.

4. Police officers,

- 5. Police officer within the meaning of
 - (a) Forest and Customs officers.

(b) Excise officers.

(c) Miscellaneous.
6. "Against a person accused of any offence,"

7. Admission made to police officers.

8. Confession in first information re-

9. Counter-complaints by accused: Admissibility.

The powers of the police are often abused for purposes of extortion and oppression,13 and confessions obtained by the police through undue influence have been the subject of frequent judicial comment.14 "The object of this section is to prevent confessions obtained from accused persons through any undue influence, being received as evidence against them."15 If a confession be "made to a police officer, the law says that such a confession shall be absolutely excluded from evidence, because the person to whom it was made is not to be relied on for proving such a confession, and he is moreover suspected of employing coercion to obtain the confession." The reason for this rule (Sec. 25) is stated thus in R. v. Babu Lal¹⁶⁻¹⁷:

"These legislative provisions leave no doubt in my mind that the Legislature had in view the malpractices of police officers in extorting confessions from accused persons in order to gain credit by securing convictions, and that those malpractices went to the length of positive torture; nor do I doubt that the Legislature, in laying down such stringent rules, regarded the evidence of police officers as untrustworthy, and the object of the rules was to put a stop to the extortion of confessions, by taking away from the police officers the advantage of proving such extorted confessions during the trial of accused persons It requires no vivid imagination to picture what too often takes place when two or three of these not very intellectual or highly-paid police officials are called away to a village to investigate a grave crime, of which there are no very clear traces. Naturally it is much the easier way for them to begin by endeavouring to obtain a confession from the suspected person or persons, instead of by searching out the clues to the evidence from independent sources, and seeing what extraneous proof there is. But, as I have more than once been constrained to remark from this Bench, the effect of this sanction given by Sec. 164 of the Criminal Procedure Gode to a Magistrate, recording in the

land and were inserted in the Act of 1861 (from which they have been taken) in order to prevent the practice of torture by the police for

tice of torture by the ponce for the purpose of extorting confessions." Steph, Introd., 165.

R. v. Babu Lal, (1884) 6 A. 509, 532. per Mahmood, J., and v. ib., 544. per Straight, J., ib., 513. per Oldfield, J.; see also S. 162, Cr.P. C. and Keramat v. R. 1926 Cal. 147; 92 I.C. 453; 42 C.L.J. 528.

^{13.} See Extract from The First Report of the Indian Law Commission and remarks of Straight J., in R. v. Babu Lal. (1884) 6 A. 509, 542 and Mahmood, J., ib. 523; but see also remarks of Duthoit, J., ib., 550, v. ante, notes to S. 24.

^{15.} Per Garth, C.J., in R. v. Hurribole, (1876) 1 C. 207, 215; see also in the matter of Hiran. (1877) 1 C. L.R. 21; R. v. Pancham, (1882) 4 A. 198. 224: Ss. 25, 26 and 27, "differ widey from the law of Eng-

course of an investigation the confessions of accused persons thus obtained, not from the hands of the police, is not so beneficial to the elucidations of guilt as is supposed, for it continually happens that, while the police have been occupying themselves in getting the confession, many of the traces of the crime, which, if at once followed up, would have produced valuable proof, have disappeared. To repeat a phrase I used on a former occasion, instead of working up to the confession they work down from it, with the result that we frequently find ourselves compelled to reverse convictions simply because, beyond the confession, there is no tangible evidence of guilt. Moreover, I have said, and I repeat now, it is incredible that the extraordinarily large number of confessions, which come before us in the criminal cases disposed of by this Court, either in appeal or revision, should have been voluntarily and freely made in every instance as represented. I may claim some knowledge and acquaintance with the ways and conduct of persons accused of crime, and I do not believe that the ordinary inclination of their minds, which in this respect I take to be pretty much the same with humanity all the world over, is to make any admission of guilt. I certainly can add, that, during fourteen years' active practice in the Criminal Courts in England, do not remember half-a-dozen instances in which a real confession, once having been made, was retracted. In this country, on the contrary, the retraction follows almost invariably, as a matter of course, and though I am well aware how this is sought to be explained by a suggestion of the influence brought to bear upon the confession by other prisoners in havalat, the fact remains as an endless source of anxiety and difficulty to those who have to see that justice is properly administered. I say it in no sense of harsh disarrangement, but it is impossible not to feel that the average Indian policeman, with the desire to satisfy his superiors before, and the terms of the Police Acts and Rules behind him, is not likely to be over-nice in the methods he adopts to make short cut to the elucidation of a difficult case by getting a suspected person to confession."

The material words in section 162, Cr. P. C. and this section are the same and the intention of the Legislature is also the same namely, to bar the admission of confession made to a police officer. The words 'any person' in section 162, Cr. P. C., in their ordinary meaning will include any person, though he may after making the statement under that section become an accused. Statements made by an accused to the police in the course of investigation are inadmissible under section 162, Cr. P. C. And if the statement is a confession, it is also hit by section 25 of the Evidence Act. An incriminating statement made to a writer-constable is hit by section 162, Cr. P. C., and is not admissible in evidence.

2. Scope and applicability. In England, confessions made in answer to questions by the police put to the accused, even when in custody, are in strict law admissible, provided there was no promise or threat used. But such

Himat Singh Badhar Singh v. State of Gujarat. I.L.R. 1964 Guj. 804: (1964) 5 Guj. L.R. 897: 1965 (2) Cr. L.J. 753: A.I.R. 1965 Guj. 302, 309.

Kakala Narayana Swami v. Emperor, A.I.R. 1939 P.C. 47.

peror, A.I.R. 1939 P.C. 47. 20. Shiv Bahadur Singh v. State of V. P. 1954 S.C.R. 1098; 1954 S.G.

A. 1316: 1954 S.C.J. 362: 1954 Cr. L. J. 910: A.I.R. 1954 S. C. 322; Mahabir Mandal v. State of Bihar. 1972 Cr. L.J. 860: A.I.R. 1972 S.C. 1331.

^{21.} Ibrahim Husen v. State, 1969 Cr. L. J. 739: A.I.R. 1968 Goa, 68, 72.

I.atu Mukhi v. State. 35 Cut. L.T. 94: 1969 Cr. L.J. 1172, 1173.

questions are to be condemned and Judges have a discretion to exclude such evidence.23 Such confessions are totally inadmissible under this section.

3. Construction of the section. The rule enacted by this section is without limitation or qualification and a confession made to a police officer is inadmissible in evidence, except so far as is provided by the twenty-seventh section, post.24 It is better in construing a section, such as this, which was intended as a wholesome protection to the accused, to construe it in its widest and most popular signification. The enactment in this section is one to which the Court should give the fullest effect.25 The terms of the section are imperative; and a confession made to a police officer under any circumstances is inadmissible in evidence against the accused. The next section does not qualify the present one, but means that no confession made by a prisoner in custody to any person other than a police offcer, shall be admissible, unless made in the presence of a Magistrate.1 The twenty-fifth and twenty-sixth sections do not overlap each other. On the other hand, the twenty-sixth section cannot be treated as an exception or proviso to this section. The two sections lay down two clear and definite rules. In this section, the criterion for excluding a confession is the answer to the question-to whom was the confession made? If the answer is that it was made to a police officer, it is excluded. On the other hand, the criterion adopted in the twenty-sixth section for excluding a confession is the answer to the question-under what circumstances was the coufession made? If the answer is, that it was made whilst the accused was in the custody of a police officer, the confession is excluded, "unless it was made in the immediate presence of a Magistrate."2 Therefore, a confession to a police officer, even though made in the presence of a Magistrate, is inadmissible.⁵ But the statement must amount to a confession; if it is not an admission of guilt it may be admissible.4

11 C. 635, 641; "the prohibition in this section must strictly be applied." R. v. Pancham. (1882) 4 A. 198, per Straight, J.

1. R. v. Hurribole, supra. 215; In the matter of Hiran, supra; R. v. Babu

Lal, (1884) 6 A. 509, 532.

2. R. v. Babu Lal. (1884) 6 A. 509, 532. per Mahmood, J., and v. ib., 544. 545, per Straight, J.

3. Zwinglee Ariel v. State, 1954 S.C. 15: 1955 Cr.L.J. 230; R. v. Domun, (1869) 12 W.R. Cr. 82; R. v. Mon Mohan, (1875) 24 W.R. Cr. 33: in this case the confession was made. this case the confession was made to the Magistrate, but the report showed that had it been made to the police it woud have been held to be inadmissible. Muthukumaraswami v. R., (1912) 35 M. 397 (Abdul Rahim and Miller, JJ. dissenting).

4. Jalal v. R., 1923 Lah, 232: 81 I.C. 347; 25 Cr. L.J. 811; Ramhit v. R., 1922 All, 24: 65 I.C. 849: 20 A. L.J. 178: 23 Cr. L.J. 193.

Ibrahim v. R. 1914 P.C. 155; 23
 I.C. 678; 15 Gr. L.J. 326; 18 C.W.
 N. 705; 1 L.W. 989; R. v. Gardner. (1915) 85 L.J.K.B. 206; R. v. Boisin, (1918) 1 K.B. 531; R. v. Cook. (1918) 34 T.L.R. 515; R. v.

Booker, (1834) 18 Cr. App. R. 47.
24. In the matter of Hiran (1877) 1
C.L.R. 21; R. v. Babu Lal, (1884)
6 All. 509; see Hira v. R., 21 Bom.
L.R. 724: 54 I.C. 601: A.I.R. 1919 B. 162 cited under S. 8 ante; see as to construction of this section, the Madras Law Journal, January and February 1895, pp. 31–36 and also Ahmad Noor Khan v. State of Assam, 1972 Cri.L.J. 779: A.I.R. 1972 Gauhati 7.

Per Garth, C.J., in R. v. Hurribole, (1876) 1 C. 215, 216: 25 W.R. Cr. 36; but see dictum of Stuart, C.J., in R. v. Pancham, (1882) 4 A. 198. 203 in which, however, Straight, J., seems not to have concurred and which was dissented from by the Calcutta Court in Adu v. R., (1885)

Moreover, the section says that the statement, if it amounts to a confession shall not be used as against the person making it. It does not say that it is inadmissible for any purpose. And so a confession has been used to show that a subsequent judicial confession was not to be believed.5 Where the statements of an accused person to a Magistrate amount to a repetition, practically without comment of a previous incriminating conversation between himself and a police officer, it is excluded by this section.6

The provisions of the secttion are unqualified. It is, therefore, immaterial whether the confessing party was, at the time of making the confession, accused or not, or whether he was in police custody or not, or whether the confession was made to a police officer in the presence of a Magistrate or not. When a police officer has evidence before him sufficient to justify the arrest of an accused, he should not, preliminary to the arrest, examine him and record his statement. The evidence of the police officer in regard to such statement cannot be regarded except as a confession to a police officer and is inadmissible under this section and is also inadmissible against the co-accused.7

In order to determine the applicability of the section, it is the position of " the person, at the time when the confession made by him is sought to be proved, and not his position at the time he made the confession that is to be considered.8 Hence, so much of a First Information Report, as amounts to a confession by the accused, is not admissible against him.9 As to the admissibility of the remaining portion of the First Information Report under Sec. 27 see notes under that section, post.

The prohibition contained in Sec. 25 is of a general nature. It forbids the proof, at a trial of a criminal offence, of any admission of an offence made by the accused to a police officer, and it makes no difference, whether the offence is one of which the accused could have been convicted at the trial, in which it was sought to prove the confession made to a police officer. In

v. R., 10 Bur.L.T. 270: 37 I.C. 314: A.I.R. 1917 I.B. 87.
Kartar Singh v. State, 1952 Pepsu 98: I.L.R. (1952) Pepsu 186: 1952 Cr. L.J. 1090.

Gulab v. R., 1923 Lah. 315: 75 I.
 G. 693: 25 Cr. L.J. 5.
 Emperor v. Anandrao. 1925 Bom., 529: I.L.R. 49 Bom. 642: 89 I.C., 1046: 26 Cr. L.J. 1478: 27 Bom. L.R. 1034.

^{7.} R. v. Jadub Das, 27 C. 295; (1899) 4 C.W.N. 129; see also Shewakram Issardas v. Emperor, 1939 Sind 130: 182 I.C. 464: 40 Cr.L.J. 661: but see Ram Lal v. Emperor, 1942 Oudh 246: 198 I.C. 276: 43 Cr. L. J. 342: 1942 O.W.N. 3; where it was held that for a confession made to a police officer to be inadmissible it must be by a person accused of an offence. As to incriminating statements of one accused against another to a police officer, see Zeta

^{9.} Kartar Singh v. State, 1952 Pepsu Kartar Singh v. State, 1952 Pepsu
98: I.L.R. (1952) Pepsu 186: 53
Cr. L.J. 1090; Mohammada v. Emperor, 1948 Lah. 19; 48 Cr. L.J.
961; Bharosa Ram Dayal v. Emperor, 1941 Nag. 86; I.L.R. 1940
Nag. 679: 193 I.G. 6; 42 Cr. L.J.
390: 1940 N.L.J. 623; Legal Remembrancer, Bengal v. Lalit Mohan
Singh Roy. 1922 Cal. 342; I.L.R.
49 Cal. 167; see also Emperor v.
Mayadhar Pothal. 1939 Pat. 577; Mayadhar Pothal, 1939 Pat, 577; I.L.R. 18 Pat. 450: 181 I.C. 1001: 40 Cr. L.J. 625; Baldeo v. Emperor, 1940 All. 263: I.L.R. 1940 All. 396: 188 I.C. 562: 41 Cr. L.J. 627 (F.B.); Harnam Kisha v. Emperor, 1935 Rom 26: L.J. 8 1935 Bom. 26: I.L.R. 59 Bom. 120: 154 I.C. 621: 36 Cr. L.J. 539: 36 Bom, L.R. 1117: Lal Khan v. Emperor, A.I.R. 1948 Lah, 43; In re Madegowda, I.L.R. 1956 Mys. 244; A.I.R. 1957 Mys. 50.

other words, the terms of this Section do not limit its applicability only to confessions of offences with which the accused was charged. This section applies equally to confessions with regard to offences not under investigation as with regard to offences under investigation.11

4. Police officers. Primarily, the term "police officer" in this section means the same as it does in the Police Act, 1861, where it is defined in Sec. 1, as including all persons enrolled under that Act.12 In construing this section, the term "police officer" should be read, not in any strict technical sense, but according to its more comprehensive and popular meaning.13 A confession therefore, made to the Deputy Commissioner of Police in Calcutta, has been held to be inadmissible.14

The reason underlying sections 25 and 26 post is that the influence of the police is presumed to affect the voluntary nature of the confession and, therefore, its reliability. Courts in this country have been so jealous of the voluntary nature of the confession that they have construed the word 'custody' not necessarily to mean custody after arrest, but it has been held to extend to a state of affairs in which the accused can be said to have come into influence of a police officer or has been ever under some form of police surveillance or restrictions on his movements by the police.15

The provisions of this section apply to every police officer and are not restricted to officers of the regular police force.16 But the term "police officer" in the section, can be extended, beyond the definition in Sec. 1 of the Police Act, to cover only those persons who, like police officers, coming within that definition, are so much more interested in obtaining convictions than any member of the community is, that they might possibly resort to improper means for doing so.17 In order to determine whether a person is a "police officer" or not, the material thing to consider would be, not the name given to him, nor the colour of the uniform he is required to wear, but his functions, powers and duties. A police officer does not cease to be such, merely because he is put into a white khaddar uniform instead of one in khaki drill.16

^{10.} Ali Gohar v. Emperor, 1941 Sind 134: I.L.R. 1941 Kar. 292: 195 I.C. 61.

Kodangi v. R., 1932 Mad. 24; 135
 I.C. 590; 61 M.L.J. 860; In re Seshapani Chetti, 1937 Mad. 209;
 I.L.R. 1937 Mad. 358; 166 I.C.

^{12.} Emperor v. Akia, 1927 Nag. 222: 101 I.C. 599.

^{13.} R. v. Hurribole. (1876) 1 C. 207, 215, per Garth, C. J., In the matter of Hiran, (1877) I C.L.R. 21; R. v. Bhima, (1892) 17 B. 485, 486, per Jardine, J., R. v. Salemuddin. (1899) 26 C. 569; R. v. Nagla, 22 B. 235; Amin Sharif v. Emperor. 1934 Cal. 580 ; I.L.R. 61 Cal. 607 ; 150 I.C. 561 (F.B.); see also Radha Kishun v. Emperor. 1932 Pat. 293: I.I. R.

¹² Pat. 46: 140 I.C. 233 (F.B.) (Customs Officer); Gopaldas v. State, I.L.R. 1958 Punj. 2420: A.I.R. 1959 Punj. 113; State v. Kaikhushroo, (1958) 3 S.T.C. 681 (Sales Tax Officer); Raja Ram Jaiswal v. State of Bihar, A.I.R. 1964 S.C. 828.

R. v. Hurribole, supra.
 Ram Singh v. State, 1970 Cr. L.J.
 635 (D.) 637. See also Section 24, ante, Note 14.

R. v. Salemuddin, (1899) 26 C. 569.

Emperor v. Akia. 1927 Nag. 222.
 Public Prosecutor v. Paramasivam. 1953 Mad. 917; I.L.R. 1954 Mad. 57: (1953) 2 M.L.J. 189: 1953 M. W.N. 397; Bhaja v. State of Orissa, (1976) 42 C.L.T. 80.

The expression "police officer" is not to be construed in a narrow sense, but in a wide and its proper sense, though not in such a wide sense as to include persons on whom only some of the powers exercised by the police are conferred.19 It is not the totality of the powers which an officer enjoys, but the kind of powers which the law enables him to exercise, which have to be considered for the purpose of determining as to who can be regarded a "police officer", for the purposes of this section. The test would be, whether the powers of a police officer which are conferred on him, or which are exercisable by him, because he is deemed to be an officer in charge of a police station, establish a direct or substantial relationship with the protection enacted by this section, that is, the recording of a confession. The test would be, whether the powers are such as to tend to facilitate the obtaining by him of a confession from a suspect or delinquent. If they do, then it is unnecessary to consider the dominant purpose for which he is appointed, or the question what other powers he enjoys.20 It is the power of investigation which establishes a direct relationship with the prohibition enacted in this section; when such a power is conferred he is a police officer within the meaning of this section.21

The expression "police officer" covers a person who is allowed to exercise the powers of a police officer. It does not necessarily mean a person who is in charge of a police station, who is empowered to make an investigation.22 The expression "police officer" is not confined only to such officers who are appointed under the Police Act, 1861, but includes also other officers who exercise the same powers as that of a police officer of a police station, in respect of certain offences.23

A confession is admissible, if not made to a police officer as, for instance, when made to a customs officer, who does not exercise police function of investigation and arrest, though he is a person in authority.24

The Section is imperative. A confession to a police officer is, in no circumstances, admissible in evidence against the accused, which covers a confession made even when the accused was free and not in police custody, as also one made before any investigation was begun.

^{19.} Raja Ram Jaiswal v. State of Bihar, (1964) 2 S.C.R. 752: A.I.R. 1964 S.C. 828; (1964) 1 Cr. L.J. 705: 1964 B.L.J.R. 414; State of Punjab (1962) 3 S.C.R. v. Barkat Ram, 338 : A.I.R. 1962 S.C. 276: 1962 (1) Cr. L.J. 217.

^{20.} Raja Ram Jaiswal v. State of Bihar. supra.

Ibid.

Punjab Mava v. State of Gujarat. A.I.R. 1965 Guj. 5.

Laxman v. State, I.L.R.
 648: A.I.R. 1965 B. 195. I.L.R. 1965 B.

^{24.} Vallabhdas Liladhar v. Assistant Customs, Jamnagar, Collector of Customs, Jamnagar, (1965) 3 S.C.R. 854; (1965) 1 S.C. J. 208: (1964) 1 S.C.W.R. 411: 66 Bom. L.R. 482: 1965 M.P.L.J. 25: 1965 M.L.J. (Cr.) 98: 1965 (1) Cr.

L.J. 490: A.I.R. 1965 S.C. 481, 483: State of Rajasthan v. Budhram 1.L.R. (1968) 18 Raj. 962: 1968 Cr. L.J. 311: A.I.R. 1969 Raj. 48, 49; Laxman v. State, I.L.R. 1965 Bom. 648: A.I.R. 1965 Bom. 195; Harban Singh v. State of Maharashtra, 1972 Cri. L.J. 759: A.I.R. 1972 S.C. 1224; Hazari Singh v. Union of India, 1973 S.C.C. (Cri.) 312; (1973) 3 S.C.C. 401: 1973 U.J. (S.C.) 359: (1974) 1 S.C.J. 13: 1974 Cri. L.J. 391; A.I.R. 1973 S.C. 62; I.L.R. (1972) I Delhi 775; Deputy Collector of Central Excise and Customs v. P. Shyam Babu Patro, (1974) 40 Cut. L. T. 806: 1974 Cut. L.R. (S.C.) 269; I.L.R. (1973) Cut. 1384.

The absolute ban imposed by this section is not qualified by section 26. The section, except as provided by section 27, absolutely prohibits a confession by an accused to a police officer.25 Thus if the F. I. R. made by an accused contains facts relating to motive, preparation and opportunity to commit the crime, with which he is charged, it is hit by this section.1 Incriminating statements made to police officers are hit by this section and section 26 of the Evidence Act.2

A person making a confession is held to be an accused even though he was not an accused person at the time when he made it. - It is not necessary that he should have been in police custody.3

Whether a confession was really made to a police officer or not is a question of fact depending on the circumstances in which the confession was made. Where it is clear that the confession was made to a police officer (police constable in the instant case) though others were present, the confession cannot be taken out of the prohibition which the section incorporates.4

The following persons are "police officers" within the meaning of this section: police patel, Bombay5 or Mysore6 but not in Berar,7 daroga,8 subinspector of a thana,9 police sub-inspector,10 police constable,11 police head constable,12 chowkidar,18 Special Officer of the Commercial Tax Department,14 Ward Rationing Officer,15 Civic Guard on duty,16 members of C. R. Police,17 and the like; but not village munsiffs in the Presidency of Madras,18 or a

25. Aghnoo Nagesia v. State. (1965) 2 S.G.A. 367: A.I.R. 1966 S.G. 119: 1965 M.W.N. 216: 1965 All. W.R. H.C. 648: 1965 B.L.J.R. 865: 1966 Cr. L.J. 100: 1966 M.P.L.J. 49:

1966 M.L.J. Cr. 134.

1. Ram Sajiwan v. State of U.P.,
A.I.R. 1964 A. 447: 1964 A.L.J.

- 2. Prabhoo v. State of U.P., (1963) 2 S.C.R. 881: (1963) 2 S.C.J. 165: A.I.R. 1963 S.C. 1113: 1962 B. L.J.R. 924: 1962 All. L.J. 1097: 1962 All. W.R. (H.C.) 876: 65 Punj L.R. 339: (1963) 2 Cr. L.J.
- 3. Devi Ram v. The State, 1.L.R. (1961) 1 Punj. 33; A.I.R. 1962 Punj. 70. 4. In re, Zahirabai v. 1966 M.L.J. (Cr.)
- 313: 1966 Cr. L.J. 921: A.I.R. 1966 Mys. 199, 201.
- 5. R. v. Bhima, (1892) 17 B. 485, 486; R. v. Kamalia, (1886) 10 B. 595.
- 6. State of Mysore v. Ramaji Ramappa. (1972) 2 Mys. L. J. 6; Devappa v. State. (1972) Mad.L.J (Cr.) 374: (1972) 1 Mys. L.J. 499.
- 7. Emperor v. Akia, 1927 Nag. 222: 101 I.C. 599; but see Mt. Mechi v. Emperor, 1925 Nag. 340: 88 I.C. 32.
- R. v. Pancham. (1882) 4 A. 198.
 In the matter of Hiran, 1 C.L.R.

- 10. Adu Shikadar v. R., (1885) 11 C.
- 11. R. v. MacDonald, (1872) 10 B.L.R. App. 2; Imperatrix v. Pitambar (1877) 2 B. 61; R. v. Pandharinath. (1881) 6 B. 34; R. v. Babu Lal. (1884) 6 A. 509.
- 12. R. v. Luchoo, (1873) 5 N.W.P. 86. R. v. Salemuddin, (1899) 26 G. 569; See Nazir Jamadar v. R. (1905) 9 C.W.N. 474: 2 Cr.L.J. 255; Deokinandan v. Emperor. 1936 All. 753; I.L.R. 1936 All. 939: 165 I.C. 701 (F.B.), overruling Ghunnai v. Emperor, 1934 All. 132: 147 I.C. 630: 1934 A.L.J. 143; Emperor v. Mst. Jagia, 1938 Pat. 308; I.L.R. 17 Pat. 369: 174 I.C. 524; explaining Radha Kishun v. Emperor. 1932 Pat. 293: I.L.R. 12 Pat. 46: 140 I.C. 283 (F.B.); Birja v. Emperor, 1941 Oudh 563: 195 I.C. 403.
- In re Someshwar H. Shelat, 1946 Mad. 430: 226 I.C. 269: (1946) 1 M.L.J. 368: 59 L.W. 252.
 Om Prakash v. State. 1951 Punj.
- 387: 53 P.L.R. 157.
- Ibrahim v. Emperor. 1944 Lah. 57: 212 I.C. 156.
- Jagjit Singh v. State of Kutch, 1956 Kutch 1.
- 18. R. v. Sama, (1883) 7 M. 287; See R. v. Bhima, (1892) 17 B. 485, 486.

village headman in Burma19 and in U. P.20 or a Kotwar in the Central Province,21 or a Foodgrains Inspector under the U. P. Foodgrains Rationing Order²² or a Food Inspector functioning under the provisions of Food Adulteration Act, 195423 or a customs officer conducting an inquiry under section 107. or section 108 of the Customs Act, 196224 or a Postal Inspector,25 or a Regional Inspector under the Mines Act, 1952,1 or officers of Railway Protection Force.2

5. Police Officer within the meaning of this section. (a) Forest and Customs Officers. In the absence of a specific provision in the Madras Forest Act, conferring on the Forest Officer all the powers of an officer in charge of a police station, he cannot be called a police officer, and a statement made to him will not be hit by this section.3 The term 'police officer' should be read not in any strict technical sense, but according to the more comprehensive and popular meaning. The investigation, or the power of investigation, is not the real or governing test in the application of this Section. Customs officer, under the powers conferred on them by the Sea Customs Act, 1878, have essential powers of prevention or detection of crimes, even though they have not been vested with the powers of investigation. Thus, a preventive officer of the Customs Department is a police officer in its extended sense within the meaning of this Section and as such no confession made to him can be proved as against a person accused of any offence.4

The Customs authorities are not police officers as they are not invested with powers of an officer-in-charge of a police station and powers of investigation, and the statement made to Customs authorities by a person, who may later on be accused of an offence under the Foreign Exchange Regulation Act,

20. Ram Charan v. Emperor, 1935 All. 549 : I.L.R. 1935 All. 321 : 155 I. C. 119 : 1935 A.L.J. 478. 21. Sukhwaria v. R., 1924 Nag. 29: 76

I.C. 291. 22. Abu v. Emperor. 1948 Oudh 81: I.L.R. 22 Luck. 492.

23. State of M.P. v. M.A. Rahman, 1972 M.P.L.J. 951: 1972 M.P.W.R. 584: 1973 F.A.C. 50: 1973 Cri.

L.J. 290.

24. Percy Rustomji Basta v. State of Maharashtra. (1971) 1 S.C.C. 847; (1971) 2 S.C.D. 424; Ramesh Chandra Mehta v. State of West Bengal, (1969) 2 S.C.R. 461: (1970) 2 S. C.A. 174: 72 Bom. L.R. 787: 1970 Cr. L.J. 863: A.I.R. 1970 S.C. 940: Illias v. Collector of Customs, 940; Illias v. Collector of Customs, Madras. (1969) 2 S.C.R. 613: (1970) 2 S.C.A. 165: (1970) 1 S.C. J. 701: (1970) 1 Andh. W.R. (S. C.) 133: (1970) 1 M.L.J. (S.C.) 133: 1970 M.L.J. (Cr.) 325: 1970 Cr. L.J. 998: A.I.R. 1970 S.C. 1065; Hazari Singh v. Union of India, A.I.R. 1973 S.C. 62.

25. State of Mysore v. D.C. Nanjappa, 1971 S.C. Cr. R. 374,

1. State v. Bhoi, 1967 Cr. L.J. 1684;

 State v. Bhoi, 1967 Cr. L.J. 1684;
 A.I.R. 1967 Pat, 441, 442; H. S. Sachdeo v. State of M. P. 1974
 Jab. L.J. 76; 1974 M.P.L.J. 64;
 1973 M. P.W.R. 626; 1974 Lab.
 I.C. 934 (M.P.).
 Babu Kishan A. Devi Dayal v. State of Maharashtra, 77 Bom. L.R. 295;
 1975 Gri. L.J. 1891 (Bom.); State of Gujarat v. Abdul Rahman Ismail Gurzi, I.L.R. (1971) Guj. 1123;
 1972 Cri. L.J. 1101 (Guj.); Ranjit Singh v. State of M.P. 1973 M.P.
 L.J. 663; 1973 Jab. L.J. 845; 1973 L.J. 663: 1973 Jab. L.J. 845: 1973 M.P.W.R. 537: 1974 Cri. L.J. 719 (M.P.); Badri Vishal v. State of M. P. 1972 Jab. L.J. 905; 1972 M.P.W.R. 709; 1973 M.P.

L.J. 82; Ekambaram v. State of Tamil Nath, 1972 Mad. L.W. (Cri.) 26. 3. E.C. Richard v. Forest Range Offi-cer. A.I.R. 1958 Mad. 31, 33: (1957) 2 M.L.J. 624: I.L.R. 1957 Mad. 1259; see also Kunhiraman v. S.R. O., 1959 M.L.J. (Cr.) 803; (1971) 2 A.P.L.J. 204.

4. Fernandez v. The State. A.I.R. 1953 Cal. 219, 221: 1953 Cr. L.J.

552. But see Issa Yacub Bichara v. State of Mysore, 1961 Mys. 7: 1961 (l) Cr. L.J. 106.

^{19..} Nga Myin v. R. 1924 Rang. 245: I.L.R. 2 R. 31: 81 I.C. 540 (F.B.).

is not hit by this Section, and is admissible in evidence. In State of Punjab v. Barkatram,5 it was held by the Supreme Court that the words 'police officer' are not to be construed in a narrow way but have to be construed in a wide and popular sense, as was remarked in R. v. Hurribole,6 and that though Customs officers may possess certain powers which may have similarity with those of Police Officers, they are not Police Officers for the purpose of this Section. The question, whether officers of departments, other than the Police, on whom the powers of an officer-in-charge of a Police Station under Chapter XIV of the Code of Criminal Procedure, 1898 (now Chapter XII of the Code of Criminal Procedure, 1973) have been conferred, are Police Officers or not for the purpose of Sec. 25 of the Evidence Act was left open.

In a case under the Sea Customs Act 8 of 1878 the Supreme Court held that a customs officer is not a police officer within the meaning of the present section as he is not invested with all the powers of a police officer qua investigation of an offence including the power to submit a report under Section 173, Cr. P. C., 1973. Therefore, a statement to a customs officer by a person who is accused of an offence is not inadmissible by virtue of section 25 of the Evidence Act.7

Even under the new Customs Act 52 of 1962, the position remains the same. The ratio of the decision in Badaku Joti Svant v. State of Mysore,8 is that even if an officer under the special Act has been invested with most of the powers which an officer-in-charge of a police station exercises when investigating a cognizable offence, he does not thereby become a police officer within the meaning of the section unless he is empowered to file a chargesheet (report) under section 173, Cr. P. C., 1973. Such a special power cannot be spelt out from any of the provisions in the new Customs Act. Therefore, though a customs officer has been invested with many powers not to be found in the repealed Sea Customs Act 8 of 1878, he cannot still be regarded as a police officer within the meaning of section 25 of the Evidence Act, hence, the statements before a customs officer by a person who is arrested or against whom an inquiry is made, are not covered by the section.9 Neither the inquiry under section 107 nor the inquiry under section 108 of the Customs Act 52 of 1962, can, in substance or in law, be considered to be the same as an investigation into a criminal offence by an officer-in-charge of a police station under

^{5.} A.I.R. 1962 S.C. 276: (1962) 1 Cr. L.J. 217; M.G. Venu Gopalan v. Esdayil Veettil Govindan 1976 Cri. L.J. 165.

^{6.} I.L.R. 1 Cal. 207.
7. Ramesh Chandra Mehta v. State of West Bengal. (1969) 2 S.C.R. 461: (1970) 2 S.C.A. 174: 72 Bom. L.R. 787: 1970 Cr. L.J. 863: A.I. R. 1970 S.C. 940, 945; State of Punjab v. Barkat Ram. A.I.R. 1962 S.C. 276 (customs officer under the Land Customs Act 19 of 1924 or under the Sea Customs Act 8 of 1978—both these Acts have been repealed in whole by the Customs Act 52 of 1962); P. Shanker Lall

v. Assistant Coilector of Customs, Madras, 1968 S.C.D. 385 (confession before Assistant Collector of Customs is admissible).

Customs is admissible).

8. A.I.R. 1966 S.C. 1746.

9. Illias v. Collector of Customs, Madras, (1969) 2 S. C. R. 613: (1970) 2 S.C.A. 165: (1970) 1 S. C.J. 701, 708: (1970) 1 Andh. W.R. (S.C.) 133: (1970) 1 M.L.J. (S.C.) 133: 1970 M.L.J. (Cr.) 325: 1970 Cr. L.J. 998: A.I.R. 1970 S.C. 1065, 1070: Puhkraj Pannalal Shah v. K.K. Ganguly. 70 Bom. L.R. 231: 1968 Cr. L.J. 1617: A.I.R. 1968 Bom. 433.

Chapter XIV of the Criminal Procedure Code, 1898 (now Chapter XII of 1973 Code). Therefore the statements recorded by the inquiring officers of the Customs department do not become inadmissible by reason of section 25.10 The law is now settled and it may be summed up thus: a customs officer conducting an inquiry under section 107 or section 108 of the Customs Act, 1962, is not a police officer and the person against whom the inquiry is made is not an 'accused person and a statement made by such a person in that inquiry is not a statement made by 'a person accused of an offence.'11 Also see cases under Note 4 ante.

(b) Excise Officers. There is a difference of opinion as to whether an Excise Inspector or Excise Officer is a police officer within the meaning of this section. The High Courts of Bombay,12 Calcutta13 and Madras,14 have held that he is a police officer, but before the Central Opium Act was amended by the Madras Legislature in 1951, a contrary view was taken,15 and the Judicial Commissioner's Court of Nagpur,16 and Sind17 had held that he is and that a confession made to him is inadmissible. But a contrary view was taken by the High Courts of Patna,18 Lahore,19 and Rangoon.20 In Badaku Joti Svant v. State of Mysore,21 it was urged that under sub-section (2) of Sec. 21 of the

10. Collector of Customs, Madras v. Kotumal. 1967 Cr. L.J. 1007: A.I. R. 1967 Mad. 263 (F.B.), 273: Assistant Collector of Customs v. Tilak Raj Shiv Dayal, 71 Punj. L. R. (D) 302: A.I.R. 1969 Delhi 201 (not a 'police officer' within the meaning of that expression in section 523, Cr. P.C. 1898 (now Sec. 457 of Cr. P.C. 1973); I.L.R. (1974) 2 Delhi 706 (customs officer is not a police officer).

Percy Rustomji Basta v. State of Maharashtra, (1971) 1 S.G.C. 847:

(1971) 2 S.C.D. 424.

 Nanoo Sheikh Ahmad v. Emperor.
 1927 Bom. 4: I.L.R. 51 Bom. 78: 1927 Bom. 4: 1.L.R. 51 Bom. 78; 99 I.C. 330 (F.B.), (Abkari Offi-cer); Emperor v. Dinshaw Cursetji Driver, 1929 Bom. 70: 117 I.C. 331: 31 Bom. L.R. 49 (Excise peon). Amin Shariff v. Emperor, 1934 Cal. 580; I.L.R. 61 Cal. 607: 150 I.C. 561 (F.B.). (Excise Officer); Kera-

tali v. Emperor, 1934 Cal. 616: I. L.R. 61 Cal. 967: 150 I.C. 980

(Excise Officer).

14. Public Prosecutor v. C. Paramasi-

vam. 1953 Mad. 917: I.L.R. 1954 Mad. 57: 1953 Cr. L.J. 1693: (1953) 2 M.L.J. 189. (Excise Officer). Mahalakshmayya v. Emperor, 1932 M.W.N. 453; Doraiswami Nadar v. Emperor. 1934 M.W.N. (Cr.) 67; Public Presecutor v. Marimuthu Goundan. 1938 Mad. 460: 39 Cr. L. J. 388: 1938 M.W.N. 95; In re Mayilvahanam. 1947 Mad. 308: 48 Cr. L.J. 326: 1946 M.W.N. 766 (Assistant Inspector of Customs); In re K. Venkata Reddi. 1948 Mad. 116: I.L.R. 1948 Mad. 574: 49 Cr.

L.J. 100: (1947) 2 M.L.J. 218: 1947 M.W.N. 524: (Prohibition Sub-Inspector); In re P.T. Vadivel Sub-Inspector); In re P.T. Vadivel Goundar, 1952 Mad. 299: 1953 Cr. L.J. 640: (1952) 1 M.L.J. 69: 1952 M.W.N. 57 (Prohibition Officer). Ram Karan Singh v. Emperor, 1935 Nag. 13: 154 I.C. 341: 36 Cr. L. J. 511 (Excise Officer). Bachoo Kandero v. Emperor, A.I. R. 1938 Sind 1: 172 I.C. 968: 39 Cr. L.J. 239 (F.B.) (Abkari Officer). Radha Kishan Marwari v. Emperor, 1932 Pat. 293: I.L.R. 12 Pat. 46: 140 I.C. 283: 34 Cr. L.J. 1: 13 P.

140 I.C. 283: 34 Cr. L.J. 1: 13 P. L.T. 627 (S. B.) (Excise Inspector). 19. Ramchand v. Emperor, 1945 Lah. 10: 217 I.C. 172: 46 Cr. L.J. 213: 46 P.R. 329 (Excise Officer).

Maung San Myin v. Emperor, 1980 Rang. 49: I.L.R. 7 Rang. 771: 121 I.C. 715: 31 Cr. L.J. 303 (Excise

Officer).
(1966) 3 S.C.R. 698: 1967 S.C.D.
152: (1967) 1 S.C.J. 701: 1966 Cr.
L.J. 1353: (1967) 1 M.L.J. (Cr.)
38: A.I.R. 1966 S.C. 1746 (the decision to the contrary in Rajendra Kumar v. State, 1966 A.W.R. (H.C.) 149: 1966 Cr L.J. 4: A.I. R. 1966 All, 42 cannot be considered good law), the fuller Bench of the Supreme Court re-affirming test in State of Punjab v. Barkat Ram. A.I.R. 1962 S.C. 276; Public Prosecutor v. Avvaru Annappa, 1969 Cr. L.J. 1022; A.I.R. 1969 Andh. Pra. 278. 280; Superintendent. Central Excise v. V. N. Malaviya. (1968) 1 Mys. L.J. 17.

Central Excises and Salt Act, 1944, a Central Excise Officer under the Act has all the powers of an officer-in-charge of a police station and, therefore, he must be deemed to be a police officer within the meaning of those words in this Section, but it was observed that this power is conferred for the purpose of Sec. 21 (1), which gives power to a Central Excise Officer to whom any arrested person is forwarded to inquire into the charge against him; but a Central Excise Officer does not appear to have power to submit a charge-sheet under Sec. 173 of the Cr. P. C., 1973. He will have to make a complaint, if he wants the Magistrate to take cognizance of an offence. The Central Excise Officer has powers of an Officer-in-charge of a police station when investigating a cognizable case, that is, for the purpose of his inquiry under Sec. 21(1) of the Central Excises and Salt Act, 1944, which is in terms different from Sec. 78 (3) of the Bihar and Orissa Excise Act, 1915, which came to be considered in Raja Ram Jaiswal v. State,22 which provided that such officer shall be deemed to be the Officer-in-charge of a police station. All that Sec. 21 of the Central Excises and Salt Act, 1944 provides is that for the purpose of his inquiry, a Central Excise Officer shall have the powers of an Officer-incharge of a police station when investigating a cognizable case. It does not say that the Central Excise Officer shall be deemed to be an Officer-in-charge of a police station and the area under his charge shall be deemed to be a police station. In any case he does not become a police officer within the meaning of this Section. Therefore, the voluntary statement made by an accused to the Deputy Superintendent of Customs and Excise is not hit by the section and is admissible in evidence unless the accused can take advantage of section 24 ante.

(c) Miscellaneous. It is immaterial, whether such police officer be the officer investigating the case; the fact that such person is a police officer invalidates a confession.23 A confession made to a police officer in the presence and hearing of a private person is not to be considered as made to the latter, and is therefore excluded by the section.24 But a policeman who overhears a conversation may be in the polition of an ordinary witness and competent to depose to what he heard. It was, therefore, held that the evidence of a policeman who overheard a prisoner's statement made in another room, and in ignorance of the policeman's vicinity and uninfluenced by it, was admissible; the statement not being made to a police officer, nor to others whilst in his custody.25 A confession made to another person in the presence of a police officer, who has asked or instructed that other person to take the confession in such a way as to be his agent, where the confession takes place under such circumstances that the police officer is in such proximity as to make his presence likely to affect the mind of the confessing person, is in substance a confession to a police officer. But, it is otherwise, if the presence of the police officer does not affect the mind of the confessing person.1 If a policeman hap-

24. R. v. Pancham, (1882) 4 A. 198,

^{22. (1964) 2} S.C.R. 752: A.I.R. 1964 S.C. 828: (1964) 1 Cr. L. J. 705: 1964 B.L.J.R. 414.

In the matter of Hiran, 1 C.L.R.
 Budhi Singh v. State, (1972) 2
 L.J. (H.P.) 152; N. C. Nath v State, 1971 Cri, L.J. 407; A.I.R.
 Tripura 16.

R. v. Sageena, (1867) 7 W.R. Cr. 56; Jagjit Singh v. State of Kutch, 1956 Kutch 1.

Emperor v. Harpiari, 1926 All. 737, 740: 97 I.C. 44: 27 Cr. L.J. 1068: 24 A.L.J. 958; Emperor v. Shankar, 1934 Oudh 222: 149 I.C. 69: 35 Cr. L.J. 894; 11 Q.W.N. 636.

pens to be a member of a crowd of villagers, and a confession was made to the villagers at large, the mere fact that a policeman happened to be present in the crowd would not make the confession inadmissible in evidence.2 Where an accused person makes a statement to another person in the presence of the police, the question whether that statement was made to the other person or to the police is a question of fact and not of law.3 Confession made to Customs Officer in the presence of police is not inadmissible.4

A confession is not taken out of the scope of this section by the fact that it was made to a person, not in his capacity of a police officer, but as an acting Magistrate and Justice of the Peace.5 A Sub-Inspector of Police on deputation in the Heavy Engineering Corporation as Security Inspector does not cease to be an enrolled Police Officer as contemplated by the Police Act, 1861, nor does he lose his character of being 'a police officer' in its comprehensive and popular sense within the meaning of that expression in section 25 of the Evidence Act.6 In the case of R. v. Hurribole,7 Pontifex, J., while agreeing that the confession there in question was inadmissible, added that he did so "without going so far as to say that this section renders inadmissible a confession made to any person connected with the police, for there are cases in which a person holding high judicial office has control over and is the nominal head of the police in his district."8 If a person while in custody, as an accused, gives information to the police as complainant in another case. his statements as such informant cannot be used as evidence against him on his trial.9 A statement made to a police officer by an accused person while in the custody of the police, if it amounts to a confession, cannot be used in evidence under this and the following section.10 In a case of theft of currency notes, confession to police did not lead to discovery of notes but of a wrist watch and transistor. Confession was held inadmissible under this section, section 27 not being applicable.11

The power of an officer to investigate into offences committed by subordinates will not necessarily attract the bar of the section.12 A Postal Inspector authorised to investigate into offences committed by a subordinate does not have powers analogous to those of a police officer under the Criminal Procedure Code. An extra-judicial confession made by a subordinate to the Postal Inspector is not hit by the section and it is admissible in evidence.13 Similarly, a Regional Inspector under the Mines Act, 1952, is not a Police Officer.14

Ghunnai v. Emperor, 1934 All. 132: 147 I.C. 630: 35 Cr. L.J. 448: 1934 A.L.J. 143.

Ram Lakhan Pandey v. State of Bihar, 1969 B.L.J.R., 707: 1969 Pat. L.J.R., 646.
 (1876) 1 C., 207.

Ib. at p. 218.
 Moher v. R. (1893) 21 C. 392.

State v. Ohri. 1967 Cr. L.J. 1684:
 A.I.R. 1967 Pat, 441, 442.

^{8.} Hakam Khuda Yar v. Emperor, 1940 Lah. 129: 188 I.C. 498: 41 Cr. L. J. 591 (F.B.); Abdul Kadar v. Emperor, 1946 Cal. 452: 228 I. C. 24: 48 Cr. L.J. 46: 50 C.W.

I.L.R. (1974) 2 Delhi 706.
 R. v. Hurribole, (1876) 1 C. 207; followed in Jas Bahadur Thapa v. Emperor. 1930 Rang. 227; I.L.R. 8 Rang. 52: 125 I.C. 337: 31 Cr. L.J. 823.

Moher v. R. (1893) 21 C. 392.
 R. v. Javecharam, (1894) 19 B. 363; R. v. Bhushmo, (1865) 5 W. R. Cr. 21 v. post.
 Rakesh Kumar v. State. 1974 Rajdhani L.R. 37 (Delhi).
 State of Punjab v. Barkat Ram, (1962) 3 S.C.R. 338: (1962) 2 S. C. A. 321: A.I.R. 1962 S.C. 276.
 State of Mysore v. D.G. Nanjappa. (1968) 1 Mys. L.J. 457, 461: 1968 M.L.J. (Cr.) 226: confirmed by the Supreme Court in D.C. Nanjappa Supreme Court in D.C. Nanjappa v. State of Mysore, 1971 S.C. Cr.

An extra-judicial confession made in the presence of a police officer cannot be considered voluntary and is, therefore, inadmissible. 15

It is improper for a Magistrate to record a confession in jail in disregard of the instructions contained in Government orders.16 But such a confession may be acted upon, if in the circumstances of the case its voluntary character was not affected.17 The court, after appreciating the circumstances which made the voluntariness open to doubt, can still hold that the confession is voluntary if it finds that there are other facts and circumstances assuring the voluntariness, 18

6. "Against a person accused of any offence." This section only provides that "no confession made to a police officer shall be proved as against a person accused of any offence." It may, however, be proved for other purposes. It does not preclude one accused person from proving a confession made to a police officer by another accused person tried jointly with him. But, under such circumstances, it is the duty of the Judge to instruct the jury that such confession is not to be received or treated as evidence against the person making it, but simply as evidence on behalf of the other.19 A confessional statement that the accused killed his wife on receiving provocation from her is not inadmissible where it is to be used not against the accused but in his favour to mitigate his offence.20 Statements made by accused persons, as to the ownership of property, the subject-matter of the proceedings against them, have been held to be admissible as evidence with regard to the ownership of the property in an inquiry held by the Magistrate under Sec. 523, Act X of 1882, (now section 452 of the Cr. P. C. of 1973).21 In this case, West J., observed: "Confession in section 25 of the Indian Evidence Act (I of 1872) means, as in the twenty-fourth section, a "confession made by an accused person", which it is proposed to prove against him to establish an offence. For such a purpose, a confession might be inadmissible, which yet for other purposes would be admissible as an admission, under the eighteenth section against the person who made it (the twenty-first section) in his character of one setting up an interest in property, the object of litigation of judicial enquiry and disposal".22 Similarly in Pohlu v. Emperor,24 Blacker, J., referring to a statement made by the accused to a Police Sub-Inspector observed:

"No doubt this is a confession to a police officer and it is also a statement made during the course of investigation. But it would only be barred under Sec. 25, Evidence Act, if it were being proved as against an accused person. For the purposes of Sec. 517, Cr. P. C., 1898 (Sec. 452 of the Code of 1973), where

Bhulakiram Koiri v. State. 73 C.
 W.N. 467: 1970 Cr. L.J. 403, 411.
 Ram Chandra v. State of U.P.,

¹⁹⁵⁷ Cr. L.J. 559: A.I.R. 1957

¹⁹⁵⁷ Cr. L.J. 559; A.I.R. 1957 S.C. 381, 386, 17. Hem Raj Devilal v. State of Ajmer, 1954 S.C.R. 1133: 1955 S.C.A. 50: 1954 S.C.J. 449: 1954 A.W.R. (Supp.) 49: 1954 Cr. L.J. 1315: (1954) 1 M.L.J. 694: A.I.R. 1954 S. C. 462, 464. 18. Shri Irfan Ali v. State, 1970 C. L. J. 603, at pp. 607, 608: 1970 C. Cr.

R. 498: 1970 A.W.R. (H.C.) 679.

^{19.} R. y. Pitamber, (1877) 2 B. 61 20. In re Thandavan. 1973 Cri. L.J.

^{21.} R. v. Tribhovan, (1884) 9 B. 131.

^{22.} Ib. 134.

^{23. 1943} Lah. 312; 209 I.C. 546; Dhanraj Baldco Kishan v. State, (1965) 2 Cr. L.J. 805: A.I.R. 1965 Raj. 238; see also Prakash Chandra Jain v. Jagdish, A.I.R. 1958 Madh, Pra.

the accused does not claim the property, it cannot be said that this statement is being used against him and as it is otherwise a perfectly good piece of evidence. I see no reason for not admitting it and relying on it. Similarly, Sec. 162, Cr. P. C., only bars the use of such a statement 'at any inquiry or trial in respect of any offence under inesvtigation at the time when such statement is made.' Section 517, Cr. P. C., 1898 (Section 452 of the Cr. P. C., 1973), does not relate to any such inquiry or trial. In fact the opening words, which are 'when an inquiry or trial in any Criminal Court is concluded', show clearly that it is a separate proceeding from the substantial trial of the accused person for the offence. I can see no bar, therefore, either in Sec. 25, Evidence Act, or in Sec. 162, Cr. P. C., to this statement being used for the purpose of Sec. 517, Cr. P. C., 1898 (Sec. 452 of the Cr. P. C., 1973) to determine, firstly, whether the property is the property regarding which an offence appears to have been committed, and secondly, for determining the person to whose custody it should be delivered."24

The expression 'accused of any offence' covers a person accused of an offence at the trial whether or not he was accused of an offence when he made the confession.25

The prohibition in the section cannot operate against the statement of a person recorded under section 162, Cr. P. C., in the course of an inquiry into a case of theft in proceeding under section 488, Cr. P. C., 1898 (Sec. 125 of the Cr. P. C., 1973) because in such a proceeding the maker-petitioner is not 'accused of any offence'.1

Statement made by an accused to police is inadmissible against co-accused.2

1. Admission made to Police officers. An admission made by an accused person to a police officer may be proved, if it does not amount to a confession.3 A statement made by the accused to the police, containing an admission of a gravely incriminating fact, or even a conclusively incriminating fact, is not of itself a confession,4 and not being a confession, it cannot be excluded by this Section. And, if the statement happens to be made to the police, prior to the investigation in the case, then it is also not hit by Sec. 162, Cr. P. C. Thus, it becomes admissible in evidence.5 Before the decision of the Privy Council in Pakala · Narayana Swami v. Emperor,6 the word "confession" was construed as meaning a statement made by an accused "suggesting

24. See also Mahanta Singh v. Het Ram, 1954 Punj. 27 and the cases cited therein; Veerabhadrappa v. Govindamma, I.L.R. 1973 Mys. 641.

A.W.R. (Sup.) 24: 1966 Cr. L.J. 1275; A.I.R. 1966 Mad. 392.

Usman Mian v. State of Bihar, 1971 Cr. L. J. 747 (Pat.).

3. Sital Chandra Maity v. State, 1956 Cal. 82.

4. Pakala Narayana Swami v. Emperor, 1939 P.C. 47: 66 I.A. 66: I.L.R. 18 Pat. 234: 180 I.C. 1: 40 Cr. L. J. 364: 1939 A.L.J. 298: 41 Bom. L.R. 428: 69 C.L.J. 273: 43 C.W. N. 473: (1939) 1 M.L.J. 756: 49 L. W. 349: 1939 M.W.N. 185: 5 B. R. 449: 20 P.L.T. 265.

5. Sital Chandra Maity v. State, 1956 Gal. 82.

6. Supra.

^{25.} Aghnoo Nagesia v. State of Bihar. (1966) 1 S.C.R. 134: (1965) 2 S.C. A. 367: 1966 S.C.D. 243: (1966) 1 S.C.J. 193: (1965) 2 S.C.W.R. 750: 1966 A.W.R. (H.C.) 648: 1965 B. 1966 A.W.R. (H.C.) 648: 1965 B.
L.J.R. 865: 1966 Cr. L.J. 100: 1966
M.P.L.J. 49: 1966 Mah. L.J. 113:
1966 M.L.J. (Cr.) 134: 1965 M.W.
N. 216: (1966) 1 Andh. L.T. 430:
A.I.R. 1966 S.C. 119, at p. 123.
1. Paltammal v. M. Munuswami. (1966)
1 M.L.J. 540: 1966 M.L.J. (Cr.)
474: 1966 M.L.W. (Cr.) 60: 1966

the inference that he had committed" the crime, and it was held in several cases that such statements made to a police officer were inadmissible under this section.7 Such statements would now be admissible, unless they are hit by Sec. 162 of the Cr. P. C. as they do not amount to confessions. The prohibition in Sec. 25 is based on a rule of public policy; it is absolute. The proposition that no confession to a police officer, of any offence made at any time shall be proved, relates only to the confession made to a police officer and not to one made in his presence. A confession made by the accused to the villagers, in the course of enquiry about the deceased, even if made in the presence of the chowkidar who is a police officer, would not be inadmissible under this Section if it is shown that the chowkidar has, in no way, influenced the accused, who was not in custody, to make a confession and has taken no part n bringing about the confession of the accused.8. The prohibition in the Section applies to a confession, only when sought to be proved against the accused person and not for him. Somasundaram, J., in In re Mottai Thevaro has held: "Section 25, Evidence Act, says that no confession made to a police officer shall be proved as against a person accused of an offence." The section loes not prohibit the use of it in favour of the accused.10 It is not also applitable to the case of a person proceeded against otherwise than for an offence, e.g., Sec. 109, Cr. P. C.11 The section forbids only the use of a confession nade to a police officer in a trial of the accused person for having committed in offence. Therefore, it would be admissible in a civil case brought against an accused for recovery of the article or for damages for trespass, etc.; and also in proceedings under Sec. 517 of the Code of Criminal Procedure, 1898 (Sec. 452 of the Cr. P. C.,1973) which are proceedings which take place after the main proceedings are over. 12

What the section hits at is a confession made to a police officer. If the confession is not made to a police officer but to somebody else, it is not renlered inadmissible by virtue of this section. Therefore, a letter written and signed by the accused containing a confession that he murdered his wife, and ilso addressed to a police officer, found near the dead body of the wife, is not a confession made to a police officer which is within the bar created by the section, for it was not made in the presence of the police officer nor was it made from the point of view of being a confession to a police officer even though the letter used the words 'Sub-Inspector'.13

 Rex v. Ramdayal, A.I.R. 1950 All. 134; 51 Cr. L.J. 436.
 Mahanta Singh v. Hetram, A.I.R. 1954 Punj. 27: 1955 Cr. L.J. 155; I.L.R. 1954 Punj. 404.

13. Sita Ram v. State of U.P., (1966) S.C.R. (Supp.) 265; 1966 S.C.D. 926; (1967) 1, S.C.J. 809; (1966) 1 S.C.W.R. 955; 1966 A.L.J. 856; 1966 A.W.R. (H.C.) 407; 1966 Cr. L.J. 1519; 1967 M.L.J. (Cr.) 664; A.I.R. 1966 S.C. 1906.

^{7.} See R. v. Haji Sher Mahomed, 1923 Bom. 65: I.L.R. 46 Bom. 961: 75 I.C. 70: 24 Cr. L.J. 870: 25 Bom. L.R. 214; Legal Remembrancer v. Lalit Mohan, 1922 Cal, 342: I.L.R.

Lalit Mohan, 1922 Cal, 342; I.L.R.
49 Cal, 167; Azimaddy v. R. 1927
Cal. 17; I.L.R. 54 Cal. 237; 99 I.C.
227; 44 C.L.J. 253.

8. Emperor v. Shankar, A.I.R. 1934
Oudh 222; 35 Cr. L.J. 894; 149 I.
C. 69; Maharani v. Emperor, A.I.
R. 1948 All. 7; 48 Cr. L.J. 939;
scc. also Jagjit Singh v. The State,
A.I.R. 1956 Kutch 1; 1956 Cr. L.
I. 217; Sridevi v. State of U. P.,
1973 All. Cr. R. 458; 1973 All. W.
R. (H.C.) 668; 1974 Cr. L.J. 126.

9. A.I R. 1952 Mad. 586; 53 Cr. L.J.
1240; 1951 (2) M.L.J. 605.

^{10.} See also Rajam v. State of Andhra Pradesh, A.I.R. 1959 A.P. 333: 1959 Cr. L.J. 813; In re Thandavan, 1973 Cri. L.J. 1041 (Mad.); 1972 M.L.W. (Cri.) 244; In re Rayappa Asari. 1972 Mad. L. W. (Cr.) 48: 1972 Gr. L. J. 1226.

The Act does not in terms apply to proceedings before the Director of Enforcement under section 23 of the Foreign Exchange Regulation Act, 1947. Section 25 of the Evidence Act does not apply when the confession is not made to such an officer having no police powers at the time of confession.14

8. Confession in first information report. If the first information report is given by the accused to a police officer and amounts to a confessional statement, proof of the confession is prohibited by the section. The confession includes not only the admissions of the offence but all other admissions of incriminating facts contained in the confessional statement. No part of the confessional statement is receivable in evidence except to the extent that the ban of section 25 is lifted by section 27 post. The separability test that if a part of the first information report is properly severable from the strict confessional part, then the severable part could be used in evidence, is misleading. The entire confessional statement is hit by section 25 and save and except as provided by section 27 post and save and except the formal part as identifying the accused as the matter of the report, no part of it can be tendered in evidence.15 This decision of the Supreme Court has set at rest the conflict in judicial decisions containing all shades of opinion ranging from total exclusion of the confession to total inclusion of all admissions of incriminating facts except the actual commission of the crime. It has also discarded the separability test. See the cases discussed on page 120 of A. I. R. 1966 S. C. 119. The first information report made to the police by a person, who is subsequently made an accused in respect of the offence reported by him, is admissible in evidence against him at the trial if it does not amount to a confession.16 A first information report is not substantive evidence and can be used only to corroborate the statement of the maker under section 157 post or to contradict it under section 145 post. It cannot be used as evidence against the maker if he himself becomes an accused nor to corroborate or contradict other witnesses.17

In Dal Singh v. Emperor,18 their Lordships of the Privy Council expressed the opinion that a first information report which the accused had made at the

^{14.} N. Gurudas v. Union of India, 1969 Ker, L.R. 450.

Ker, L.R. 450.

15. Aghnoo Nagesia v, State of Bihar, (1966) 1 S.C.R. 134; (1965) 2 S.C. A. 367; 1966 S.C.D. 245; (1966) 1 S.C.J. 193; (1965) 2 S.C.W.R. 750; 1966 A.W.R. (H.C.) 648; 1965 B.L.J.R. 865; 1966 Cr, L.J. 100; 1966 M.P.L.J. 49; 1966 Mah. L.J. 113; 1966 M.L.J. (Cr.) 134; 1965 M.W.N. 216; (1966) 1 Andh. L.T. 430; A.I.R. 1966 S.C. 119, 120; Khatri Hemraj Amulakh v, State of Gujarat, 1972 Cri. L.J. 626; 1972 Cri. App., R. 184 (S.C.); (1972) 2 S.C. J. 299; 1972 Mad. L.J. (Cri.) 573; 1972 U.J. (S.G.) 717; (1972) 3 S. C.C. 671; 1972 S.C. Cri. R. 535; 1972 S.C.C. (Cri.) 715; A.I.R. 1972 S.C. 922; Badri v. State of U. P. 1973 All. Cri. R. 113; 1978 P. 1973 All. Cri. R. 113: 1978 All W. R. (H. C.) 142: 1973 All. L.J. 251: 1978 Cri. L.J. 1478; In re Muthiah Nadar, 1970 M.L.W. (Cri.) 287: 1971 Cri. L. J. 730 (Mad.); State v. Mayadhar Rana, (1972) 58 Cut. L.T. 725: (1971) Cut.

L, R. (Cri.) 363; Bhuta v. State of Rajasthan, 1975 W.L.N. 682: 1975 Raj. L.W. 479; Jalam Singh v. State of Rajasthan, (1975) W.L.N. 623; Gopal v. State, 1977 A.W.C. 38: 1977 Cr. L.J. 358 (All.): 1977 A. Cr. R.

<sup>29.

16.</sup> Jaddi v. State of Madhya Pradesh, 1964 S.G.D. 779: (1964) 2 S.C.W. R. 140: 1964 Jab. L.J. 252: 1964 M.P.L.J. 609: 1964 Mah. L. J. 519: 1964 (2) Cr. L.J. 744: A.I.R. 1964 S.C. 1850; Jattiya v. State of M.P., 1967 Jab. L.J. 504; Natesan. In re. 1969 Cr. L.J. 83 (Madras), 84.

17. Nisar Ali v. State of Uttar Pradesh, 1957 S.C.R. 657: 1957 S.C.A. 312: 1957 S.C.C. 128: 1957 S.C.J. 392: I.L.R. (1957) 1 All. 361: 1957 A. L.J. 447: 1957 A.W.R. (H.C.) 461: 1957 B.L.J.R. 552: 1957 M.P. C. 346: (1957) 1 M.L.J. (Cr.) 314: 1957 Cr. L.J. 550: A.I.R. 1957 S.C. 366; Chhote Lal v. State, 1968 Cr. L.J. 15: A.I.R. 1968 All. 37, 39.

18. A.I.R. 1917 P.C. 25: 39 I.C. 311: 18 Cr. L.J. 471: 33 M.L.J. 555.

station to the police under the provisions of Sec. 154, Cr. P. C., 1898, (Sec. 154 (1), Cr. P. C., 1973) prior to his arrest, was clearly admissible and that certain statements in it constituted cogent evidence against him. It was said:

"It is important to compare the story told by Dal Singh when making his statement at the trial with what he said in the report he made to the police in the document which he signed, a document which is sufficiently authenticated. The report is clearly admissible. It was in no sense a confession. As appears from its terms, it was rather in the nature of an information of a charge. . . . As such the statement is proper evidence against him".

Thus a self-deserving statement of an accused person, in a document, or an oral statement, suggesting an inference as to any fact in issue or relevant fact, whether it amount to a confession or not, is always provable as an admission under Sec. 21, if not hit by any provision of law. It is substantive evidence of a valuable kind against him if it is satisfactorily traced to an accused person and proved to be in his handwriting or to have been signed by him. In In re Barendra Kumar Ghose,10 it was said that a document to be admissible at all against an accused person should be proved to be either a document in the handwriting of an accused person by comparison with his admitted or proved specimen of his handwriting in the light of the testimony of an expert witness, or to be in the possession of an accused person, or to be admissible as falling within the scope of Sec. 10 of this Act. Similarly, just as there can be proof against accused persons from admissions in documents traceable to them, there can also be proof for accused persons. An accused person usually files such a document at the close of the prosecution case adopting them in his oral or written statement in answer to the examination by the court under Sec. 342, Cr. P. C., 1898, (Sec. 313, Cr. P. C., 1973). Where they contain provable admissions in writing by the accused, they constitute valuable substantive evidence under the law for the accused. Emperor v. Tutibabu20 is authority for the proposition that there may be cases in which a court would be justified in accepting documents in evidence for the defence without separate evidence to prove them.

Confession in F. I. R. in favour of accused is not inadmissible.²¹

9. Counter-complaints by accused: Admissibility. The position has been summarised in Ramakrishnaya v. The State,22 where it is stated:"Counter-complaint made by accused persons when sought to be used for or against them when aguring as complainants in their cases attracts only the provisions of the law of evidence as to corroboration or contradiction and are no more than former statements of witnesses; yet when used against them as accused they attract the provisions as to admissions and confessions."

In Hasil v. Crown,25 it was held, that where two versions of the same incident are put forward, it is of greatest importance for an accused to be able to show that his own explanation was put forward at the earliest possible op-

^{19. 37} Gal. 467.

A.I.R. 1946 Pat. 373: 47 Cr. L.J. 937; I.I.R. 25 Pat. 33: 226 I.C. 20.

Dharma v. State, 1975 W.L.N. 508;
 1975 Raj. L.W. 870.

⁽¹⁹⁵⁴⁾ M.W.N. 41: 1954 MWN (Cr.) 9: 55 Cr. L. J. 610: A.I.R. 1954 M. 442.

^{23.} I.I.R. 1943 Lah. 77: A.I.R. 1942 Lab. 37: 198 I.C. 441.

portunity and it is the duty of the prosecution to bring that on record. In Mohammad v. Crown24 the position was summed up thus: A report which amounts to confession is not admissible as being a confession made to a police officer, but a report not amounting to confession can be admitted in evidence. At the same time a report of the latter kind cannot, since the maker is an accused person and not a witness, be treated as evidence against any coaccused.

The view of the Madras High Court is also similar. In Guruswami Tevan v. Emperor²⁵ it was observed that the complaint made by the accused was not inadmissible either under Sec. 162, Cr. P. C. or as being a confession made to a Police Officer. In In re Pedda Venkatanna1 it was stated that it was the duty of the prosecution to exhibit the counter-complaint arising out of the same transaction.

In Emperor v. Bhagi,2 it was held, that where, after the first information report of a murder had been recorded, the accused voluntarily goes to the police station, and makes a report to the police by way of defence or reply and no question is put to him by the police, the report of the accused is not a statement made in the course of investigation within Sec. 162, Cr. P. C. and is not, therefore, inadmissible. It was also stated that a report of self-exculpatory nature made by the accused to the police is not a confession and is not excluded under this section, but is admissible under Sec. 21. This was followed in Qamrul Hasan v, Emperor.3.. See also the undernoted case.3-1

In Akal Sahu v. Emperor,4 an information was given by the accused long before the police had information of the occurrence. It was held, that the statement was admissible as an admission, provided it was not of the nature of a confession and did not come within the excluding provisions (Secs. 24, 25 and 26) of the Evidence Act, and was not hit by Sec. 162, Cr. P. C. It was pointed out that such statement may also be admissible under other sections of the Evidence Act [e.g., Sec. 8, Explanation I and Sec. 32].

In Suba Chaudhary v. King,5 the son of the deceased gave information and immediately thereafter the accused gave a counter-complaint and the counter-complaint was held to be admissible, as investigation had not started.

In Gopaldas Shivlomal v. Emperor,6 the first information report given by the accused himself which was not a confession was held admissible in evidence.

In Sebastian David v. Sirkar,7 it was observed, that there is the high authority of the Privy Council⁸ for bringing counter-information which ac-

A.I.R. 1948 Lah. 19.
 1939 M.W.N. 513: 184 I.C. 336: A.I.R. 1939 M. 780.

^{1, 1952} M.W.N. 69: (1952) 1 M.L.J. 244: 65 M.L.W. 146: I.L.R. 1952 Mad, 562: 1954 M. 15, 2. A. I. R. 1941 Oudh 359: 194 I.C.

^{236.}

A. I. R. 1942 Oudh 60: 197 I. C. 121; See also Mathai v. State of Kerala, 1959 Ker. L. R. 839.

^{3-1.} I. L. R. (2) 1970 Delhi 854.

^{4.} I. L. R. 26 Pat. 49: A. I. R. 1948 Pat. 62; 48 Cr. L. J. 565; 230 I.C.

^{5.} I. L. R. 28 Pat. 762: A. I. R. 1950 Pat. 44.

^{6.} A. I. R. 1945 Sind 132; I. L. R.

¹⁹⁴⁴ Kar. 456: 221 I. C. 358.
7. A.I.R. 1950 T.C. 9.
8. Dal Singh v. Emperor. 1917 M.W.
N. 522: A. I. R. 1917 P.C. 25: 39 I. C. 311.

cused has given on the record of the case in which the informant himself stands his trial.

26. Confession by arcused while in custody of police not to be proved against him. No confession made by any person whilst he is in the custody of a police officer, unless it be made in the immediate presence of a Magistrate,9 shall be proved as against such person.

¹⁰[Explanation. In this section, "Magistrate" does not include the head of a village discharging magisterial functions in the Presidency of Fort St. George 11[* * *] or elsewhere, unless such headman is a Magistrate exercising the powers of a Magistrate under the Code of Criminal Procedure, 1882.]12

s. 25 (Confession to a Police Officer)

s. 27 (Facts discovered in consequence of information .)

SYNOPSIS

Object and principle.
 Scope and applicability.
 Police custody.

- 4. In the immediate presence of a Magistrate.
- 1. Object and principle. The object of this section (as of the last) is to prevent the abuse of their powers by the police.13 The last section excludes confessions to a police officer under any circumstances. The present section excludes confessions to anyone else, while the person making it is in a position to be influenced by a police officer, that is, when he is in the custody of a police officer, unless the free and voluntary nature of the confession is secured by its being made in the immediate presence of the Magistrate, in which case the confessing person has an opportunity of making a statement uncontrolled by any fear of the police.14 A confessional statement must be proved to be voluntary by the evidence of the Magistrate who recorded it and the intrinsic evidence contained in the document itself.15
- 2. Scope and applicability. Incriminating statements to police are hit by Sec. 25.16 This section interdicts confessional statements made by per-

1871 (4 of 1871), Sec. 20. Ins. by the Indian Evidence (Amendment) Act, 1891 (3 of

1891), S. 3. 11. The words "or in Burma" rep. by

the A.O. 1987.

12. See now the Code of Criminal Procedure, 1973 (Act 2 of 1974).

R. v. Monmohun, (1875) 24 W.
 R. Cr. 33, 36, per Birch, J.
 In the matter of Hiran, (1877) 1 C.

L.R. 21, per Ainslie, J.; R. v. Hurribole, (1876) 1 C. 207, 215, For later application of Ss. 26 and 27, see Mannalal v. R., 1925 Oudh 1: 75 I.C. 753; 25 Cr. L. J. 49; In re Naina Malai, (1921) 23 Cr. L.J. 697.

15. Banarsingh Tanti v. State of Assam,

15. Banarsingh Tanti V. State of Assam, 1977 Cr. L.J. 296.

16. Prabhoo v. State of U. P., (1963) 2 S.C.R. 881: 1963 S.C.D. 115: (1963) 2 S.C.J. 165: I.L.R. (1962) 1 All, 161: 1962 A.L.J. 1097: 1962 A.W.R. (HC) 876: 1962 B.L. J.R. 924: 1963 M.L.J. (Cr.) 365: 65 Punj. L.R. 339: (1963) 2 Cr. L. J. 182: A.J.R. 1963 S.C. 1118. J. 182: A.I.R. 1963 S.C. 1118.

^{9.} A Coroner has been declared to be a Magistrate for the purposes of this section, see the Coroners Act,

sons in police custody.17 The law is imperative in excluding what comes from an accused person in custody of the police, if it incriminates him.18 The prohibition in this section must be strictly applied.19 This section does not apply when confession is made by a person not in police custody, though in the presence of the police.20 This section does not qualify the preceding one,21 so that a confession made to a police officer is not admissible, even if it was made in the immediate presence of a Magistrate but not recorded in the manner laid down by Sec. 164, Cr. P. C.22 But this section, as well as the last, is qualified by the following one.23. The twenty-fifth section applies to all confessions to police officers; the present section to all confessions to any person, other than a police officer, made by persons whilst in police custody.24 This section includes all statements made by a person, whilst in custody of the police and applies to such statements to whomsoever made, e.g., to a fellow prisoner, a doctor or a visitor. Such statements are not covered by Sec. 162, Cr. P. C.25 The words "no confession" and "any person" used in this Section are not limited to accused persons. All that is necessary to attract the provisions of this section is the custody of a police officer and a confession; any confession, it would seem and not merely a confession of the offence then under inquiry, and any confession made by any person in custody whether he is an accused person or not, that is to say, he may be in merely preventive custody for his own safety, or alternatively in jail serving a sentence for another offence.1 Such confessions are inadmissible unless made in the immediate presence of a Magistrate.2

The section applies only to statements and not to acts, such as the counterfeiting of coins.3 A person proceeded against under Sec. 109, Cr. P. C., is not prosecuted for any offence, so that a statement made by him is not a confession and is not therefore affected by this section.4 A confession inadmissible under this section against the confessing party, might, however, be admissible in favour of a co-accused.⁵ As to the meaning of the expression "police officer", see section 25 ante Note 5.

3. Police custody. As this section relates to confessions made to persons other than a police officer, whilst the accused is in the custody6 "of the police", a confession made to such third persons by an accused whilst the

17. Udai Bhan v. State of U.P., A.I.
R. 1962 S.C. 1116: (1962) 2 Cr.
L.J. 251: 1962 All. W.R. (HC)
512: (1962) 2 All. L.J. 502: I.L.
R. (1962) 2 All. 522.

18. R. v. Mathews, (1884) 10 C. 1022, 1023, per Field, J.; see as to the construction of this section the Madras Law Journal, Jan. and Feb., 1895, pp. 36-44.

19. R. v. Pancham, (1882) 4 A. 198.

204. per Straight, J. 20. I.L.R. (1974) 2 Delhi 706. 21. R. v. Domun, (1869) 12 W.R. Cr. 82; R. v. Babu Lal. 6 A. 509, 532, v. ante.

Zwinglee Ariel v. State, 1954 S.
 C. 15: 1954 Cr. L.J. 230.

23. R. v. Babu Lal, (1884) 6 A. 509; Ahmad Noor Khan v. State of Assam 1972 Cri. L.J. 779, see note to S.

27. post. 24. See Hakam Khuda Yar v. Emperor, 1940 Lah. 129: I.L.R. 1940 Lah. 242: 188 I.C. 498: 41 Cr. L.J. 591

(F.B.). 25. Pakala Narayana Swami v. Emperor, 1939 P.C. 47, 52: 66 I.A. 66; I.L.R. 18 Pat. 234: 180 I.C.

 Ram Bharose v. Emperor, A.I.R. 1944 Nag. 105: I.L.R. 1944 Nag. 274: 212 I.C. 449 (F.B.).

2. v. Ante.

3. Brij Na.idan v. Emperor, A.I.R. 1931 All. 9; 133 I.C. 154,

4. R. v. Ram Dayal, A.I.R. 1950 All. 134: 1949 A.L.J. 413.

5. R. v. Pitamber, (1876) 2 B. 61. 6. See Maung Lay v. Emperor, A.I.R. 1924 Rang. 173; I.L.R. 1 Rang. 609; 77 I.C. 429.

latter is not in such custody is not excluded by the section. Where a woman, who was not in the custody of the police at the time, made a cosfession to a Village Munsif, whom the Court held not to be a police officer within the meaning of the preceding section, it was held that the confession could not be excluded under this section.⁷

The word "custody", in this and the following section, does not mean formal custody, but includes such state of affairs in which the accused can be said to have come into the hands of a police officer, or can be said to have been under some sort of surveillance or restriction.8

"Police custody" for the purposes of this section does not commence only when the accused is formally arrested, but it also commences from the moment whent his movements are restricted and he is kept in some sort of direct or indirect police surveillance. In Maung Lay v. Emperor, it was said, that as soon as an accused or suspected person comes into the hands of a police officer, he is, in the absence of any clear and unmistakable evidence to the contrary, no longer at liberty and is therefore, in the custody within the meaning of this section and Sec. 27. Every indirect control over the movements of suspects by the police amounts, in law to, "police custody" within the meaning of this section. Indeed, there may be police custody without formal arrest. In State of U. P. v. Deoman Upadhyaya, the majority of the Judges observed:

"Section 46 of the Code of Criminal Procedure does not contemplate any formality before a person can be said to be taken in custody: submission to the custody by word or action by a person is sufficient. A person directly giving to a police officer by word of mouth information which may be used as evidence against him, may be deemed to have submitted himself to the custody of the police officer."

In Paramhansa v. State,14 it was held that the accused was in police custody for the purpose of this Section from the date of his interrogation by the inspector and that he continued to be in police custody when he was brought and left in the custody of the doctor, when some persons who came

Paramhansa v. State, A.I.R. 1964
 Orissa 144: 1963 O.J.D. 372,

10. A.I.R. 1924 R. 173.

1932 S. 201.
12. Gurdial Singh v. Emperor. A.I.R., 1932 L. 609; In re Mannem Edukondalu, A. I. R. 1957 A. P. 729.
13. (1961) 1 S.C.R. 14: (1960) 2 S.C.

^{7.} R. v. Sama, (1886) 7 M. 287.

^{8.} Mst. Maharani v. Emperor, A.I.R.

1948 All 7: 1947 A.L.J. 285;
Chhotey Lal v. State. of U.P., 1954
All, 687: 1954 A.L.J. 93; -Maung Lay
v. Emperor. A.I.R. 1924 Rang. 173;
I.L.R. 1 Rang. 609: 77 I. C. 429;
Hakam Khuda Yar v. Emperor,
1940 Lah. 129: I. L. R.
1940 Lah. 242: 188 I. C. 498
(F.B.); Rodal Mal v. Ramji Das,
1933 Lah. 609: 146 I.C. 40; Allahditta v. Emperor, 1937 Lah. 620:
I.L.R. 1937 Lah. 106: 171 I.C.
377; Emperor v. Pancham, 1933
Oudh 192: I.L.R. 8 Luck. 410:
143 I.C. 846; Emperor v. Mst.
Iagia, 1938 Pat. 308: I.L.R. 17 Pat.
369 · 174 I.C. 524; I.L.R. (1971)

² Ker. 30

Haroon v. Emperor, A.I.R. 1932
 S. 149; Pharho v. Emperor, A.I.R.
 1932
 S. 201.

^{13. (1961) 1} S.C.R. 14: (1960) 2 S.C. A. 371; (1961) 2 S.C.J. 334; I.L. R. (1960) 2 All. 431; 1960 A.L.J. 733; 1960 A.W.R. (HC) 568; (1961) 2 Andh. W.R. (SC) 90; (1961) 2 M.L.J. (S.C.) 90; 1961 M.L.J. (Cr.) 554; 1960 Cr.L.J. 1504; A. I.R. 1960 S.C. 1125, at p. 1131.

with the police van were left there, for there was indirect control and surveillance over the movements of the appellant by the police, which continued till the next day and the Circle Inspector came there and formally arrested him. It is settled that once police custody has commenced the mere fact that for a temporary period, the police discreetly withdraws from the scene and leaves the accused in charge of some other person does not render the confession of the accused before the person in whose charge the accused was left admissible. Thus, in Emperor v. Sheo Ram,15 the confession before a Postmaster was held inadmissible, and in (Mst.) Hassan Pari v. Emperor,16 the confession before a Medical Officer in hospital was held inadmissible, as police custody had commenced. In Emperor v. (Mst.) Jagia,71 the fact that the accused was in charge of a private individual after he was first taken into police custody was held insufficient to render his confession before that individual admissible.18 The scheme of the Act appears to divide the cases into two classes:

- (1) Confessional statements made by persons not in custody are admissible in evidence against such persons in a criminal proceeding unless they are procured in the manner described in Section 24, or made to a police officer and fall under Section 25;
- (2) Confessional statements made by persons in custody, except those made in the presence of a Magistrate fall under this Section and are not provable except to the limited extent permitted by Section 27 of the Act.

This distinction has been upheld in State of U. P. v. Deoman Upadhyaya,19 where it was said:

"Sections 25 and 26 were enacted not because the law presumed the statements to be untrue, but having regard to the tainted nature of the source of the evidence, prohibited them from being received in evidence. It is manifest that the class of persons who needed protection most were those in the custody of police and persons not in the custody of the police did not need the same degree of protection"

Where a person goes to a police officer and makes a statement which shows that an offence has been committed by him, he accuses himself and though he is formally not arrested, since he is not free to move wherever he likes after disclosure of the information to the police, he must be deemed to be in custody of the police.20 In Bakshia Mukanda v. State of Bombay,21 the view was taken that the fact that the accused was interrogated and that he made a statement and

A.I.R. 1928 L. 282,
 A.I.R. 1941 Peshawar 22.
 A.I.R. 1938 Pat. 308.

See also Empress v. Lester, I. L.
 R. (1895) 20 B. 165; Emperor v. Mallangowda, I.L.R. 42 B. 1: A. I.R. 1917 B. 130.

^{19. (1961) 1} S.C.R. 14: (1960) 2 S.C. A. 371: (1961) 2 S.C.J. 334: I.L. R. (1960) 2 All. 431: 1960 A.L.J. 733: 1960 A.W.R. (HC) 568: (1961) 2 Andh. W.R. (SC) 90: (1961) 2

M.L.J. (SC) 90: 1961 M.L.J. (Cr.) 554: 1960 Cr. L.J. 1504: A. I.R. 1960 S.C. 1125 at p. 1130.

State v. Mohamad Husain, A.I.R. 1959 B. 534. 536: 61 Bom. L.R. 715, 718; see also Legal Remembrancer v. Lalit Mohan, I.L.R. 49 C. 167: A.I.R. 1922 C. 342: Santokhi v. Emperor, I.L.R. 12 Pat. 241: A.I.R. 1933 Pat. 149.

^{21.} A.I.R. 1960 B. 263: 62 Bom. L.R.

led the panchas and the police officer to a field and thereafter produced certain articles which were the subject-matter of dacoity, was sufficient to establish that there was submission on his part to police custody.

The word "custody" in this Section or Section 27, does not mean formal custody but includes cases in which the accused can be said to have come into the hands of a police officer or can be said to have been under some sort of surveillance or restriction.²²

The "police custody" is deemed to extend even when the accused is deemed to have submitted to such custody of a police officer by submitting to the interrogation and by making statement about discovery, and cannot thereafter be said to be a free man.²⁸

Even if a police officer, in order to avoid the effect of the provisions of this Section, studiously refrains from taking the accused into his custody, that is not a good ground for not ruling out a confession, if it was actually made before the accused's movements were controlled by the police. The crucial test is, whether, at the time, when a person made an extra-judicial confession, he was a free man, or his movements were controlled by the police, either by themselves or through some other agency, employed by them for the purpose of securing such a confession.²⁴

The arrest by the police officer need not be legal. Whether the arrest is legal or illegal, the mischief which this Section is intended to avert remains all the same.²⁵ The terms of the section do not limit its applicability only to confessions of offences with which the accused was charged, nor to confessions made by a person while in the actual custody of police.¹ Any sort of custody appears to be sufficient. So, where the prisoners were among certain persons who had been "collected" by a police patel on suspicion and the police patel had himself accused them of complicity in the offence, the prisoners were deemed to be in the custody of the police.² The immediate presence of the custodian is not necessary. Language would probably have to be strained to suggest that a person in the immediate presence of a Magistrate with the police outside to see that he does not escape is not in the custody of the police simply because they cannot be seen by the prisoner.³ When once an accused is arrested by a police officer and is in his custody, the mere fact, that, for some purpose or other, he happens to be temporarily absent and during his temporary absence leaves the accused in charge of a private individual, does

Maharani v. Emperor, A.I.k. 1948
 A. 7. 9.

^{23.} Punja Mava v. State of Gujarat, I.L.R. 1964 Guj. 954; A.I.R. 1965 Guj. 5.

Pharho v. Emperor, 1932 Sind 201 206: 141 I.C. 392; Haroon v. Emperor, 1932 Sind 149: 141 I.C. 215.

^{25.} Emperor v. Mst. Jagia, 1938 Pat. 308: I.L.R. 17 Pat. 369: 174 I.C. 524

^{1.} Ali Gohar v. Emperor, 1941 Sind

^{134:} I.L.R. 1941 Kar. 292: 196 1. C. 61; Ram Bharose v. Emperor, I.L.R. 1944 Nag. 274: 212 I.C. 449: A.I.R. 1944 Nag. 105.

R. v. Kamalia, (1886) 10 B. 595, 596; see also Maung Lay v. Emperor, 1924 Rang. 173: L.L.R. 1 Rang. 609: 77 I.C. 429; (Mst.) Aishan Bibi v. Emperor, 1934 Lah. 150 (2): I.L.R. 15 Lah. 310: 152 I.C. 206.

^{3.} Ram Bharose v. Emperor, supra.

not terminate his custody-the accused is deemed to be still in police custody.4 In the undermentioned case,5 a person under arrest on a charge of murder was taken in a tonga, from the place where the alleged offence was committed to Godhra. A friend drove with her in the tonga and a mounted policeman rode in front. In the course of the journey, the policeman, left the tonga and went to a neighbouring village to procure a fresh horse, the tonga meanwhile proceeding slowly along the road for some miles without any escort. In the absence of the policeman, the accused made a communication to her friend, with reference to the alleged offence. At the trial, it was proposed to ask what the prisoner had said on the ground that she was not then in custody, and that this section did not apply; but, it was held, that, notwithstanding the temporary absence of the policeman, the accused was still in custody, and the question was disallowed. In a subsequent case,6 it was held, that the custody of the keeper of a jail, who is not a police officer, does not become that of a police officer, merely because his subordinates, the warders of the jail, are members of the police force. In the absence of any suggestion of a close custody inside the jail, such as may possibly occur when an accused person is watched and guarded by a police officer investigating an offence, this section does not exclude such a jailor from giving evidence of what the accused told him while in jail. But the words "fellow prisoner, a doctor, or a visitor", used by their Lordships of the Privy Council in Pakala Narayana Swami v. Emperor,6-1 indicate that jail custody is still police custody.7 In the under-noted case,8 a question having arisen, whether the confession was properly let in, it was held that the confession was excluded by this section, because the accused who was in police custody up to his arrival at the hospital remained in that custody, while the policemen were standing outside on the verandah of the doctor's room where the accused was. But, custody in a judicial lock-up is magisterial custody, as opposed to police custody. The presence of the policemen, whose duty it is to guard the lock-up, is quite immaterial, for even the Police Sub-Inspector cannot approach the accused confined in the lock-up without the permission of the Magistrate in charge of the lock-up.9

As to the effect of prolonged custody before the making of a confession, see section 24 ante, Note 14.

4. In the immediate presence of a magistrate. If the confession be made to a third person, the presence of a Magistrate is necessary in order to render the confession admissible under this section. But a confession made to the Magistrate himself conforms to the requirement of the section and is admissible even though the confessing party be at the time in the custody of the police.10

6. R. v. Tatya, (1895) 20 B. 795.

Emperor v. (Mst.) Jagia, 1938 Pat. 308, 311; I.L.R. 17 Pat. 369: 174 I.C. 524; Emperor v. Sheo Ram. 1928 Lah. 282: 108 I.C. 398: 29 Gr. L.J. 386; Birja v. Emperor, 1941 Oudh 563: 195 I. C. 493; (Mst.) Hassan Pari v. Emperor, 1941 Pesh 22: 193 I. C. 284; Empress v. Lester, (1895) 20 Bom. 165.

^{5.} Empress v. Lester, (1895) 20 B, 165.

^{6-1.} A. I. R. 1939 P.C. 47.7. Ram Bharose v. Emperor, I.L.R. 1944 Nag. 274: 212 I.C. 449: A.I. R. 1944 Nag. 105. R. v. Mallangowda, 1917 Bom.

^{130: 42} B. 1: 42 I.C. 597.

^{9.} Imam Din v. Emperor, 1934 Lah. 75: 151 I.C. 894.

R. v. Monmohun (1875) 24 W.R.
 Cr. 33; R. v. Nilmadhab. (1888) 15 G. 595.

In a case, however, to which provisions of Sec. 164, Cr. P. C. apply, a confession to a Magistrate is not admissible, unless those provisions are strictly complied with.¹¹ In the undernoted case,¹² it was pointed out that the ruling of their Lordships of the Privy Council¹³ relates to confessions made to a Magistrate in the course of investigation, and a confession made by an accused person before a Magistrate, before the investigation is begun, does not come within the ruling of the Privy Council. In another case, it was held by the same High Court, that Sec. 164, Cr. P. C., comes into play when during an investigation an accused is formally brought before a Magistrate for the purpose of recording his confession and that a confession recorded by a Magistrate holding an inquest under Sec. 176, Cr. P. C., and not empowered under Sec. 164 to record confessions, is admissible in evidence and can be sued against the accused even though the provisions of Sec. 164, Cr. P. C. have not been complied with.¹⁴ In Miral v. Emperor,¹⁵ the Chief Court of Sind observed:

"It is to be observed that if this ruling of the Privy Council is to be kept as clearly it should be kept in effect to cases of confessions recorded by Magistrates empowered to record confessions during the course of an investigation, the special provisions of Sec. 164, Cr. P. C., do not apply to confessions otherwise made; they would not apply, for instance, to a confession made by an accused person to a third class Magistrate such as in 31 S. L. R. 460,16 nor to a second class Magistrate not especially empowered to record confessions; nor also to a confession alleged to have been made, as in this case, to someone who is not a Magistrate, Sher Muhammad. The ruling of thier Lordships and the provisions of Sec. 164 would also not apply to a statement of a confession for which a special provision is made in Sec. 339 (3), Criminal Procedure Code."

Where a (Second Class) Magistrate not specially empowered by the State Government to record a confession under section 164, Cr. P. C., does so, his oral evidence to prove the confession will be inadmissible.¹⁷ A confession so recorded cannot be treated as an extra-judicial confession because there was no evidence as to who recorded the same. In the instant case it was held that it mattered little whether the confession was recorded by the Magistrate in his own hand or was got recorded by some other person.¹⁸

^{11.} Nazir Ahmad v. King-Emperor, 1936 P.C. 253 (2): 63 I.A. 372; I L.R. 17 Lah, 629: 163 I.C. 881; Bala Majhi v. State of Orissa, 1951 Orissa 168; I.L.R. 1951 Cut. 65 (F.B.); Zwinglee Ariel v. State of Madhya Pradesh, 1954 S.C. 15; 1954 Cr.· L.J. 230; Miral v. Emperor, 1943 Sind 166; I.L.R. 1943 Kar. 285: 209 I.C. 242; see also Emperor v. Kommoju, 1940 Pat. 163; I.L.R. 19 Pat. 301; 188 I.C. 57; In re Dinanath Ganpat Rai, 1940 Nag. 186; I.L.R. 1940 Nag. 232; 189 I.C. 591; State of Orissa v. Jayadhar, 1975 Cut. L. R. (Cr.) 433; I.L.R. 1975 Cut. 1557.

^{12.} In re Nainamuthu. 1940 Mad. 188:

I.L.R. 1940 Mad. 428; 186 I.C.

Nazir Ahmad v. King--Emperor, supra.

^{14.} In re Ramaswami Reddiar, 1953 Mad. 138: (1952) 2 M.L.J. 814: 1952 M.W.N. 897.

^{15. 1943} Sind 166 at p. 169.

Noukar Mouledino v. Emperor, 1937 Sind 212: 170 I.C. 827: 31 S. L.R. 460.

State of U.P. v. Singhara Singh. 1964 A.W.R. (HC) 97; Basdeo v. State, 1965 A.L.J. 77: 1965 All. Cr. R. 122: 1965 A.W.R. (HC) 117: 1967 Cr. L.J. 1104.

^{18.} Basdeo v. State, supra.

A confession made to a Magistrate does not become inadmissible because of the presence of an armed constable. As far as possible the accused should be kept in charge of Magistrate's own staff.19

A Full Bench of the Bombay High Court has also held that although under Sec. 19 of the Coroners Act, a Coroner is, for the purposes of this section, to be deemed to be a Magistrate, a confession recorded by him is admissible even if the provisions of Sec. 164, Cr.P.C. have not been complied with.20 But in a case a Bench of the Madras High Court has held that a correct interpretation of the Privy Council decision in the case of Nazir Ahmad v. King-Emperor,21 is that no confession recorded by a Magistrate of any rank is admissible unless it conforms to the provisions prescribed in Sec. 164, Cr. P. C.22

It is true that in the Privy Council case the confession was made to a Magistrate who was empowered to record the confession under Sec. 164, Cr. P.C. But the observations of their Lordships make it clear that no confession which does not conform to the provisions of Sec. 164, Cr. P. C., can be admitted in evidence. The observations of their Lordships that "any Magistrate of any rank could depose to a confession made by an accused so long as it was not induced by a threat or promise without affirmatively satisfying himself that it was made voluntarily and without showing or reading to the accused any version of what was supposed to have said, or asking for the confession to be vouched by any signature. The range of magisterial confessions would be so enlarged by this process that the provisions of Sec. 164, Cr. P. C., would almost inevitably be widely disregarded in the same manner as they were disregarded in the present case", make it quite clear that they do not approve of any confession recorded by a Magistrate which does not conform to the provisions of Sec. 164, Cr. P.C. 23

It was held that, in order to give weight to confessions of prisoners recorded, there should be a judicial record of the special circumstances under which such confessions were received by the Magistrate, showing in whose custody the prisoners were and how far they were quite free agents.24 In another case decided under the same section, it was held that the words Magistrate" mean "any Magistrate" and not merely "the Magistrate having jurisdiction."25

The word "Magistrate" in this section included Magistrates of Native States as well as those of British India. And so a confession made by a prisoner while in police custody, to a first class Magistrate of the Native State of Muli

Padan Munda v. State, I.L.R.
 1966 Cut. 635: 32 Cut. L.T. 1170, at pp. 1180-1182; see also the observations of Meredith, J., in Dikson Mali v. Emperor, A.I.R. 1942 Pat. 90, at p. 94.

^{20.} Government of Bombay v. Dashrath Ramnivas, 1945 B. 265: I.L.R. 45 B. 614: 220 I.G. 182 (F.B.).

^{21. 1936} P.C. 253 (2). 22. In re Thothan, 1956 Mad. 425: (1956) 1 M.L.J. 206; 1955 M.W. N. 1012 (2).

Ib., see also The King v. Saw Min, 1939 Rang. 219: 182 I.C. 705.
 R. v. Kodai. (1886) 5 W.R. Cr. 6; see Sastry's Criminal Procedure Code, ss. 164, 281, 463.

R. v. Vahala, (1870) 7 Bom. H.C. R. (Crown cases) 56; see also Dhaman Hiranand v. Emperor, 1987 Sind 251; 171 I.C. 737; Emperor v. Hulasi-1933 All. 286: 144 I.C. 157; Pan-chanatham v. Emperor, 1929 Mad. 487; I.L.R. 52 Mad. 529; 121 1. C. 151,

in Kathiawar, and duly recorded by such Magistrate in the manner required by the Code of Criminal Procedure, was held to be admissible in evidence.1

This section does not make the admissibility of the confession dependent upon the knowledge of the accused as to the identity of the Magistrate, the main consideration being the presence of the Magistrate and the making of the confession in his presence.² The mere presence of the Magistrate, however, would not ipso facto make the confession voluntary.3

In a case of bribery, the admission of recovery of currency notes by a trap party, the memo of which was signed by the accused, would, by virtue of the presumption under section 4 of the Prevention of Corruption Act, 1947, practically amount to a confession of guilt made by the accused while in police custody. The recovery memo cannot be used as evidence of any such confession by the accused but it can be used as embodying any statement by the accused during investigation.4

If at the time an extra-judicial confession was made, the accused was under the surveillance of a police constable, and it was retracted, the confession is hit by this section.5 When a confession is retracted the court will require other evidence to corroborate the facts stated in the confession.6

In a case where mother and son were accused of murdering the father, an extra-judicial confession was alleged to have been made by them to P at the saw-machine of N who never appeared as a witness and the presence of Prosecution Witness P at the saw-machine was neither genuine nor plausible. No connection between P and N on the one side and the accused on the other was suggested. In the circumstances it was impossible to believe that the accused went to strangers like P and N. The extra-judicial confession was, therefore, not worthy of credence.7

A statement by an accused to a doctor about the cause of injuries on his person, though made while he was in the custody of the police, is not a confession but an admission and is as such admissible in evidences construing the

R. v. Nagla, (1896) 22 B, 235;
 Govinda v. R., (1920) 23 Cr. L.J.

Jog Raj v. Emperor, 1930 Lah. 534, 593: 129 I.C. 289; see also Pharho v. Emperor, 1932 Sind 201: 141 I.

^{3.} In re Krishna Iyer, 1935 Mad. 479: 4. Prakash Chand Jain v. State, 1968

Cr. L.J. 391 (All.), 398.
5. Jairam Ojha v. State, 34 Cut. L.T.
141; 1968 Cr. L. J. 765; A. I. R.
1968 Orissa 97, 98.

I.L.R. (1971) 2 Ker. 30.
 Krishna Wanti v. State, Punj. L.R. 280, 285.

^{8.} Kanda Padayachi, In re, 1970 L.W. (Cr.) 132 (affirmed in appeal by Supreme Court in Kanda Padayachi v. State of Tamil Nadu, 1972 Cr.L.J. 11: (1972) 1 S.C.R. 450; 1972 All, W.R. (HC) 204: A.I.R. 1972 S. C. 66: (1972) 1 S.C.J. 395; 1972 M. L.J. (Cri.) 251: 1972 An. W. R. (S.C.) 70: 1972 (I) M.L.J. 70. 1972 All Cri. R. 140.

word 'confession' strictly as in decisions of the Supreme Court pertaining to that word in section 25.9

- 27. How much of information received from accused may be proved. Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.
 - s. 24 (Confession caused by induce- s. 26 (Confession by accused while in

s. 25 (Confession to a Police Officer.)

police custody.).

Steph. Dig. Art. 22; Taylor, Ev., ss. 902, 903; Phipson, Ev., 11th Ed., 368, 369; Wills, Ev., 3rd Ed., 307; Roscoe, Cr. Ev., 16th Ed., 61; 3 Russ. Cr. 482-485.

SYNOPSIS

 Principle, Analogous provisions in English and American laws: Analogous (a) England. (b) America, 3. Validity of the section: (a) General. (b) The Section and Article 20 (3) of the Constitution. 4. Section not affected by Sections 161 and 162, Cr. P.C. This Section and Section 8, 6. The Section,

Section is not ultra vires.

Scope and applicability,
 "Any fact".

10. "Deposed to". "Discovered".

12. Information, 12-A. "Accused of any offence".

15. "As relates distinctly to the fact thereby discovered".

"In consequence of information".

15. The extent of the information admissible under Section 27.

16. From an accused person in custody.

16-A. Police officer.

17. Custody.

18. Information given by more than one accused.

19. "So much of such information may be proved."19-A. Two statements by accused. Ad-

missibility of, 20. "Whether it amounts to a confes-

sion or not."

21. Admissibility against co-accused:

Secs. 27 and 30. 22. Witnesses to recovery memo.

24, 25 and 26 ante.

- 1. Principle.—The broad ground for not admitting confessions made under inducement (Section 24) or to a police officer (Section 25) or by persons whilst in custody (Section 26) is the danger of admitting false confession.¹⁰ But, the necessity for the exclusion disappears, in cases provided for by this section, when the truth of the confession is guaranteed by the discovery of facts in consequence of the information given. It is this guarantee, afforded
 - Pakala Narayana Swami v. Emperor, A.I.R. 1939 P.C. 47 (the limited definition of "confession" in section 25 which has been followed by the Supreme Court); Palvinder Kaur v. State of Punjab, A.I.R. 1952 S.C. 354; Om Prakash v. State of U.P., A.I.R. 1960 S.G. 400; see Jaddi v. State of M.P., A.I.R. 1964
- S.C. 1850 where the first information report of an accused was used against him as containing an admission which did not amount to a confession; see also Dal Singh v. Emperor, 44 Ind. App. 137; 33 M. L.J. 555: A.I.R. 1917 P.C. 25. 10. See cases cited in the notes to Ss.

by the discovery of the property, for the correctness of the accused's statement which is the ground of the admission of the exception to the general rule. The fact discovered shows that so much of confession as immediately relates to it is true,11 and also perhaps voluntary.12 But, there is always this rider, that, if the facts disclosed point to the accused having been subjected to third degree methods prior to the discovery of the fact, the genuineness of the discovery is rendered doubtful, and the discovery may become worthless as a piece of evidence. The reason behind the view, that threat, promise and inducement are irrelevant for admissibility of evidence of discovery, within the purview of this section, seems to be that discovery by itself is a guarantee of the genuineness of the discovery.18 In State of U. P. v. Deoman Upadhyaya14 their Lordships of the Supreme Court reversed the decision of the Full Bench of the Allahabad High Court, and held that this section and section 162 (2) of the Criminal Procedure Code, in so far as that section relates to this section, are intra vires and do not offend Article 14 of the Constitution.

The Section seems to be based on the view that, if a fact is actually discovered in consequence of information given, some guarantee is afforded thereby that the information was true, and accordingly that information can be safely allowed to be given in evidence, but the extent of information admissible depends on the exact nature of the fact discovered to which such information is required to relate.15 The fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given, must relate distinctly to this fact. Information as to past user, or the past history, of the object produced, is not related to its discovery in the setting in which it is discovered.16 The Section brings out what part of the statement is admissible under it. It is only that part which distinctly relates to the discovery which is admissible; but if any part of the statement distinctly relates to the discovery, it will be admissible as a whole, whether it be in the nature of a confession or not.¹⁷ The extra-judicial confessions, and statements making disclosure, constitute circumstances independent from the circum-

Jethiya v. State, 1955 Raj. 147.

 Chinnaswamy v. State of Andhra Pradesh, (1963) 1 Andh.L.T. 111; 1963 A.W.R. (H.C.) 56: (1963) 1 Cr.L.J. 8: (1962) 2 Ker.L.R. 364: A.I.R. 1962 S.C. 1788, 1793.

R. v. Babu Lal, (1884) 6 A. 509,
 513, 517, 546; R. v. Nana, (1889)
 14 B. 260, 264; see also Palukuri Kotavya v. Emperor. 1947 P.C. 67: 74 I.A. 65: I.L.R. 1948 Mad. 1: 230 I.C. 185; Ram Kishan v. State of Bombay. 1955 S.C. 104: 1955 S.C. J. 129: 1955 Cr. L.J. 196: (1955) 1 M.L.J. (S.C.) 66: 57 Bom. L.R. 600: 1955 All. W. R. (Sup.) 41; Taylor, Ev., ss. 902, 903. "But not only are confessions excluded when obtained by means of excluded when obtained by means of improper inducements, but also the acts of the prisoner done under the influence of such inducements unless confirmed by the finding of the property; for the same influence which might produce a groundless con-fession might produce a ground-less conduct". 3 Russ, Cr. 485. As to the Indian Authorities, see R. groundless conv. Nana. (1889) 14 B. 260, 265; R.

v. Rama Birapa, (1878) 3 B. 12; R. v. Babu Lal, (1884) 0 A. 509, 517, 547.

Jethiya v. State, 1955 Raj. 147.
 Dhoom Singh v. State. A.I.R. 1957
 All. 197: 1957 All.L.J. 330
 (1961) 1 S.C.R. 14: (1960) 2 S.
 C.A. 1125: (1961) 2 S.C.J. 334:
 I.L.R. (1960) 2 All. 431: 1960 A.
 L.J. 783: 1960 A.W.R. (H.C.)
 568: (1961) 2 Andh.W.R. (S.C.)
 90: (1961) 2 M.L.J. (S.C.) 90:
 1961 M.L.J. (Cr.) 554: 1960 Cr.
 L.J. 1504: A.I.R. 1960 SC. 1125.
 Pulukuri Kottaya v. Emperor, A.
 I.R. 1947 P.C. 67, 70.
 Ibid.

stances constituted by a judicial confession, as such proof or otherwise of one would not affect the other.18

- 2. Analogous provisions in English and American law. (a) England. It is a well established rule that confessions must be voluntary before they can be held admissible in evidence. Further, under certain circumstances, the Judge may exercise a discretion to exclude a confession, even though it has not been induced by threat or promise. But, it sometimes happens that by means of a confession that is not admitted in evidence, facts are brought to light which may be relevant to the case and which the prosecution wishes to put in evidence. In England, an inadmissible confession, thus verified by subsequently discovered evidence, is stated to be a confession confirmed by subsequent facts. Two questions arise, namely, first, the extent to which the confession can be admitted and secondly, the discovered facts. In the Law Quarterly Review, Volume 72 (1956), Mr. Gotlieb has reviewed the entire case-law on the subject beginning from the earliest case of R. v. Warwickshall. The law on the subject has not been uniform and Mr. Gotlieb has classified the authorities under the following groups establishing the following propositions:
- (1) Subsequent facts are admissible but they cannot in any way be connected with the confession.²⁰
- (2) Evidence can be given of subsequent facts and that they were discovered as a result of a statement made by the accused.²¹
- (3) Evidence may be given of subsequent facts and so much of the confession as strictly relates to them. This has been stated to be the currently existing law by such authorities as Stephen (Art. 23), Phipson (Evidence, 11th Ed., 1970, at pp. 368, 369) and Cockle (Cases and Statutes on Evidence, 8th Ed.; 1952, at page 197), and more cautiously, by Archbold (Pleading, Evidence and Practice in Criminal Cases, 32nd Ed., page 399).
- (4) Subsequent facts and the whole confession that led to their discovery are admissible. Wigmore on Evidence, 3rd Edition, S. 858, and Baker following him, argue that it is the most desirable view to take, on the principle, that the assumption is, that improperly induced confessions are excluded solely because they are not entitled to credit, but when they are confirmed or verified in part, the whole confession should be admitted in evidence, since it can hardly be supposed that, at certain parts, the possible fiction stopped and the truth began, and that if we are to cease distrusting any part, we should cease distrusting all.
- (5) Subsequent facts are not admissible.²² Mr. Gotlieb considers the lastcited decision clearly an unsatisfactory decision on which to base a wide exclusionary rule.

The learned author has summarised his analysis by stating as follows:

"The problem of how to treat evidence discovered through an inadmissible confession is a difficult one, chiefly because of a lack of consistent approach

Kalu v. State, 1974 Cri.L.J. 839 (J. 21. Harney's Case, East, 2 P.C. (1803) & K.).

^{19. (1783) 1} Leach C. C. 263. 22. R. v. Barker, (1941) 2 K. B. 381; 20. R. v. Warwickshall, (1783) 1 Leach C. C. 263. (1941) 3 All. E. R. 33.

in English law on how to treat improperly obtained confessions and evidence got through illegal searches and seizures. It is submitted that, as a general rule, evidence discovered through confessions ought to be admissible, whether or not the confession is excluded. But, it is doubtful, if any part of the confession ought to be admissible, even though confirmed by the discovery of evidence made in consequence of the confession, as the reasons for excluding improper confessions are complex, and not based solely on a presumed untrustworthiness."

- (b) America. Similar discordant views are taken in the United States of America concerning the admissibility of involuntary confessions after verification of inculpatory facts. Wharton's Criminal Evidence, 12th Edition, sections 357 and 358, sum up the position as follows:
- "357. When an inadmissible confession leads to the discovery of inculpatory facts, all courts admit evidence of such facts, but differ in the extent to which they will admit the confession itself under such circumstances. The authorities are divided into three classes: (1) those courts that admit no part of the confession, but only the inculpatory facts which have been discovered; (2) those courts which admit the entire confession to accompany the facts, on the theory that if any part of the confession can be believed, the entire confession must be deemed trustworthy; and (3) those courts that admit only that part of the confession which is relevant to the corroborating facts.

"It is true that the line is not always clearly drawn between these different views. The inculpatory facts are always admissible, and, of necessity, the court must determine the connection of the accused with those facts. Did the accused have knowledge of the inculpatory facts because he was an unwilling witness to, or discovered, the crime; or did the accused have knowledge of the inculpatory facts because he committed the crime, and are such facts of corroboration of the involuntary confession? To determine satisfactorily either form of the question, more or less detail must be inquired into, and necessarily, the line cannot be very closely drawn, so that many of the authorities cited seem to support both the first and the third views above set forth.

- "358. All facts discovered in consequence of information given by the accused, and which go to prove the existence of the crime charged, are admissible as evidence, even though such information was contained in a confession which is itself inadmissible because coerced. Thus, when the accused, in confessing, points out or tells where the stolen property is, or, in case of homicide, states where the body can be found, or where the deceased was shot, which is verified by blood stained earth at the spot, or with what weapon, and in what part of the body, the deceased was shot, which is verified by exhuming and examining the body, or when he gives a clue to other evidence which proves the case, all such facts are admissible. Only a few Courts have questioned this rule."
- 3. Validity of the section. (a) General. In the undernoted case,²³ it has been held that this section is not void under Art. 13 (1) of the Consti-

^{23.} Jethiya v. State, 1955 Raj. 147.

tution, as being repugnant to Art. 20(3) of the Constitution, under which "no person accused of any offence shall be compelled to be a witness against himself". No doubt, as pointed out by their Lordships of the Supreme Court in M. P. Sharma v. Satish Chandra,24 "to be a witness" is nothing more than "to furnish evidence" and such evidence can be furnished not only through the lips, but also by the production of a thing, and the protection afforded by Art. 20(3) is not confined to the oral evidence of a person standing his trial for an offence when called to the witness-stand, but extends to his testimony previously obtained from him, but the guarantee in the Article is only against "testimonial compulsion." The Article protects a person against being compelled to be a witness against himself, but the information admissible under this section cannot be presumed to be "compelled testimony" so as to make the section repugnant to the Article.

The scope of Article 20(3) of the Constitution has been laid down by the Supreme Court in The State of Bombay v. Kathi Kalu,25 as follows:

By Majority. Approving its earlier decision in Mohamed Dastagir v. The State of Madras,1 the Court held: "In order to bring the evidence within the inhibitions of clause (3) of Article 20, it must be shown not only that the person making the statement was an accused at the time he made it and that it had material bearing on the criminality of the maker of the statement, but also that he was compelled to make that statement". 'Compulsion', in the context, must mean what in law is called 'duress.'

The compulsion in this sense is a physical objective act and not the state of mind of the person making the statement, except where the mind has been so conditioned by some extraneous process as to render the making of the statement involuntary and, therefore, extorted. Hence, the mere asking by a police officer investigating a crime against a certain individual to do a certain thing is not compulsion within the meaning of Article 20(3). Hence, the mere fact that the accused person, when he made the statement in question was in police custody would not, by itself, be the foundation for an inference of law that the accused was compelled to make the statement. Of course, it is open to an accused person to show that while he was in police custody at the relevant time, he was subjected to treatment which, in the circumstances of the case, would lend itself to the inference that compulsion was in fact exercised.

Therefore, if it is manifest that the discovery was made as a result of information extorted from the accused by duress, the evidence of the discovery at the instance of the accused would be hit by the provisions of Article 20 (3) of the Constitution.

(b) The Section and Article 20 (3) of the Constitution. In In re Madugula Jeremiah2 it was held:

A.I.R. 1957 A. P. 611.

^{24. 1954} S.C.R. 1077: 1954 S.C.A. 1954 S.C.R. 1077; 1954 S.C.A. 449: 1954 S.C.J. 428: (1954) 1 M. L.J. 680; 1954 M.W.N. 566; 1954 Cr.L.J. 865: A.I.R. 1954 S.C. 300. (1962) 3 S.C.R. 10: 1961 A.L.J. 936; 1961 A.W.R. (H.C.) 736; 1961 B.L.J.R. 840; 64 Bom. L.R. 240:

^{(1961) 2} Cr.L.J. 856; (1961) 2 Ker.

L.R. 378; A.I.R. 1961 S.C. 1808.
1. (1960) S.C.J. 726; (1960) 2 M. L. J. (S.C.) 39; (1960) 3 S. C. R. 116; A.I.R. 1960 S. C. 756; 1960 All. W. R. (H.C.) 357; 1960 Cr. L.J. 1459.
2. I.L.R. (1956) Andh. Pra. 173;

"It is not a condition for the applicability of section 27 that the information should have been given voluntarily by the accused. Whether it is given voluntarily or otherwise, the said information is made admissible in evidence as the Legislature presumably thought that the fact discovered in consequence of the information is sufficient guarantee of the truth of the information. This is the reason why, though as a rule, statements made to the police are inadmissible as substantial evidence on the assumption that the police are in a position to compel an accused to give information, the guarantee afforded by the discovery is thought sufficient protection against any self-inculpatory information extracted from the accused. Therefore, the information given under section 27 may be either voluntary or extracted from him by compulsion. In either case, before the Constitution it was admissible in evidence, if the conditions laid down in the section are complied with. But Article 20(3) of the Constitution 'embodies the principle of protection against compulsion of self incrimination' and the protection afforded under that Article extends to compelled testimony previously obtained from him. The information given to the police by the accused is certainly testimony previously obtained from him, for that is intended to be used in a Court of law. If that information is not voluntary but is compelled testimony, Article 20(3) prohibits the user of the said evidence in Court. Section 27 of the Evidence Act and Article 20(3) of the Constitution may be reconciled. Information voluntarily obtained from an accused, relating distinctly to the fact thereby discovered, is not hit by Article 20 (3) and, therefore, is relevant evidence under section 27 of the Evidence Act. But such information obtained by compulsion was admissible in evidence before the Constitution. After the enactment of Article 20(3), they must be excluded from evidence for otherwise in effect the accused would be compelled to be a witness against himself."3 There is no presumption that information received by the police from an accused person is the result of compulsion and such information is not violative of Article 20 (3) of the Constitution.4

The above authority has been followed in Ahmedmiyan v. The State.5

In State of U. P. v. Deoman Upadhyaya,6 Hidayatullah, J., has suggested the desirability of cautioning as in the United Kingdom in cases falling under Sec. 27 and has cited the recommendation of the Royal Commission on Police Powers and Procedure.7

4. Section not affected by Secs. 161 and 162, Cr. P. C.—Before the Privy Council decision in Pakala Narayana Swami v. Emperor,8 it had been held by some Courts that the provisions of Secs. 161 and 162, Cr. P. C. do not affect

^{3.} See also Amrut Soma v. State of Bombay, A. I. R. 1960 Bom. 488: I.L.R. 1960 Bom. 664.

^{4.} N. Vasudevan Pillai v. State of Kerala, I.L.R. (1968) 2 Ker. 303: 1968 Cr.L.J. 1362, 1371. 5. A.I.R. 1963 Guj, 159: 1963 Guj,

L. R. 543.

^{6.} A. I. R. 1960 S.C. 1125, 1146; (1960) 2 S.C.A. 371; 1960 A.L.J. 733: 1960 Cr.L.J. 1504: 1960 All.

W. R. (H.C.) 560.
7. (1928-29) C.M.D. 3297. See also Rules framed by the Judges of the King's Bench Division for the guidance of the police and reproduced in Halsbury's Laws of England (3rd Edition), Vol. 10, page 470, para 865.

^{8. 1939} P.C. 47; I.L.R. 18 Pat. 234; 180 I.C. 1; L.R. 66 I. A. 66.

this Act on the ground that statements by accused are not within those sections.9 A Full Bench of the Madras High Court10 had held that the statements made by the accused were not excluded from the operation of Sec. 162, Cr. P. C. but that section being general did not, in any way, affect the operation of this section when the conditions therein were fulfilled. Their Lordships of the Privy Council in Pakala Narayana Swami v. Emperor, supra, also held, that the expression "any such statement" in Sec. 162, Cr. P. C., includes a statement made by a person possibly not then even suspected but eventually accused, but left undecided the question whether Sec. 162, Cr. P. C., pro tanto repealed the provisions of this section or not. The question was subsequently considered by almost all the High Courts, but their opinions differed. The Bombay,11 Nagpur,12 Madras,13 Patna14 and Rangoon15 High Courts have held that this section has not been pro tanto repealed by Sec. 162, Cr. P. C. A contrary view was taken by the Allahabad,16 Calcutta17 and Lahore18 High Courts. The controversy has been set at rest by the Legislature by amending 19 Sec. 162 (2), Cr. P. C., which now runs as follows: "Nothing in this section shall be deemed to apply to any statement falling within the provisions of Sec. 32, clause (1) of the Evidence Act, 187220 or to affect the provisions of Sec. 27 of that Act." So the position now is that the provisions of this section are not affected by sec. 162 of the Code of Criminal Procedure.

5. This Section and Section 8.—In the under-noted case,21 it was said that the prohibition contained in section 162, Cr. P. C., extends to all statements made to a police-officer in the course of an investigation under Chapter XIV, irrespective of whether those statements are admissible under any provision of the Evidence Act, except this section. If a statement does not come within this section, it cannot be admitted in evidence by circumventing the provisions of section 162, Cr. P. C., on the ground that it is relevant under some other section of this Act. In In re Vridhichand Sowcar,22 however, it was observed that although, evidence of conduct is admissible yet it is not admissible because of the prohibition in section 162, Cr. P. C.

In In Re Bandi Murugulu,23 the accused after stabbing the deceased went to the police station and made a confession and stated inter alia that he would show the place where the deceased fell, and also the tree where the dagger

9. Jagwa v. R., 1926 P. 232: I.L.R. 5 Pat. 63: 93 I.C. 884; Rannun v. R., 1926 Lah. 88: 7 Lah. 84: 94
I.G. 901; R/, v. Nga Tha Din,
1926 Rang. 116: I.L.R. 4 Rang.
72: 96 I.C. 145 (F.B.); Azimaddy
v. R., 1927 Cal. 17: I.L.R. 54 Cal.
237: 99 I.C. 227.

10. Syamo Mahapatro v, Emperor, 1932 M. 391: I.L.R. 55 M. 903: 137 I.C. 9, 33 (F.B.).

Biram Sardar v. Emperor, 1941 Bom. 146 : I.L.R. 1941 Bom. 333 : 194 I.C. 122,

Bharosa v. Emperor, 1941 Nag. 86:

I.L.R. 1940 Nag. 679: 198 I.C. 6. In re Subbiah Tevar, 1939 Mad. 856: I.L.R. 1939 Mad. 947: 184 I.C. 593.

Adhik Lal v. Emperor, 1942 Pat. 156: 200 I.C. 208.

15. Ram Dayal v. Thé King, 1942 Rang,

62, read with Emperor v. Nga Tha Din, 1926 Rang. 116: I.L.R. 4

Kang, 72: 96 I. C. 145 (F.B.). 16. Baldeo v. Emperor, 1940 All. 263: I.L.R. 1940 All. 396: 188 I.C. I.L.R. 1940 562 (F.B.);

17 Naresh Chandra Das v. Emperor. 1942 Cal. 593: I.L.R. (1942) 1 Cal. 436: 204 I.C. 111.

18. Hakam Khuda Yar v. Emperor, 1940 Lah. 129: T.L.R. 1940 Lah. 242: 188 I.C. 498 (F.B.).

19. By the Criminal Procedure Code, Second Amendment Act, 15 of 1941.

20. I of 1872,

The State v. Kali, A.I.R. 1951 H. P. 28.

A. I. R. 1943 Mad. 527: 208 I.C.

265; (1943) 1 M. L. J. 377. I.L, R. (1961) 1 A.P. 123; A.I.R. 1963 A.P. 87.

and the stick were kept. It was held that the statement was admissible under this section, and even otherwise, inasmuch as the conduct of the accused immediately after the death of the deceased was relevant under section 8 of the Act, that conduct was admissible, and also the statement "I shall show the place where Venkamma fell and the date tree where kaizar and stick were kept" which affected or influenced that conduct.

Where a stick used in a murderous assault concealed in a cow-shed produced by the accused was produced by him, the production is relevant as evidence under the section and can be used as against the accused. It is also relevant as evidence of subsequent conduct under section 8 ante and the statements accompanying such conduct are also admissible as evidence of res gestae.24 If the accused gives information to the police head constable and the panchas that he will show the stolen goods and takes them to a cow-dung hill and he himself takes out the stolen goods from that hill, it is evidence of conduct of the accused under section 8 ante. Such evidence can also be said to be evidence under this section.25 Where the accused produces the weapon of attack or points out the place of its concealment, his conduct itself is tantamount to making statement or conveying information and is admissible under this section.1

Even if a statement of the accused is for some reason not admissible under the section, the fact discovered can be proved under section 8 ante and if it is relevant, it can be used against the accused.2

It should be noted that section 162, Cr. P. C., extends only to statements made to a police officer and this section refers only to information. None of these sections affects the relevancy of conduct for which provision is made in section 8 of this Act.

6. The Section. Under section 25, a confession, which is made to a police officer cannot be proved against the person who is accused of an offence. That section does not set out anything regarding the state of the person who is making the confession. It is not necessary that the confession should be made when he is in police custody nor is it necessary that he must be an accused person. The section merely enacts that when an accused person is being tried, a confession, which he, on a previous occasion, made to a police officer, cannot be proved against him. It is not specified that the accused person must have been an accused person at the time of making the statement, nor need he have been in police custody. That section applied to cases where confessional statements, made by persons, who were not accused persons at the time of making the statements are tried subsequently. Section 26 deals

^{24.} Raman v, State, 1969 Cr. L. J. 1393;

A.I.R. 1969 Goa 116, 121.

25. Kacharji Hariji v. State of Gujarat, 1969 Cr. L. J. 471: A.I.R. 1969 Guj. 100, at pp. 101, 102.

Karan Singh v. State of U. P., 1972 All, Cri. R. 125: 1972 All. W. R. (H.C.) 192: State of Bombay v. Kathi Kalu A.I.R. 1961 S.C. 1808

and Prabhoo v. State of U. P. A. I.R. 1963 S.C. 1113 rel. on.

2. Paras Ram v. State 1970 A.L. J. 149. 158; Misri v. King-Emperor, I.L.R. (1909) 31 All. 592 (F.B.); Ganu Chandra Kashid v. Emperor, A. I. P. 1989 Page 1986. A.I.R. 1932 Bom, 286; Emperor v. Nanna, A.I.R. 1941 All, 145.

fore, they must be accused persons. Under that section when a confessional statement is made by an accused person who is in police custody, that statement is inadmissible in evidence unless it is made in the immediate presence of a Magistrate. This Section provides an exception to sections 25 and 26, because this section contains the phrase "in the custody of a police officer". The confessional-statement mentioned in this section is a statement made by a person in police custody, and accused of an offence. In other words, this section relates only to those confessional statements which are made by accused persons while they are in police custody. The section lays down that such confessional statements are admissible in evidence provided they lead to the discovery of a fact, in consequence of information received from the person accused of any offence in the custody of a police officer. If the statement is made by a person who is a stranger or is a prosecution witness, then such statement is not admissible in evidence, despite the fact that it amounts to a confession and leads to the discovery of a new fact.3

Before the provisions of this section can be attracted, two essential requirements should be satisfied, namely,-

- (1) the person making the statement must be accused of any offence,
- (2) he must be in the custody or deemed to be in the custody of a police officer.

It is only when both the above requirements are satisfied that the information relating to the discovery can be received in evidence. If either of the two conditions is not satisfied the statement would fall outside the purview of this section.4

The embargo on statements of the accused before the police will not apply if the following conditions are fulfilled:

- (1) the information given by the accused must lead to the discovery of the fact which is the direct outcome of such information;
- (2) only such portion of the information given as is distinctly connected with the said recovery is admissible against the accused; and
- (3) the discovery of the fact must relate to the commission of some

In Pulukuri Kottaya v. Emperor,6 the Judicial Committee pointed out the following necessary conditions to bring the section into operation:

(1) discovery of a fact in consequence of information received from a person accused of any offence in the custody of a police officer must be deposed to, and

^{3.} Devi Ram v. The State, I.L.R. (1961) 1 Punj. 33: A.I.R. Punj. 70.

 ^{4. (}In re.) Bandi Murugulu, I.L.R. (1961) 1 A.P. 123; A.I.R. 1963 A.P. 87.
 5. Jaffer Husain Dastagir v. State of Maharashtra, (1970) 2 S.C.R. 332; 1969 Iab. L. J. (S.N.) 135 (S.C.);

¹⁹⁶⁹ Ker, L. T. (S.N.) 25 (S. C.): 1970 M.L.W. (Gr.) 138: 1970 Cr. L. J. 1659: A.J.R. 1970 S.C. 1934,

^{1937.} 6. L.R. 74 I.A. 65: I.L.R. 1948 M. 1: 230 I.C. 135: A.I.R. 1947 P. C. 67. This decision has been cited with approval in many decisions of the Supreme Court; Ram Kishen v.

(2) thereupon so much of the information as relates distinctly to the effect thereby discovered may be proved.

Their Lordships observed that the section seems to be based on the view that if a fact is absolutely discovered in consequence of information given, some guarantee is afforded thereby that the information was true, and accordingly can be safely allowed to be given in evidence; but, clearly the extent of the information admissible must depend on the exact nature of the fact discovered to which such information is required to relate. Normally, the section is brought into operation when a person in police custody produces from some place of concealment some object, said to be connected with the crime of which the informant is the accused. Their Lordships said that it is fallacious to treat the "fact discovered" within the section as equivalent to the object produced. The fact discovered embraces the place from where the object is produced and the knowledge of the accused as to this, and the information given must relate distinctly to this fact. Information as to past user, or the past history of the object produced is sot related to its discovery in the setting in which it is discovered,

This section partially removes the ban on the reception of confessional statements under section 26. But the removal of the ban is not of such an extent as to absolutely undo the object of section 26. All that it says is that so much of the statement made by a person accused of an offence and in custody of a police Officer, whether it is confessional or not, as relates distinctly to the fact discovered, is provable.7

This section is an exception to sections 25 and 26, which prohibit the proof of a confession made to a police officer or a confession made while a person is in police custody, unless it is made in the immediate presence of a Magistrate. It allows that part of the statement given by the accused to the police, whether it amounts to a confession or not, which relates distinctly to the fact thereby discovered, to be proved.8 Thus, even a confessional statement before the police which distinctly relates to the discovery of a fact may be proved under this section.9 In other words, it is only that part which distinctly relates to the discovery which is admissible wholly, and the Court cannot say that it will excise one part of the statement because it is of a confessional nature.10

Although the statement may lead to certain discovery, it would not prove the offence, for after the discovery the prosecution has still to show that the articles recovered are connected with the crime.11 The extent of the informa-

State of Bombay, A.I.R. 1955 S.C. 104, 116; Pershadi v. State of U. P., A.I.R. 1957 S.C. 211, 214; Udai Bhan v. State of U. P., A.I.R. 1962 S.C. 1788, 1792; Chinnaswami Raddy v. State of A.P., A.I.R. 1962 S.C. 1788, 1792; Prabhoo v. State of U. P., A.I.R. 1963 S.C. 1113. See also Rajani Kant Keshav v. State, 1967 Cr.L.J. 357: A.I.R. 1967 Goa 21, 29 (F. B.), (information by accused in police custody-currency notes in a case of robbery and murder-conditions of section satisfied),

^{7.} Udai Bhan v, State of U. P., I.L.R. (1962) 2 A. 522; A.I.R. 1962 S.C. 1116: 1962 All.W.R. (H.C.) 512: (1962) 2 All.L.T. 502: (1962) 2 Cr. L.J. 251.

Chinnaswamy Reddy v. State of A. P. (1963) 1 Andh.L.T. 111; 1963 A.W.R. (H.C.) 56: (1963) P Cr. L.J. 8: (1962) 2 Ker.L.R. 364: A.I.R. 1962 S.C. 1788, 1793.

^{9.} Ibid, 10. Ibid, 11. Ibid,

tion admissible must depend on the exact nature of the lact discovered to which such information relates. The fact discovered, as already stated, embraces the place from where the object is produced and the knowledge of the accused about it. The information given must relate distinctly to that fact.12

- 7. Section is not ultra vires. This section and section 162 (2) of the Code of Criminal Procedure, in so far as the latter section relates to this section, are intra vires and do not offend Art. 14 of the Constitution.13
- 8. Scope and applicability. The submission of a person to the custody of a Police Officer, within the meaning of section 46 (1) of the Criminal Procedure Code, is custody within the meaning of this section.14 Though the words "in the custody of a police officer" might seem to indicate that this section was intended to be a proviso to the preceding section only, and that it is inapplicable when the information relating to the fact discovered thereby constitutes a confession "made to a police officer", it has been held that this section is a proviso not only to the preceding section but also to the twenty-fifth section; and that therefore, so much of the information given by an accused to a police officer, whether amounting to a confession or not, as distinctly relates to the fact thereby discovered, may be proved.15 It qualifies also Sec. 24 ante.18 But the present section only qualifies the twenty-fifth section when the accused person is in the custody of the police: therefore, confessions to Police Officers by persons who are accused, but not in custody, or are in custody, but not accused, or are neither accused nor in custody do not fall within the scope of present section.17 This section also qualifies the twenty-sixth section.18 Therefore,

12. The State v. Ramchandra, A.I.R.

1965 Orissa 175.

13. State of U.P. v. Dedman Upadhyaya, (1961) 1 S.C.R. 14; (1960) 2 S.C. A. 1125; (1961) 2 S.C.J. 334; I. L.R. (1960) 2 All. 431; 1960 A.L.J. 733; 1960 A.W.R. (H.C.) 568; L.R. (1960) 2 All. 431: 1960 A.L.J. 735: 1960 A.W.R. (H.C.) 568; (1961) 2 Andh.W.R. (S.C.) 90: (1961) 2 M.L.J. (S.C.) 90: 1961 M.L.J. (Cr.) 554: 1960 Cr. L.J. 1504: A.I.R. 1960 S.C. 1125 at pp. 1132, 1133; State v. Ram Bilas, A.I.R. 1961 A. 614: 1961 A. L. J.

14. Legal Remembrancer v. Lalit Mohan, (1922) 49 C. 167: A.I.R. 1922 C

15. Ram Kishan v, Bombay State, 1955 S.C.R. 903; 1955 S.C.A. 410; 1955 S.C.J. 129: 1955 A.W.R. (Sup.) 41: 57 Bom.L.R. 600: 1955 Cr.L. 41; 57 Bom.L.R. 600: 1955 Cr.L.
J. 196; (1955) 1 M.L.J. (S.C.)
66; 1955 M.W.N. 146: A.I.R.
1955 S.C. 104; Anna v. State of
Hyd., 1956 Hyd. 99; Ali Bux v. Emperor, 1947 Sind 36; (In re) Kamakshi
Naidu. 1948 Mad. 89: I.L.R. 1948
Mad. 456: 204 I.C. 555; Naresh
Chandra v. Emperor, 1942 Cal. 593:
I.L.R. (1942) I.Cal. 436: 204 I.C. I.L.R. (1942) 1 Cal. 436: 204 I.C. 111; Adhik Lal v. Emperor, 1942 Pat. 156: 200 I.C. 208; Emperor v. Ramaniya, 1935 Mad. 528: I.L.R.

58 Mad. 642: 158 I.C. 764 (F. B.); R. v. Pagaree, (1873) 19 W.R. Cr. 51; and see under the old law R. v. Petta, (1865) 4 W.R. Cr. 19; R. v. Jora, (1874) 11 Bom. H.C.R. 242; R. v. Rama Birapa (1878) 3 B. 12; R. v. Pancham, (1882) 4 A. 198; R. v. Babu Lal, (1884) 6 A. 509 (F.B.); Adu v. R., (1885) 11 C. 635; R. v. Kamalia, (1886) 10 B. 595; R. v. Nana, (1889) 14 B. 260; Surendranath v. R., 1918 All, 160; 47 I.C. 659: 16 A.L.J. 478; Chinnaswamy v. State of A. P., A.I.R. 1962 S.C. 1788: (1962) 2 Ker.L.R. 364: (1963) 1 Cr.L.J. 8: 1963 All.W.R. (H.C.) 56. See generally as to the 51; and see under the old law R. v. (H.C.) 56. See generally as to the construction of this section, the

Construction of this section, the Madras Law Journal, p. 74, March, 1895; 123 et. seq., April, 1895.

16. Amiruddin v. R., 1918 Cal. 88: I. L.R. 45 Cal. 557: 44 I.C. 321.

17. R. v. Babu Lal. (1884) 6 A. 509, 513, 533 534 (F. B.), per Oldfield and Mahmood, JJ, v. post. As to custody, see for instance Maung Lay v. R., 1924 Rang, 173: I.L.R. 1 Rang, 609: 77 I.C. 429.

18. R. v. Misri, (1909) 31 A. 592; see also Hakam Khuda Yar v. Emperor 1940 Lah, 129: I.L.R. 1940 Lah, 242: 188 I. C. 498 (F. B.) per Dalip Singh and Bhide, JJ.

whatever the inducement that may have been applied, or made use of, towards the accused, there is nothing in the law which forbids policemen or others from, at any rate, going so far as to say: "In consequence of what the prisoner told me, I went to such and such a place, and found such and such a thing." Moreover, they may repeat the words in which the information was couched, whether they amount to a confession or not, provided they relate distinctly to the fact discovered.19 Therefore, although a confession may be generally inadmissible, in consequence of an inducement having been offered within the meaning of the twenty-fourth section, yet, if any fact is deposed to as discovered in consequence of such confession, so much thereof as relates distinctly to the fact thereby discovered may be proved under this section. But, though the present section qualifies the twenty-fourth section, it will not be applicable in every case that falls within the scope of that section, which enacts that confessions unduly obtained are irrelevant whether the confessing party was in custody or not. But the present section refers to confessions made by accused persons in custody. Therefore, confessions made by persons when accused but not in custody, or in custody but not accused, or neither accused nor in custody, will not be rendered admissible by the present section, even if there is discovery.20

The Section lays down that where an accused is in the custody of a police officer and furnishes some information in consequence of which some fact is discovered then so much of such information as relates distinctly to the fact so discovered can be proved, and it would not matter whether such information amounts to a confession or not. This section is based on the doctrine of confirmation by subsequent facts. That doctrine is, that where, in consequence of a confession otherwise inadmissible, search is made and facts are discovered which confirm it in material points, then such discovery is a guarantee that the confession made was true. But only that portion of the information can be proved which relates distinctly or strictly to the facts discovered.²¹ The section

Emperor v. Remis Christian, 1947 Pat. 152: I.L.R. 25 Pat, 205: 230 I.C. 99; Mathura Prasad v. Emperor, 1946 Pat, 210: I.L.R. 24 Pat. 671: 229 I.C. 557; Durlav Namsudra v. Emperor, 1932 Cal. 297: I.L.R. 59 Cal. 1040: 138 I.C. 116; Ram Richpal v. State, I.L.R. 1954 Punj, 876: 1954 Punj. 97: 56 Punj. L.R. 23 (F.B.).

Punj. 876: 1954 Punj. 97: 56 Punj.
L.R. 23 (F.B.).

19. R.v Babu Lal, (1884) 6 A. 509, 545
(F.B.), per Straight, C.J., ib. per Brodhurst, J., citing Taylor, Ev., Sec. 902
(contra), per Mahmood J., ib. 535; and
R. v, Kuarpala, All. Weekly Notes
(1882), 223; see also to the same
effect. viz. that S. 27 does not
qualify S. 24; R. v. Luchoo, (1873)
5 N.W.P. 86; R. v. Rama Birapa,
(1878) 3 B. 12, 16; per West, J.:
"It is not pretended that any discovery of facts, through information
derived from R. occurred after
that statement was made. Its defect as made under undue influence
therefore was not and could not be
counteracted in the only possible
way" This qualification of the rule
enacted in S. 24 by that enacted in

with the English law upon the subject: see Taylor, Ev., s. 902. The question does not appear to have been discussed by the Calcutta and Madras High Courts in any reported case. But under the corresponding section of Act XXV of 1861 (S. 150), it was held by the former Court that where a Police Officer had offered an inducement to make a confession no part of his evidence, as to the discovery of facts in consequence of such confession, was admissible; R. v. Dharum, (1867) 8 W.R. Cr. 13; see also Bishoo v. R., (1868) 9 W.R. Cr. 16, 17.

20. See R. v. Babu Lal, (1884) 6 All. 509 (F.B.).

21. Dharma v. The State, A.I.R. 1966
Raj. 74: 1965 Raj. L.W. 418;
Brahmananda v. State, (1971) 1 Cut,
W.R. 351: I.L.R. 1971 Cut. 466;
State v. Krishna Chandra Saha (1972)
1 C.W.R. 1023; State of Rajasthan
v. Rama, (1973) W. L. N. 934
(Raj.); Pukhraj v. State of Rajasthan, 1970 W.L.N. (Part I) 518:
I. L. R. (1971) 21 Raj. 52.

can have no application, if the fact is discovered otherwise than on account of the information given. Accused gave information about selling stolen property to A, but when the accused took the police to A, A said that he had sold the articles to others and the police recovered those articles at the instance of A. The information furnished by accused was held inadmissible.²² The information given to the police by the accused cannot be used against him when it did not lead to any discovery.28 When the knife was not discovered, as a result of the statement by the accused, the same cannot be relied upon.24

This section, as a qualification of the imperative rules contained in Secs. 24-26, should be strictly construed and applied.25 Any relaxation must be sparingly allowed, care being exercised to see that the purpose and object of Secs. 25 and 26, and the safeguard provided in Sec. 27, are not rendered nugatory by a lax interpretation.1 The protection given to the accused by these sections should not be dependent on the ingenuity of the police officer, or the folly of the prisoner, in composing the sentence which conveys the information.2

9. "Any fact". The expression "fact" as defined by Sec. 3 of the statute includes, not only the physical fact which can be perceived by the senses, but also the psychological fact or mental condition of which any person is conscious. It is in the former sense that the word is used in this Section. The phrase "fact discovered" used by the Legislature refers to a material, and not to a mental fact.3 The fact discovered within the meaning of this section must be some concrete fact to which the information directly relates.4 In the Full Bench case of Emperor v. Ramanuja Ayangar,5 Cornish and Burn, JJ., held that the word 'fact' in this section is not restricted to actual physical material object which can be exhibited as material object, but Lakshmana Rao, J., held, that the fact discovered should be a material or concrete and not a mental fact.6 But in Pulukuri Kottaya v. Emperor,7 their Lordships of the Privy Council

22. Gurnam Singh v. State, 1972 W. L.

Gurnam Singh v. State, 1972 W. L. N. 303: 1972 Raj. L. W. 530; 1972 Cri. L. J. 1688.
 State v. Zilla Singh, 1974 J. & K. L.R. 51: 1973 Cri. L.J. 1384; In re Karunakaran, 1974 M.L.W. (Cri.) 190: 1975 M.L.J. (Cri.) 106: (1975) 1 M.L.J. 209: 1975 Cri. L. J. 798 (Mad.); H.P. Administration v. Om Prakash. A.I.R. 1972 S.C. 975: 1972 Cri. L.J. 606.
 Ibid.

25. R. v. Pancham, (1882) 4 A. 198; see Adu v. R., (1885) 11 C. 635, 642, In R. v. Ram Charan, (1875) 24 W.R. Cr. 36, Jackson J., commented upon a prevailing tenden-cy to disregard the provisions of Sec. 26 of the Evidence Act, which has occurred in this case as well as in others, recourse being had, although not justified by facts, to the proviso contained in Sec. 27; Tara v. Emperor, 16 Cr. L.J. 545: 29 I.C. 817.

Supdt. and Remembrancer of Legal Affairs v. Bhajoo, 1930 Cal. 291: 125 I.C. 733: I.L.R. 57 Cal. 1062:

34 C.W.N. 106.

 Naresh Chandra Das v. Emperor, 1942 Cal. 593: 204 I.C. 111; I.L.R. 1942—1 C. 436; Supdt. and Remembrancer of Legal Affairs v. Bhajoo, 1930 Cal. 291; I.L.R. 57 Cal. 1062; 125 I.C. 733; 34 C.W. N. 106; Sonaram Mahton v. Emperor, 1931 Pat. 145; I.L.R. 10 Pat. 153: 131 I.C. 797: 32 Cr. L.J. 792: 12 P.L.T. 481; Phulua v. Emperor, 1936 Nag. 23; 161 I.C. 8: 37 Cr. L.

3. Sukhan v. Emperor, 1929 Lah. 344: I.L.R. 10 Lah, 283: 115 I.C. 6: 80

Cr. L.J. 414 (F.B.).
4. Ganu Chandra Kashid v. Emperor, 1932 Bom. 286: I.L.R. 56 Bom. 172: 137 I.C. 174: 38 Cr. L.J. 396: 34 Bom. L.R. 303.
5. 1935 M. 528: I.L.R. 58 Mad. 642: 158 I.C. 764 (F.B.).
6. The majority view was followed

in the case of R. Ramamurthy, in re, 1941 Mad. 290: 193 I.C. 347: 42 Cr. L.J. '407: 1940 M.W.N. 163.

7. 1947 P.C. 67; 74 I.A. 65; I.L.R. 1948 Mad. 1; 230 I.C. 135.

observed: "It is fallacious to treat the 'fact discovered' within the section as equivalent to the object produced, the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this and the information given must relate distinctly to this fact." This view has been approved by the Supreme Court in the undernoted cases.8 In the undernoted case,9 it was observed that 'facts discovered' mean the physical perception of a material fact, and not merely learning of a mental fact or the contacting of a witness. The fact discovered may be the stolen property, the instrument of the crime, the corpse of the person murdered or any other material thing; or it may be a material thing in relation to the place or the locality where it is found.10 Applying the decision in Pulukuri Kottaya v. Emperor,11 the Supreme Court has held as admissible the statement of the accused promising to produce the clothes of the deceased, which was followed up by his taking them out of the place where they were hidden and which were identified as the clothes of the deceased.12 The Supreme Court has observed in the undernoted case that what makes the information leading to the discovery of a witness admissible is the discovery from him of the thing sold to him or hidden or kept with him which the police did not know until the information was furnished to them by the accused. No witness with whom some material such as weapon of murder, stolen property or other incriminating article is not hidden, sold or kept (which is uhknown to the police) can be said to be discovered as a consequence of information furnished by accused.18

The words "any fact" are qualified by the word "discovered" as used in the section. Under the present section, it is not every statement made by a person accused of any offence while in the custody of a police officer, connected with the production or finding of property, which is admissible. Whatever be the nature of the fact discovered, that fact must in all cases be itself relevant to the case, and the connection between it and the statements made must have been such that that statement constituted the information through which the discovery was made, in order to render the statement admissible. Opice statements connected with the one, thus made evidence, and thus mediately but not necessarily or directly connected with the fact discovered, are not admissible.14 As their Lordships observed in Pulukuri Kottaya v. Emperor,15 the information given must relate distinctly to this fact. Information as to past user, or the past history, of the object produced is not related to its discovery in the setting in which it is discovered. Information supplied by a person in custody that "I will produce a knife concealed in the roof of my house" does not lead to the discovery of a knife; knives were discovered many years ago. It leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge, and if the knife is proved to have been used in the

9. Kartar Singh v. State, 1952 V.P. 42: 1953 Gr. L.J. 986.
10. Sukhan v. Emperor, 1929 Lah. 344: I. L. R. 10 L. 283: 115 I. C. 6; Public Prosecutor v. A. Haribabu, (1975) 1 An. W. R. 304.

11. A.I.R. 1947 P.C. 67.

242; State of Rajasthan v. Rama

1973 W. L. N. 934 (Raj.). 15. 1947 R. C. 67: I. L. R. (1948) M. 1: 230 I.C. 135.

^{8.} Mohmed Inayatullah v. The State of Maharashtra, A.I.R. 1976 483: 1976 Cri. L.J. 48: (1976) 1 S. C.C. 828; H.P. Administration v. Om Prakash, A.I.R. 1972 S.C. Om Prakash, A.I.R. 975: 1972 Cri. L. J. 606.

^{12.} Pershadi v. State of U. P., A.I.R. 1957 S. C. 211, 214; 1957 Cr. L. J.

^{13.} H. P. Administration v. Om Prakash, A.I.R. 1972 S.C. 975: 197: Cri. L. J. 606; In re Karunakaran, 1975 Cri. L. J. 798 (Mad). 14. R. v. Jora, (1874) 11 Bom. H.C.R.

commission of the offence, the fact discovered is very relevant. But if to the statement the words be added "with which I stabbed A" these words are inadmissible since they do not relate to the discovery of the knife in the house of the informant. In a case before the Supreme Court,16 it was held that the words in the statement of the accused, namely, 'where he had hidden them' had nothing to do with the past history of the crime and that they were related distinctly to the discovery that took place by virtue of the statement. But in Mohmed Inayatullah v. The State of Maharashtra,17 the Supreme Court held that only the words "I will tell the place of the deposit of the three chemical drums" out of the words "I will tell the place of the deposit of the three chemical drums which I took out from Haji Bunder on first August" are admissible, because the rest of the statement, namely, "which I took out from Haji Bunder on first August" constituted only the past history of the drums or their theft by accused and it was not distinct and proximate cause of discovery.

"No judicial officer (dealing with the provisions of this section) should allow one word more to be deposed to by a police officer, detailing a statement made to him by an accused, in consequence of which he discovered a fact, than is absolutely necessary to show how the fact, that was discovered, is connected with the accused, so as in itself to be a relevant fact against him. The twenty-seventh section was not intended to let in a confession generally. but only such particular part of it as set the person, to whom it was made, in motion, and led to his ascertaining the fact or facts of which he gives evidence.18 The test of the admissibility under this section of information received from an accused person, in the custody of police officer, whether amounting to a confession or not, is: "Was the fact discovered by reason of the information and how much of the information was the immediate cause of the fact discovered and as such a relevant fact?"19

Where it appeared that there was no reason for the officer to fabricate, and that, in fact, no information leading to the discovery of property had been given, it must be held that the information was obtained by the investigating officer by his tact and skill.20

10. "Deposed to." The condition necessary to bring the section into operation is that the discovery of a fact, in consequence of information received from a person accused of any offence in the custody of a police officer, must be deposed to, and thereupon so much of the information as relates distinctly to the fact thereby discovered may be proved.21 The fact may be deposed to by anyone. But the fact must be deposed to.22

21. Pulukuri Kottaya v. Emperor, A.I. R. 1947 P. C. 67.

22. Legal Remembrancer v. Lalit Mohan, 1922 Cal. 342; I. L. R. 49 Cal. 167

Chinnaswamy Reddi v. State of A. P., (1963) 1 Andh. L. T. 111: 1963

 A. W. R. (H.C.) 56: (1963) 1 Cr. L. J. 8: (1962) 2 Ker. L. R. 364:
 A. I. R. 1962 S. C. 1788.

 A. I. R. 1976 S. C. 483: (1976) 1

 S. C. C. 828: 1976 S. C. C. (Cri.)
 199: 1976 S. C. Cr. R. 375: 1976
 Cri. L. J. 481: 1976 All. Cri. C. 11: 1976 Mad. L. J. (Cri.) 329.

 R. v. Babu, (1884) 6 A. 509. 546, per Straight C. J., cited and adopted by Norris. J., in Adu v. R. (1885) 11 C. 635, 641,

^{19.} R. v. Commer Sahib, (1888) 12 M. 153 in which it was also said that "the reasonable construction of Sec. 27 is that in addition to the fact discovered, so much of the information as was the immediate cause of the discovery is legal evidence," 20. Aziz Khan v. State, 1958 Raj, L. W.

11. "Discovered." There is no discovery of facts when the facts were already known to the police from other sources. The discovery that the section contemplates must be of some fact which the police had not previously learnt from other sources and the knowledge of the fact should be first derived from information given by accused.28 If an accused states to the police, 'I will show you the articles at the place where I have kept them' and the articles are found there, there can be no doubt that the information given by him led to the discovery of a faet, i.e., keeping of the articles by the accused at the place mentioned. The discovery of the fact deposed to in such a case is not discovery of the articles but the discovery of the fact that the articles were kept by the accused at a particular place. Similar is the statement that 'I will show you the person to whom I have given the articles.' The only difference between the two statements was that a 'named person' was substituted for 'the place where the articles were kept.24 In neither case were the articles, the fact discovered. If the statement of the accused that another accused had the custody of the stolen articles was not something unknown to the police so as to constitute 'a fact deposed to as in consequence of the information received' from the accused, the discovery merely related to the whereabouts of the other accused. There was thus no discovery of any fact deposed to by the accused within the meaning of the section. Although the statement of the accused might otherwise have been admissible in evidence, there was no discovery of a fact connecting the accused with the receipt of the stolen articles within the meaning of this section because the police already knew that the other accused had the stolen articles.25 The discovery referred to in this section is that made to, or by a police officer, and the section applies, in such a case, though the facts are already known to persons other than police officers.1

The word "discovery" may either mean the purely mental act of learning something which was not known before to a person, as the mere mental act of becoming aware of something after hearing it stated; or, the physical act of finding upon search or inquiry something, or some material fact, the exis-tence or the exact locality of which was unknown till then. It is in the latter sense that the word is used in this section, that is, in the sense of a finding upon a search or inquiry, of articles connected with a crime or other material

1. Legal Remembrancer v. Lalit Mohan, I.L.R. 49 Cal, 167: 1922 Cal.

842 at p. 844.

^{23.} Thimma v. State of Mysore, (1970)
2 S. C. C. 765; (1970) 2 S. C. W.
R. 122; (1971) 1 S. C. J. 721;
(1971) Mad. L. J. (Cri.) 336; 1971
Cri. L. J. 1314; (1971) 1 S.C.R.
215; A.I.R. 1971 S.C. 1871; Mema
v. State. (1972) 1 Cut. L.R. (Cri.)
101; (1972) 2 Sim. L.J. (H.P.)
118; I.L.R. (1972) H.P. 105.
24. I.L.R. (1971) 2 Ker. 30.
25. Jaffer Husain v. State of Maharashtra, (1970) 2 S. C. R. 332;
1969 Jab. L.J. (S.N.) 135 (S.C.);
1969 Ker.L.T. (S. N.) 25 (S.C.);
1970 M.L.W. (Cr.) 138; 1970 Cr.
L.J. 1659; A.I.R. 1970 S.C. 1934
at pp. 1936, 1937, 1939; Aher Raja
Khima v. State of Saurashtra, (1955) Khima v. State of Saurashtra, (1955) L. E. 100

² S.C.R. 1285: 1956 S.C.A. 440: 1956 S. C. J. 243: 1957 Andh. L. T. 92: 1956 A.W.R. (Sup.) 60: (1956) 1 M.L.J. (S.C.) 195: 9 Sau.L.R. 109: 1956 Cr.L.J. 421: A.I.R. 1956 S.C. 217, 223 (information not derived from accused but one of the other suspects): 1967 A.L.J. 473, 477: 30 Cr.L.J. 385: 115 I.C. 1: 1929 Lah. 388; State of Mysore v. Vasantha Kumar, 18 Law Rep. 320: 1969 M.L.J. (Cr.) 575: 1969 Cr. L.J. 1299 (alleged recovery of skull of deceased) of deceased).

fact; the reason being, that it is only this kind of discovery which proves that the information, in consequence of which the discovery was made, is true and not fabricated. This is well illustrated by the decision of the Supreme Court in Balbir Singh v. State of Punjab.2 There the murderer had stated that he had buried the ear-rings of the deceased under a pipal tree but he did not say that he was in possession of them. There was, however, evidence that the deceased in fact had worn the ear-rings, which it was also proved were made by a goldsmith who also gave evidence. Their Lordships held that it was immaterial that the accused had only knowledge of the place of concealment; his statement that he had buried the articles was admissible and the recovery was a circumstance which connected the accused with the crime.

"Discovery" for the purpose of this section need not be the direct causation of this or that state, but should be the direct consequence of this or that information. The discovery should be of a palpable physical fact; and furthermore it should be the finding of something which had been partly or wholly concealed and which might not have been found out, when the accused is taken round by the police, and shows this or that place; there is really no discovery until the place itself, or a physical object which had been concealed partially or fully, could not have been lighted upon but for the information given by the accused. On the other hand, if it is merely a statement that the accused went to this or that place and got this or that article, then the statement would not be evidence unless made to a Magistrate. When there is no concealment, there is no discovery.3

Nothing is 'discovered' unless the place where the incriminating article is recovered is really a place of concealment which the police could not have discovered without some assistance from the accused.4 The indicating of a corpse in an open place and before the accused was arrested is not in any sense a discovery and none as envisaged by this section.⁶

As a corollary, it has been ruled that this section will not apply when the discovery is first made, and then the accused gives a statement explaining the discovery.6 Where the 'discovery' had not been as a result of interrogations of the accused but as a result of search made by Customs Officers, and the recovery list was signed by the accused, it was held that this section did not apply so as to render the memos admissible.7

The word "discovered" in this section is used in a peculiar sense. When a man confesses to a police officer that he murdered another person, it might be contended that the fact that he murdered that person was discovered by the statement, but, it is obvious, that this is not the meaning of the word 'discovered' in this section. The test is, that the fact discovered must be discovered in the sense, that the proof of the existence of that fact no longer

^{2.} A.I.R. 1957 S.C. 216.

State v. Dhanna Lal, 1961 (2) Cr, 238 (M.P.); 1973 Cut.L.R. (Cri.) 413.

^{4.} Sadhu Singh v. State. I.L.R. (1966)

1 Punj. 765: 1966 Cur.L.J. 37:
1967 Cr.L.J. 118: A.I.R. 1967

Punj. 14, 15 (concealment of opium); Gomtu v. State, (1972) 2 Sim.
L.J. (H.P.) 105: 1972 Cri. L.J.

 ^{683 (}Him. Pra.).
 State of M.P. v. Gangabai, 1971 M. P.L.J. 829: 1971 M.P.W.R. 443,

Kalukhan v State, A. J. R. 1957
 Orissa 102: 1.L.R. (1951) Cut. 468; v. Bairagi Charan Mohanty, (1972) 38 Cut.L.T. 754.

^{7.} Barkat Ram v. State, A.I.R. 1959 Punj. .287.

rests on the credibility of the accused's statement but rests on the credibility of the witnesses who depose to the existence of that fact. The fact discovered must be such that the Court is capable of arriving at a conclusion as to whether the said fact existed or not by weighing the credibility of the witnesses who depose to the existence of that fact, quite apart from anything that has been stated by the accused person.⁸ The recovery of articles cannot be a 'discovery' under this section, when they are not recovered from any hidden place and when the investigating agency comes by them without any initiative from the accused.⁹

The "fact discovered" within the Section is not equivalent to the object produced. The fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this. The information given must relate distinctly to this fact. Information as to past user, or the past history, of the object produced is not related to its discovery in the setting in which it is discovered. Information supplied by a person in custody that "I will produce a knife concealed in the roof of my house" does not lead to the discovery of a knife; knives were discovered many years ago. It leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge, and if the knife is proved to have been used in the commission of the offence, the fact discovered is very relevant. But, if to the statement the words be added "with which I stabbed A", these words are inadmissible, since they do not relate to the discovery of the knife in the house of the informant.10 In a statement of the accused that 'he had kept the stone on which he ground dhatura in a corner of the pit in a garage', the part of the statement to the effect that the accused had ground the dhatura on the stone related to the past user of the stone and did not lead to any discovery: this part was therefore inadmissible but the remaining part was admissible.11 In another case, only the portion of the statement of the accused, 'I had pawned the transistor with a servant of a tea stall at Railway Station who sells tea on the platform for Rs. 25'; the past history of the transistor was inadmissible under the section.12 Incriminating statements made to a police officer are not admissible in evidence as they are hit by Sections 25 and 26. Where the accused states that the axe was one with which the murder had been committed, it is not a statement which leads to any discovery within the meaning of this section. Nor is a statement, that the blood-stained shirt and dhoti belong to the accused, a statement which leads to any discovery within the meaning of this section. Such statements cannot be admitted in evidence. Statements not leading to discovery are inadmissible.13

Karam Din v. Emperor. 1929 Lah.
 338: 115 I.C. 1.

⁹ Amin v. State, A.I.R. 1958 All, 293;
I.L.R. (1959) 2 A. 110; Mahendra
Pal Singh v. State, 1968 A.W.R.
(H.C.) 100, 102 (information by
co-accused that stolen property was
lying with accused at his place); see
also N. Brajabidhu Singh v. Union
Territory, A.I.R. 1966 Manipur 8

Territory, A.I.R. 1966 Manipur 8, 10. Pulukuri Kottaya v. Emperor, L. R. 74 I.A. 65: A.I.R. 1947 P.C. 67.

Irfan Ali v. State, 1970 All, Cr. R. 498 · 1970 A.W.R. (H.C.) 679 :

¹⁹⁷⁰ Cr. L. J. 603, 612. 12. Jai Singh v. The State, 69 P.L.R. (D.) 100, 106.

^{13.} Prabhoo v. State of U.P., (1963)
2 S.C.R. 881: (1963) 2 S.C.J.
165: I.L.R. (1963) 1 All. 161: A.
I.R. 1963 S.C. 1113: 1962 B.L.J.R.
924: 1962 All. L. J. 1097: 1962
All. W. R. (H.C.) 876: 65 Punj.
L.R. 339: (1963) 2 Cr.L.J. 182;
Jamil Ahmad v. State, 67 Punj.L.R.
1010. 1015: 1966 A.W.R. (Sup.) 9
(statement of accused 'I have kept concealed' my 'payjama and banyan',

The statements admitted under the section are statements preceding finding upon search or inquiry.14 It is not now necessary that the discovery should be by the deponent;15 if the latter be a police officer investigating a case, he will not be allowed to prove an information received from a person accused of an offence in the custody of a police officer, on the ground that a material fact was thereby discovered by him when that fact was already known to another police officer.16 When the police succeed in discovering property in consequence of information received from an accused, it is not competent to the police to replace the property in the place whence it is discovered and to ask the other accused to produce the property because there is no further discovery under this section as against the other accused.17 While statements preceding finding upon search or inquiry are admissible under this section, mere statements, which lead to no physical discovery after they are made, are inadmissible.18 In the case of statements made, while pointing out the scene of the crime, the general rule is, that, if a prisoner points out or shows the scene of the offence and objects around as connected therewith, and makes contemporaneous statements in reference thereto, his acts may be given in evidence, as amounting to "conduct" relevant under the eighth section ante, but the accompanying statements are not admissible under the present section, there being no such "discovery" as is required by it, nor do they fall within the first Explanation to the eighth section, and are therefore wholly excluded,19 that is, assuming the accompanying statements to amount to confessions; the rule, however, as to such statements when more particularly stated, appears to be that, if such statements are really explanatory of the acts they accompany they may be proved.20 So, where the prisoner made a confession to the police officer before and during his pointing out particular places and particular articles said to have been connected with the murder of which he was charged, West, J., observed: "A confession of murder made to a police constable is not at all confirmed by the prisoner's saying, 'this is the place where I killed the deceased,' and when starting from the pointing to a ditch or a tree, a long narrative of transactions, some of them altogether remote from any connection with the spot indicated, is allowed to be deposed to as a confession by the prisoner, the intent of the Evidence Act is not

> Thus the statement that these articles belonged to accused inadmissible: Harbans Lal v. State, 1967 Cr.L.J. 62: A.I.R. 1967 Him. Pra. 10, 14 (statement that shirt belonged to murdered person not admissible as it did not relate distinctly to discovery of shirt); Public Prosecutor v. Haribabu, (1975) 1 An. W.R.

1955 Pepsu 33.

 Under Sec. 150, Act XXV of 1861, the words were "discovered by him," the single-quoted words have been omitted in the present section,

16. Adu v. R. (1885) 11 C. 635, 642,

17. R. v. Beshya, (1900) 2 Born. L.R.

18. R. v. Rama Birapa, (1878) 3 B. 12; see The Madras Law Journal, supra,

The Madras Law Journal, March (1895) p. 82; R. v. Jora, (1874) 11 Bom, H.C.R. 242, 246; R. v. Rama Birapa, (1878) 3 B. 12, 16, 17. R. v. Jora, supra, 245, 246; R. v. Rama Birapa, supra, 17, subject. however, to the further proviso that

Sec. 8, so far as it admits a statement as included in the word "conduct," cannot admit a statement as evidence which would be shut out by Secs. 25 and 26: R. v. Nana, (1889) 14 B. 260, 263,

^{304: 1975} Mad.L.J. (Cri.) 283.

14. See The Madras Law Journal, March 1895, pp. 80, 85; R. v. Jora. (1874) 11 Bom.H.C.R. 242; R. v. Rama Birapa, (1878) 3 B. 12; R. v. Nana, (1889) 14 B, 260 in all the cases under this section where the statements were held to be admissible the "discovery" was of articles or other material facts. The section, as thus understood, enacts the same rule as is given in Taylor, Ev., ss. 902, 903; for an example of an admission subsequent to discovery see R. v. Kamal. (1872) 17 W. R. Cr. 50: (Mst.) Bhagan v. State of Pepsu,

fulfilled but defeated.21 From the statement "this is the place where I killed the deceased," there is no "discovery" within the meaning of this section, and therefore no guarantee of the truth of the statement; and further, the prosecution had not, in the particular case, shown that any act done by the accused had been so explained by his statements as to make the latter admissible under the first Explanation to the eighth section ante.22 Similarly. in the case of statements, accompanying production of articles the general rule is, that, if the prisoner himself produces or delivers articles said to be connected with the offence and contemporaneously makes declaration as regards them, the act of producion or delivery itself may be proved as "conduct" under the eighth section ante.28 But, as there is no "discovery", the accompanying statements are not admissible under the present section nor under the first Explanation to the eighth section ante.24 But where the accused makes a statement, as to the locality of certain property, and after, and upon such statement, the police accompany him to the locality, where upon arrival, the accused by his own act produces the property, such statement may be admissible as leading to the discovery of the property.25 (v. post). Discovery at an open place, which provides access to everyone, is not 'discovery' within the meaning of this section.1 But, it has been held in Murugan, In re,2 that if the property is found to be so hidden away that no ordinary member of the public could know of its existence there, the fact that it was on the information of the particular person and his pointing out unaccompanied by any explanation of innocent knowledge, the incriminating article 'was discovered and recovered, would lead to the presumption that he was the person who had secreted it there.

R. v. Rama Birapa, (1878) 3 B. 12, 16, 17.
 Tara Singh v. R., 1915 P.R. 11: 1915 Gr.L.J. 545.

^{23.} Rafique Uddin v. Emperor, 1935 Cal. 184: I.L.R. 62 Cal. 572: 125 I.C. 687 (F.B.); Kalijiban v. Emperor, 1936 Cal. 316: I.L.R. 63 Cal. 1053: 163 I.C. 41.

^{24.} R. v. Jora, (1874) 11 Bom.H.C.R. 242; in this case the first prisoner produced a bill-book and knife from the field, and the second prisoner a stick, and each made a certain incriminatory statement which the Court held to be inadmissible both under this section since there was no "discovery," and under Sec. 8. Explanation (1); however it held that the acts of the prisoners could be proved, R. v. Pancham, (1882) 4 A. 198; see R. v. Kamalia, (1886) 10 B. 505, 597; Adu v. R. (1885) 11 C. 635, 640, 661; see aslo Dhaman v. Emperor, 1937 Sind 251: 171 I. C. 737; Hira Gobar v. Emperor, 1919 Bom. 162: 52 I.C. 601: 21 Bom.L.R. 724; Emperor v. Shivputraya, 1930 Bom. 244: 126 I.C. 876; 31 Cr.L.J. 1104; 32 Bom.L.R. 574; Turab v. Emperor, 1935 Oudh 1: J.L.R. 10 Luck 281: 152 I.C.

^{473;} Ramani Mohan De v. Emperor, 1933 Cal. 146: 143 I.C. 797; Baghel Singh v. Emperor. 1929 Lah. 794: 121 I.C. 497; (Mst.) Gajrani v. Emperor. 1933 All. 394: 144 I.C. 357: 1933 A.L.J. 1617; Bala Hudder v. Emperor, 1933 Nag. 252; Abdul Rahim v. Emperor, 1945 Lah. 105: I.L.R. 1945 Lah. 290: 220 I.C. 467 (F.B.). As to accompanying statement, see Taylor, Ev., 1903; 3 Russ. Cr. 484.

Russ. Cr. 484.

R. v. Nana, (1889) 14 B. 260; Ram Richhapal v. State, I.L.R. 1954 Punj. 876: 1954 Punj. 97: 56 Punj. L. R. 23 (F. B.); Rama Shidappa v. State. 1952 Bom. 299: I.L.R. 1952 Bom. 662: 54 Bom.L.R. 316 (F.B.); Deputy Legal Remembrancer v. Chena Nashya, 2 C. W. N. 257; Amir-Uddin v. Emperor, 1918 Cal. 88: I. L. R. 45 Cal. 557; Manjunathaya v. Emperor, 1914 Mad. 61 (2): thaya v. Emperor, 1914 Mad. 61 (2): 24 I.C. 845: 26 M.L.J. 352: (In re) Sogiamuthu Padayachi, 1926 Mad. 638: 93 I.C. 42; Nawabdin v. Emperor, 1933 Lah. 516: 144 I.C.

^{1.} Shobha Param v. State of M. P., A.I.R. 1959 Madh, Pra. 125: 1958 M.P.L.J. 758.

^{2.} A.I.R. 1958 Mad. 451.

In the Full Bench case of Emperor v. Ramanuja Ayyangar, where the accused who was charged with the murder of a woman whose corpse was found to be wrapped up in a coir mattress made the following statement while in custody of the police officer at the shop of a witness: "I purchased the mattress from this shop and it was this woman (another witness) that carried the mattress." It was held, that the statement was admissible as it directly led to the police officer making the discovery of not merely a shop-keeper and a coolie woman, but that one had sold a mattress to the accused and the other had carried it for him from the shop. Following this case, it was held in another case that if a complainant is discovered as a result of a statement made by the accused, that statement is admissible.4 Similarly, it has been held, that where, as a result of information given by the accused, another co-accused is found by the police, the statement of the accused, as to the whereabouts of the co-accused, is admissible under this section as evidence against the accused.5

Where a fact is irrelevant to the enquiry, the fact deposed to, if discovered in consequence of the information by the accused, is inadmissible.6

Where the accused gave information to the Investigating officer, that they had concealed the pieces of rope with which the dead body was carried, they gave discovery of the ropes and their statement is admissible.7

Discoveries of incriminating articles containing human blood may arouse strong suspicion that the accused might be the murdered but mere suspicion, however grave, cannot take the place of legal proof.8

The investigation of the police is concluded not when a preliminary charge-sheet is filed but only when the final charge-sheet is filed before the Magistrate. Hence, documents showing the recovery of article after the filing of the preliminary charge-sheet but before the filing of the final charge-sheet which is in fact and in law a report under section 173 (1), Cr. P. C., are admissible in evidence The Magistrate takes cognizance only when the final charge-sheet is filed.9

The fact that the disclosure statement of the accused led to the recovery of the knife (in a case of murder) shows that it was wthin the exclusive knowledge of the accused that he had buried the knife at the place from which it was recovered.10

Discovery evidence by itself is subsidiary and cannot sustain a conviction but it can lead considerable corroborative value to the evidence in support

^{3. 1935} Mad. 528; I.L.R. 58 Mad.

^{642: 158} I.C. 764 (F.B.). 4. (In re) Pasupuleti Venkata Subbayya, 1943 Mad. 418: 207 I.C. 238: (1943) 1 M.L.J. 192.

Ismail v. Emperor, 1946 Sind 43:
 I.L.R. 1945 Kar. 419: 224 I.C. 83.

Gokul v. R., 1928 Pat. 22; I.L.R.
 Pat. 611; 105 I.C. 683.
 Pingal Khadia v. State. I.L.R. 1969
 Cut. 809; 1969 Cr.L.J. 1255; A. I.R. 1969 Orissa 245, 248.

^{8.} Dandun v. State, (1969) 35 Cut.L. T. 301, 304; Bakshish Singh v. State of Punjab, 1971 Cr.L.J. 1452: A. I.R. 1971 S.C. 2016; State v. Yousuff Dar, 1973 Cr. L. J. 955 (J. & K.); Onkar v. State of M. P., 1974 Cr. L.

J. 1200 (M.P.). 9. Ramsethi Butchaiah v. State, 1969

Cr. L. J. 542 (Andh. Pra.). 10. Mulkh Raj v. State, 1969 Cr. L. J. 94, 97 (Punj.).

of the prosecution case.11 However, statement of accused leading to discovery of stolen property is not subsidiary but main evidence in a charge under Sec. 4'1, I. P. C.12 In the absence of any rational explanation by accused as to how he acquired knowledge of the existence of bones of deceased at a particular place, inference that the accused committed the murder can be drawn.13

The prosecution must establish the connection of the object recovered with the crime,14 otherwise the discovery is of no consequence.15

The discovery contemplated by the section is one in consequence of the information supplied by the accused himself. Where the accused stated that the incriminating articles were kept in the room of one of the prosecution witnesses and they were not found there but they were actually recovered on the basis of the information supplied by another prosecution witness, the recovery is not one in consequence of the information received from the accused under the section.16 So also where the person from whom recovery was made said that the accused pledged the article with him but there is no evidence that recovery was the result of any information given by the accused, the recovery cannot be relied upon to infer participation of the accused in the crime.17 The statement of accused that the article was with 'A' would be admissible if it led to discovery of article at the shop of 'A' but it is not necessary that it should have been found on person of 'A'.18

If the recovery of a blood-stained dhoti from the person of the accused was not put to him in his examinaion under section 342, Cr. P. C., it could not be used as a circumstance against him.19

12. Information. The word "information" cannot be used as synonymous with the word "statement". There is no reason why the word "information" should have been used instead of the word "statement" in the

 Chinnaswamy Reddy v. State of A.P., (1963) 1 Andh.L.T. 111: 1963 A. W.R. (H.C.) 56: 1963 (1) Cr.L.J. 8: (1962) 2 Ker.L.R. 364: A.I.R. 1962 S.C. 1788, 1793; Irfan Ali v. State, 1970 All.Cr.R. 498: 1970 A.

Cr. L. J. 1108.

W.R. (H.C.) 679: 1970 Cr.L.].

603, 612. 15. Kalu v. State, 1973 Kash.L.J. 363: 1963 J. & K. L. R. 822: 1974 Cr. L.J. 839; State of Gujarat v. Adam Fatch Mohammad (1971) 3 S C.C. 208; S. S. Akhade v. State of Maharashtra, (1971) Cr.L.J. 86: A.I.R. 1971 Tripura 8.

Bhaskaran Nair v. State of Kerala, 1970 Ker.L.T. 11: 1970 M.L.J. (Cr.) 123.

17. State of H. P. v. Wazir Chand, A. I.R. 1978 S.C. 315.

 State of M. P. v. Murari Lal, 1973
 M.P.L.J. 707: 1973
 M.P.W.R. 461: 1973 Jab. L. J. 706: 1973 Cri. L.J. 1559 (Madh. Pra.). 19. Prabhu Sahay Khadia v. State, 1969

P.L.J.R. 364, 369: 1969 B.L.J.R.

^{11.} Dinkar Bandhu Deshmukh v. State. 72 Bom.L.R. 405: 1970 Mah. L. J. 634: 1970 Cr.L.J. 1622: A.1.R. 1970 Bom. 438, 446; Bhagwan Dass v. State of Rajasthan, 1974 Cr. L.J. 1168: A.I.R. 1974 S.C. 1699 (Eye witnesses receiving injury and wea-pon recovered at the instance of accused. Conviction for the offence of murder held proper); Karan Singh v. State of U.P., 1972 All. Cr. R. 125: 1972 All. W.R. (H.C.) 192 (Inability of prosecution to say that article stained with human blood is not fatal to prosecution case); Chandra Pal Singh v. State, 1971 All. Cr. R. 409; State v. Yousuff Dar, 1973 Cr.L.J. 955 (J. & K.); On-kar v. State of M. P., 1974 Cr.L.J. 1200 (M.P.); Shri Ram v. State, 1973 W.L.N. 401: 1973 Raj. L.W. 495: 1973 Cr.L.J. 1443 (If weapon not proved to be stained with human blood, such corroboration would be lacking).

¹⁹⁷⁵ Mah. Cr. R. 204 (Bom.). Surchand Ramji Chavan v. State of Mysore, (1972) 1 Mys. L. J. 297: 1972 Mad. L. J. (Cr.) 196; 1972

section, if by "informaition" statement alone was intended. The word "information" as distinct from the word "statement" connotes two things, namely, a statement or other means employed for imparting knowledge possessed by one person to another, and the knowledge so derived by the other person. Since "information" also includes the knowledge derived by the person informed from the informant, it is clear that when a person deposes simply to the following effect, namely, that from information received from the accused, he proceeded to do certain things, and discovered certain other things, this statement is by itself relevant and admissible in evidence against the accused. In order to make it irrelevant or inadmissible against the accused, it would not be sufficient merely to put a question to the deponent which tended to show that the information was derived from an oral statement made by the accused, for the fact that there was such an oral statement would not make the statement inadmissible for the reason that the word "information" includes, as already stated, the knowledge derived by the person as well as the means taken to impart that knowledge. Of course it is open to the accused, when such a deposition is made against him, to challenge its veracity, by requiring the deponent to state the exact words and depose to the surrounding circumstances at the time when the alleged information was given. If the deponent fails to prove the exact words, this might affect the weight of his evidence but would not affect its relevancy or its admissibility.20

Whatever statement is attributed to an accused person in police custody, giving information leading to the discovery, must be proved by witnesses like any other fact. The Court should ascertain the words of the accused exactly. The investigating officer should not have written them in his own words.²¹

The actual words used by the accused in the information leading to the discovery and not a paraphrase thereof by third persons must be proved. Then, it will be for the court to decide how much of it is admissible under the section,²² unless the actual words are proved, no reliance can be placed on the information and discovery.²³

When a statement coptaining information under the section which led to discovery is recorded and witnesses are present, nothing in law prevents them from testifying to it and even from attesting it.²⁴

It is only proper for the prosecution to adduce evidence under the section to prove by production of written record so much of the statement as led to discovery of the article. The oral statement of witnesses, without corrobora-

Karam Din v. Emperor, 1929 Lah.
 338; 115 I.C. 1.

^{21.} Bhagirath v. State of M. P., A.I.R. 1959 Madh. Pra. 17: 1958 M.P.L.J. 745; State of Maharashtra v. Pocha Lachama. 1976 Mah. I. J. 195

Lachama, 1976 Mah. L. J. 195.

22. Athappa Goundan, In re, I.L.R.
1937 Mad. 695 at p. 728: A.I.R.
1937 Mad. 618 (F.B.) 630; Surajbhai Gulambhai v. State of Gujarat,
(1966) 7 Guj. L. R. 119, 120: 1966
Cr.L.J. 154 (1); State of M.P. v.
Jamuna Das, 1969 Jab.L.J. (S.N.)
106; Wahangbum Nainai Singh v.
Manipur Administration, 1968 Cr.

L.J. 1237, 1242; see also Emperor v. Shivputraya. A.I.R. 1930 Bom. 244.

Bhagirathi Prasad v. State of M.P.,
 1958 M.P.L.J. 745; Dhoom Singh v. State, A.I.R. 1957 All. 197;
 Wahangbum Nainai Singh v. Manipur Administration, supra; State of Maharashtra v. Pocha Lachama,

State of Kerala v. K. Chekkotty, 1966 Ker. L. T. 843: 1967 Cr. L. J. 1332: 1967 M. L. J. (Cr.) 47; A. I. R. 1967 Ker. 197, 198; explaining Karunakaran v. State of Kerala, 1960 Ker. L. T. 959.

tion by any written record of such statement contemporaneously made is unsafe to rely on, because of the very nature of the evidence.25 A witness of discovery at the instance of the accused may be believed where though appearing in two or three previous police cases he was not disbelieved therein.1 Signature of a person on the recovery memo is no guarantee of his having seen the recovery.2 Statement in the seizure list is inadmissible in evidence as it is merely opinion of the officer who made the list.3 No reliance can be placed on evidence to prove confessional statement where there are material contradictions about important factors such as time, place and circumstances of making the alleged statement,4 or where it was not recorded contemporaneously and is not corroborated⁵ or where the presence of the witness was most unlikely6 or where there is sole testimony of police officers without corroboration and the police was shown to have padded the evidence.7

The whole evidence, relative to the discovery, would become worthless, if there is evidence of third degree methods having been used prior to discovery.7-1 If for instance, stolen articles are discovered from a place not inside the house of the accused, but outside, then the possibility of planting by the police to that place would have to be negatived, before the evidence could be relied on.8

12-A. 'Accused of any offence'. The expression "accused of any offence" is descriptive of the person against whom evidence relating to information alleged to be given by him is made provable by this section. It does not predicate a formal accusation against him at the time of making the statement to be proved, as a condition of its applicability.9

A recovery of a weapon of offence from one prosecution witness at the evidence of another, is not within the mischief of the section.10

13. "As relates distinctly to the fact thereby discovered." Sections 25 and 26 impose a ban on admissibility of confessions before police officers. This section provides an exception to the prohibition imposed by the two preceding sections. The condition necessary to bring this section into operation is that discovery of a fact in consequence of information received from

^{25.} Panchu Gopal Das v. State, 1968 Cr.L.J. 40: A.I.R. 1968 Cal. 38,

^{1.} Purshottam Narain v. State, 1972 All. Cr. R. 488.

I.L.R. (1971) 2 Ker. 30.
 I.L.R. 1973 Cut. 1448.

Lal Tiwari v. State, 1971 Bankey All. Cr. R. 496.

Rajmohan Chudhury v. Assam L. R. 1972 Gau. 128 (Panchu Gopal Das v. State, A. I. R.

¹⁹⁶⁸ Cal. 38, Rel. on).
6. 1975 Punj.L.J. (Cr.) 93.
7. Satbir Singh v. State of Punjab. (1977) 2 S.C.C. 263: 1977 Cr.L.J. 285: 1977 S.C.C. (Cr.) 333: A. I. R. 1977 S. C. 1294.

^{7-1.} Santosh Kumari v. State, (1978) 3 Sim.L.J. (H.P.) 103: I.L.R. (1973) H.P. 291: 1973 Cr.L.J. 1651; Kalu v. State, 1973 Kash.L.J. 363: 1973 L.E.-101

J. & K. L.R. 822: 1974 Cr.L.J. 839; State of Rombay v. Kathi Kalu, 1001 Cr. L. J. 856 (S.C.) followed.

^{8.} Bhagirathi Prasad v. State of M.P., A.I.R. 1959 M. P. 17: 1958 M.P.

^{1.} J. 745.
9. State of U.P. v. Deoman Upadhyaya, (1961) 1 S.C.R. 14: (1960) 2 S.C.A. 1125: (1961) 2 S.C.J. 334: L.L.R. (1960) 2 All. 431: 1960 A. L.J. 733: 1960 A.W.R. (H.C.) 568: (1961) 2 Andh.W.R. 90: (1961) 2 M.L.J. (S.C.) 90: 1961 M.L.J. (Cr.) 554: 1960 Cr.L. I. 1504: A.I.R. 1960 S.C. 1125, 1132; Anam v. 7. N. Rajkhowa, 1975 Cr.L.J. 354 (Gau).

Narengham v. Union Territory of Manipur. 1966 Cr.L.J., 772: A.I.R.

¹⁹⁶⁶ Manipur 8. 11,

an accused in police custody must be deposed to, and thereupon so much of the information as relates distinctly to the fact thereby discovered may be proved. The words "as relates distinctly to the fact" are significant. The Section is based on the view that if a fact is actually discovered in consequence of information given, some guarantee is afforded thereby that the information was true, and can be safely allowed to be given in evidence. The extent of the information admissible must, however, depend on the exact nature of the fact discovered, to which such information is required to relate distinctly. Generally, the section comes into operation, when a person in police custody produces from some place of concealment some object, such as a dead body, a weapon, or ornaments, said to be connected with the crime of which the informant is accused. The fact discovered embraces the place from which the object is produced and the knowledge of the acccused as to this, and the information given must relate distinctly to this fact.11 The statement which relates to the information given by the accused and which is vouchsafed by the ultimate discovery of the dead body can be admitted in evidence.12

The word "distinctly" confines the information which may be proved with-in certain strict limits. The expression "distinctly" means "clearly or positively". If the accused makes a compound statement, the Court should divide it into its component parts and admit that which has led to the discovery of the particular fact.13

No statement of an accused, subsequent to recovery of a weapon from a well near his shop discovered in consequence of his information, such as that it was the same as he had thrown into the well or that he had cut away a part of the handle of that weapon, is admissible in evidence, for such a statement is not of the description in the section.14

Where the accused made a statement to the police that some months previously he and two others had snatched three gold chains from some women in a certain house, the portion relating to the removal of the chains from the women is inadmissible in evidence. But the other portion would be admissible in evidence as relating distinctly to the fact discovered thereby.18

14. "In consequence of information." In the first place, whatever be the nature of the fact discovered, that fact must, in all cases, be itself relevant to the case, and the connection between it, and the statement made must have been such that that statement constituted the information through which the discovery was made in order to render the statement admissible.16 The information must be such as has caused the discovery of the fact. This condi-

242, 244.

^{11.} Paula Nayak v. The State, I.L.R. 1962 Cut. 955: A.I.R. 1963 Orissa 93; Pulukuri Kottaya v. Emperor, A.I.R. 1947 P.C. 67 relied on; Mohmed Inayatullah v. The State of Maharashtra, A.I.R. 1976 S.C.

^{483: 1976} Cr. L. J. 481.

12. Punja Mava v. State of Gujarat,
I.L.R. 1964 Guj. 954: A.I.R. 1965
Guj. 5, relying on Prabhoo v. State of U. P., A. I. R. 1963 S.C. 1113; Pulukuri Kottaya v. Emperor, A. I. R. 1947 P.C. 67; L.R. 74 I.A. 65.

^{13.} Dharma v. The State, I.L.R. (1966) 15 Raj. 989: 1965 Raj.L.W. 418: 1966 Cr. L. J. 414: A. I. R. 1966 Raj. 74.

Ghazi v. State, 1966 Cr.L.J. 369:
 A.I.R. 1966 All, 142, 149.
 Puttanna Setty, C. V. v. Balasubramanyan. A. V. (1969) 17 Law Rep. 803: 1969 M.L.J. (Cr.) 374: (1969) 1 Mys. L. J. 417, 419.
 R. v. Jora, (1874) 11 Bom.H.C.R. 242, 244.

tion follows from the phrase "discovered in consequence of information" and also from the expression "thereby discovered" used by the Legislature with reference to the facts. In other words, the fact must be the consequence, and the information the cause of its discovery. The information and the fact should be connected with each other as cause and effect. If any portion of the informa-tion does not satisfy this test, it should be excluded.¹⁷ Information is inadmissible if no discovery is made in pursuance of it.18 Where blood stained articles were found before arrest of accused they cannot be said to have been recovered in consequence of information of accused while in police custody.19

Information given by an accused leading the police to a spot where in fact the incriminating article was thrown is admissible in evidence though the actual recovery was made, on further information at that spot, from another place or person, the reason being that the recovery was still made in consequence of the information given by the accused to the police.20

15. The extent of the information admissible under section 27 .-Clearly the extent of information admissible depends on the exact nature of the fact discovered. This has been set out in Pulukuri Kottaya v. Emperor21 which has been interpreted in decisions. See Public Prosecutor v. Oor Goundan,22 Vellingiri, In re,23 Sheik Khader Sahib v. The King.24 Their Lordships of the Privy Council themselves did not put an arbitrary limitation on this section and all that they did was to set limits to unwarranted extensive use of the same by the police to prove not only so much of the information as led to the discovery of the facts but also information as to past user or past history of the object produced, etc. They brought back the use under section 27 of the Evidence Act to the original limits, which were set up by decisions previous to (In re) Athappa Goundan²⁵ like (In re) Choda Atchenah (Holloway & Ellis, JJ.) ¹ Sukhan v. The Crown² and Ganuchandra Kashid v. Emperor,³ and held that this section provides an exception to the prohibition imposed by the pre-

L.J. 1832; A.I.R. 1966 Raj. 241,

22. 1948 M.W.N. 60: (1947) 2 M.L. J. 427: A.I.R. 1948 M. 242. 23. 1950 M.W.N. 297: (1950) 1 M.L. J. 457: A.I.R. 1950 M. 613.

24. 1949 M.W.N. 512: (1949) 2 M.L.

J. 451.

25. 1938 M.W.N. 442; A.I.R. 1937 M. 618 (F.B.).

1. 3 M.H.C.R. 318.

2. I.L.R. 10 Lah. 283; 115 I.C. 6; A.I.R. 1929 Lah. 344 (F.B.).

3. 56 Bom. 172; 137 A.C. 174; A. I. P. 1932 B. 286 (Beaumont, C.J.).

R. 1932 B. 286 (Beaumont, C.J.).

Sukhan v. Emperor, 1929 Lah. 344:
 I.L.R. 10 Lah. 283: 115 I.C. 6

N. C. Nath v. State, 1971 Cr.L.J. 407: A.I.R. 1971 Tripura 16.
 (1972) 1 Cut.L.R. (Cr.) 227.
 Kapur Singh v. Emperor, A.I.R. 1919 Lah. 184, 186: In re Ramamurthy A.I.R. 1941 Mad. 290, 294; N. Vasudeva Pillai v. State of Kerala, I.L.R. (1968) 2 Ker. 303; 1968 Cr.L.J. 1362, 1370; Jujhar Singh v. State of Rajasthan, 1976 W.L.N. 288; Him. Rajasthan, 1976 W.L.N. 288; Him. Pra. Administration v. Om Prakash, (1972) 1 S.C.C. 249: 1972 S.C.D. 128: (1972) 1 S.C.J. 691: (1971) 2 S.C.W.R. 819: (1972) 2 M.L.J. (S.C.) 16: 1972 Cur.L.J. 654: (1972) 2 An.W.R. (S.C.) 16: (1972) Un.N.P. 105: 1972 S.C.C. (Cr.) 88: (1972) 2 S.C.R. 765: 1973 M.L.W. (Cr.) 161: I. L. R. (1974) 2 Delhi 73: 1972 Gr.L.J. 606: A.I.R. 1972 S.C. 975; Badruddin Mohmad Ali v. State, (1973) 14 Guj.L.R. 606 (If relationship of 14 Guj.L.R. 606 (If relationship of "cause and effect" exists between information and fact discovered,

that information though repeated more than one occasion is admissible in evidence, if information is substantially the same in different statements: (1961) 2 Cr.L.
J. 238 followed; A.I.R. 1939 Mad.
15; A.I.R. 1940 Mad. 710; A.I.R.
1952 Raj. 20; A.I.R. 1959 Ker. 46;
A.I.R. 1968 Punjab 120 dissented).
21. 1947 M.W.N. 217: I.L.R. 1948 M.
1: 230 I.C. 135: A.I.R. 1947 P.
C. 67; Prabhati v. State, 1966 Cr.
L.I. 1832: A.I.R. 1966 Raj. 241

ceding section and enables certain statements made by a person in police custody to be proved. The condition necessary to bring the section into operation is Withat the discovery of a fact which may be, for example, the stolen property, the Instrument of the crime, the corpse of the person murdered, or any other material thing or it may be a material thing in relation to the place or locality where it is found, in consequence of the information received from a person accused of any offence, in the custody of a police officer must be deposed to, and thereupon so much of the information as (a) has caused the discovery of the fact and (b) the information relating distinctly to the fact thereby discovered may be proved. The extent of the information admissible must depend upon the exact nature of the fact discovered to which such information is required to relate. On normal principles of construction, the proviso to section 26 added by this Section should not be held to nullify the substance of the section. It is fallacious to treat the fact discovered within the section as equivalent to the object produced, the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given must relate distinctly to this fact. Information as to past user, or the past history, of the object produced is not related to its discovery in the setting in which it is discovered. Any information which serves to connect the object discovered with the offence charged is not admissible under Sec. 27. But at the same time, their Lordships of the Privy Council make it clear that this is so, except in cases in which the possession or concealment of an object constitutes the gist of the offence the foundation of the prosecution case only, it would be only one link in the chain of proof and the other links have to be forged in the manner allowed by law. The decision of the Privy Council has been referred to and followed by a Bench of the Madras High Court in The Public Prosecutor v. Oor Goundan3-1 in which it was held that the statement, "I have buried in the margin of the eastern ridge of my sugarcane garden the knife. If you come with me I shall take and give it," is admissible.

The section makes that part of the statement which is distinctly related to the discovery admissible as a whole, whether it be in the nature of a confession or not.4 Therefore, the statement of an accused that he has extracted gold from ornaments and had hidden the copper linings under a tree is relevant and admissible. But the words in the statement that he had committed the crime, is not admissible in evidence under this section, as it does not relate to the discovery of any article.5

Before admitting even the strictly relevant portion, care should be taken to see that the information given by the accused was recorded as nearly as possible in the very words of the accused6 and that the information is not (a) the result of persistent, unfair and oppressive questioning savouring of third

86; I.L.R. 1940 M. 254: A.I.R. 1940 M. 710.

^{3-1. 1948} M.W.N. 60: (1947) 2 M. L.

J. 427: A.I.R. 1948 M. 242.
 Chinnaswamy v. State of A.P., 1963 Andh.L.T. 111: 1963 A.W.R. (H.C.) 56: 1963 (1) Cr.L.J. 8: (1962) 2 Ker.L.R. 364: A.I.R. 1962 S.C. 1788, 1793. Thunilal v. Union of India, A.I.R. 1964 H.P. 27 (he had stolen orna-

ments); Karan Singh v. State of U. I, 1972 All. Cr. R. 125: 1972 All.

W.R. (H.C.) 192 "with which 1 committed murder") Jogendra Nath v. State of Assam, 1977 Cr.L.J. 1309 (that he killed the deceased). 6. Public Prosecutor v. Venkoba Rao, 1937 M.W.N. (Cr.) 441: (1937) 2 M.L.J. 32: 38 Cr.L.J. 1025; Chenna Reddi. In re, 1940 M.W.N.

degree methods which take away all its voluntary character; (b) or is not a repetition of what had already been stated to the police or already known to the police; (c) or is a composite statement of several accused where it is impossible to say how much of the statement was made by one and how much by the other.

It depends upon the circumstances of each case, whether the discovery was really made in consequence of the information given by the accused. But, there are four possibilities which have to be guarded against in the case of any recovery:

- "(1) The complainant might have been persuaded by the police to state in the first information report that property which in fact was not stolen had been stolen and to hand over such property to the police to be used in fabricating recoveries from the accused persons.
 - (2) The police might have obtained property similar to the stolen property from the complainant or someone else and used it for the purpose of fabricating the recoveries. In considering this hypothesis regard must necessarily be had to the nature and value of the property recovered.
 - (3) The police might have suppressed some of the stolen property recovered from an accused person and utilised it in inventing a recovery from another accused person.
 - (4) The property might have been recovered from a third party and used by the police in one of the impugned recoveries."11

The practical test to determine whether or not there is such a connection between the information and the discovery has been stated to be as follows: "In regard to the extent of the words 'thereby discovered,' we may derive some assistance from the test applied by the Courts in dealing with proximate and remote causes of damage, namely, whether what followed was the natural and reasonable result of the defendant's act." Only that portion of the information is provable which was the immediate or proximate cause of the discovery of the fact. Anything, which is not connected with the fact as its cause, or is connected with it, not as its immediate or direct cause, but as its remote cause, does not come within the ambit of the section, and should be excluded. It

Chinna Papiah, In re 1939 M.W.N. 1134: 186 I.C. 484; A.I.R. 1940 M. 136; Emperor v. Poligadu, 1939 M.W.N. 873; 185 I.C. 829; A.I.R. 1940 M. 12; see however opposite view in Public Prosecutor v. Pakkiriswami 1929 M.W.N. 785: A.I.R. 1929 M. 846.

^{8.} Krishna Iyer, In re, 36 Cr. L. J. 1107: 1935 M.W.N. 82: 157 I.C. 297: A.I.R. 1935 M. 479; Public Prosecutor v. Subba Reddy, 1938 M. W. N. 1118: 180 I.C. 590; Chenna Feddy, In re, 1940 M.W.N. 86: I. L.R. 1940 M. 254: A.I.R. 1940 M. 710.

Peria - Guruswami Gounder v. Emperor, 1941 M.W.N. 766: 197 I.C. 54: A.I.R. 1941 M. 765: (In re) Sheikh Mahboob, 1942 M.W.N. 877: 201 I.C. 524: A.I.R. 1942 M. 532 (1).

Public Prosecutor v. I. C. Lingiah, 1953 M.W.N. (Cr.) 282: A.I.R. 1954 Mad. 433, 441.

Uma Kishana v. State of Ajmer, 1956 Cr.L.J. 1134: A.I.R. 1956 Ajmer 57, 61.

R. v. Nana, (1889) 14 B. 260, 267, per Jardine, J.

Sukhan v. Emperor, (1929) 10 Lah. 283.

was formerly held by the Bombay and Allahabad High Courts,14 that where an article said to be connected with an offence was produced by the party himself after giving information in respect of it, the article could not be said to have been discovered "in consequence of the information." It was said that in such a case the article is discovered by the act of the party and not in consequence of the information. But this view was subsequently dissented from, in, and (so far as the Bombay High Court is concerned) overruled by, a case,15 in which the facts were as follows: The accused, in the course of the police investigation, was asked by the police where the property was, and replied that he had kept it and would show. He said that he had buried the property in the fields. He then took the police to the spot where the property was concealed and with his own hands disinterred the earthen pot in which it was kept. It was held that the statement of the accused that he had buried the property in the fields was admissible under this section, as it set the police in motion, and led to the discovery of the property, and that a statement is equally admissible whether it is made in such details as to enable the police to discover the property themselves, or whether it be of such a nature as to require the assistance of the accused in discovering the exact spot where the property is concealed. This view has also been adopted by the Calcutta,16 Madras,17 Lahore,18 and Punjab,19 High Courts and has been accepted by the Supreme Court.20 And in a case in the Allahabad High Court, to a certain spot and there found ornaments worn by the girl at the time of her death, it was held that evidence of these acts was admissible as conduct within the meaning of Sec. 8, whether such conduct was or was not caused by the inducement of the police.21

Statements made whilst producing the material object concerned cannot be received in evidence, as they are not statements in consequence of which a fact is discovered.22 But, where the statement and the discovery are not simultaneous, but after stating that the article concerned was buried at a particular place, the accused takes the police to that place and digs out the article, the statement is admissible.28 Where certain witnesses told the police that the accused had said that he had hidden the jewels of the murdered woman in

14. R. v. Panchan. (1882) 4 A. 198, 204; R. v. Babu, (1884) 6 A. 509, 544, per Straight, J.; R. v. Kamalia, (1886) 10 B. 595, 597. 15. R. v. Nana, (1889) 14 B. 260 fol-

lowed in Rama Shidappa v. State, 1952 Bom, 299; I.L.R. 1952 Bom. 662: 1952 Cr. L.J. 1219: 54 Bom.

L.R. 316 (F.B.). 16. Legal Remembrancer v. Chema, 25 C. 413: 2 C.W.N. 257; Amiruddin Ahmed v. Emperor, 1918 Cal. 88: I.L.R. 45 Cal. 557 and see also R. Pagaree, (1873) 19 W.R. Cr. 51 in which case the party himself produced the property.

Manjunathaya v. Emperor, 1914 Mad. 61 (2): 24 I.C. 845: 26 M.L. 352; In re Sogiamuthu, 1926 Mad. 638: 93 I.C. 42.

18. Nawabdin v. Emperor, 1933 Lah.

516: 144 I.C. 12.

 Ramrichpal v. State, 1954 Punj. 97:
 I.L.R. 1954 Punj. 876: 56 P.L.R. 28 (F.B.).

 Karan Singh v. State of U.P. 1978
 Cri. App. R. 145 (S.C.): 1978 S.C. Cri. App. R. 145 (S.C.): 1973 S.C.
C. (Cri.) 468: (1973) 3 S.C.C.
662: 1973 S.C. Cri. R. 322: 1973
Cri.L.R. (S.C.) 90: 1973 Cri.L.J.
1136: A.I.R. 1973 S.C. 1385.
21. R. v. Misri, (1909) 31 A. 592; see
also Emperor v. Chokhey, 1937

All, 497: I.L.R. 1937 All, 710: 170. I.C. 453.

(In re) Annika Lakhimudu, 1942 Mad. 287; 199 I.C. 87; 48 Cr. L. J. 468; 1941 M.W.N. 956.

23. Public Prosecutor v. Kandikatla Nagabhushanam 1943 Mad. 661: 209 I.C. 272: (1948) 2 M.L.J. 283; 1943 M.W.N. 577.

his or his sister's field, and subsequently the accused took the police to a particular place in his sister's field and dug up the ground and disclosed the jewels, it was held that the jewels were discovered in consequence of information given by the accused and it was held admissible.24 No doubt, it is not necessary that the informant himself should personally recover any property about which he gives information, but when the informant has tried unsuccessfully to recover such property, it must be conceded that the effect of his information has become completely exhausted, and the information is not admissible, even if the property is subsequently recovered due to the action of a co-accused.26 Confessional statement of accused not leading to discovery of articles stolen in that case but to other articles is inadmissible.1

Confessional statement should be read as a whole but it is open to reject a part thereof. (Exculpatory portion of confessional statement was rejected.).2

- 16. From an accused person in custody. Section 150 of Act XXV of 1861, as amended by Act VIII of 1869, was re-embodied in the twenty-seventh section of the Evidence Act with slight alterations of language. The only alteration on which any stress can be laid is the omission of the word "or".8 This shows that the operation of the section is restricted to information from an accused person in custody of the Police, and does not apply to information from an accused person not in custody of the police.4 In order to bring a case of discovery within the scope of this section, it is necessary that the party making the statement should be both accused and in custody at such time;5 and
 - (a) a confession obtained by inducement under the circumstances mentioned in the twenty-fourth section; or
 - (b) a confession made to a police officer,6

will not be affected by the operation of the twenty-seventh section when the person confessing is at the time-

- (i) neither accused nor in custody, or
- (ii) in custody, but not accused, or
- (iii) accused but not in custody,notwitl standing any discovery in consequence thereof.

A confession made to any person other than a police officer by a person who was at the time in the latter's custody, but not accused is in-

24. In re Chundru Pallayya, 1943 Mad. 315; 206 I.C. 101; 1943 M.W.N. 11,

(In re) Nandiwada Ganganna, 1940 Mad. 744, 745: 190 I.C. 396: (1940)

1 M.L.J. 758: 1940 M.W.N. 542. 1. Rakesh Kumar v. State, 1974 Raj-

dhani L.R. 37.

1. L.R. (1975) Cut. 1254.

3. Sec. 150 The relevant portion ran: "accused of any offence or in the custody of a police officer."

4. R. v. Babu Lal, (1884) 6 A. 509. 513, per Oldfield, J., see the Madras Law Journal. pp. 128, 129, April

Law Journal, pp. 128, 129, April,

In re Malladi Ramiah, 1956 Andhra

56; Jalla v. Emperor, 1931 Lah. 278: 131 I.C. 93; Chetu v. Emperor, 1948 Lah. 69: 228 I.C. 334.

 R. v. Babu Lal, (1884) 6 A. 509
 533. A confession made to a police officer by a person who is not in the custody of the police even though such confession led to dis-covery would not be admissible in evidence because it could not fall under the purview of S. 27, which is restricted to persons "in the custody of a police officer." per Mahmood, J., and see per Oldfield J. at p. 513, supra.

admissible even though it may lead to discovery, unless indeed it was made in the immediate presence of a Magistrate.7 But the arrest and custody need not be in respect of the offence under investigation. Thus, where a person, arrested for criminal breach of trust in respect of a cycle that he had taken on hire and later sold, confessed that he had also sold another cycle, and, as a result of that confession, the cycle was discovered, it was held that such a confession was admissible under this section.8

See S. 26 ante, Note 3, "Police custody".

16-A. Police officer. An excise officer exercising powers of entry, search, seizure, arrest and investigation of offences under the Assam Opium Prohibition Act is a "police officer" for the purposes of this section.9 Under Orissa Grama Rakshi Act, a Gram Rakshi is a"police officer". 10

See also cases under note 4 to section 25.

17. Custody. 'Custody' does not mean physical custody. When a person not in custody approaches a Police Officer and offers to give information leading to the discovery of a fact having a bearing on the charge which may be made against him, he may appropriately be deemed to be 'in the custody of a police officer' within the meaning of the section.11 When a person states that he has done certain acts which amount to an offence, he accuses himself of committing the offence; and if he makes the statement to a police officer, as such, he submits to the custody of the officer within the meaning of Sec. 46 (1), Cr. P. C., and is then in the custody of a police officer within the meaning of this section.12 Formal arrest is not necessary; constructive custody is enough.13

For the purposes of this section, the word 'custody' does not necessarily mean detention or confinement; submission to custody by word or action under Sec. 46 (1), Cr. P. C., may be taken to amount to custody.14 The word 'custody', in Sec. 26 or this section, does not mean formal custody, but includes

7. See R. v. Babulal, 6 All. 509; 1884 A.W.N. 229 (F.B.); Deonandan v. Emperor, 1928 Pat. 491; I.L.R. 7 Pat. 411: 111 I.C. 118.

8. (In rc) Kamakshi Naidu, 1943 Mad. 89; I.L.R. 1943 Mad. 456; 204 I.C. 555; see also Public Prosecutor Kandikatla Nagabhushanam, 1943 Mad. 661: 209 I.G. 272: (1943) 2 M.

9. Public Prosecutor v. Viswanathachari 1972 Cr. L.J. 779; A.I.R. 1972 Gauhati 7.

10. Sanatan Bindhani v. State. (1972) 38 Cut. L.T. 428.

11. State of U.P. v. Deoman Upadhyaya, (1961) 1 S.C.R. 14: (1960) 2 S.C. A. 1125; (1961) 2 S.C.J. 334; I.L. R. (1960) 2 All. 431; 1960 A L.T. 733; 1960 A.W.R. (H.C.) 568; (1961) 2 Andh. W.R. (S.C.) 90; (1961) 2 M.L.J. (S.C.) 90; 1961 M.L.J. (Cr.) 554; 1960 Cr. L.J. 1504: A.I.R. 1960 S.C. 1125, 1131; State of Assam v. V.N. Rajkhowa,

1975 Cr. L.J. 354 (Gauhati); I.L. R. (1971) 2 Ker. 30.

12. Santokhi Beldar v. Emperor, 1933 Pat. 149, 151; I.L.R. 12 Pat. 241: 142 I.C. 474 (S. *B.); Legal Remembrancer v. Lalit Mohan, 1992 Cal. 342; I.L.R. 49 Cal. 167. 1922 Cal. 342: I.L.R. 49 Cal. 167: 62 I.C. 578; State of Bihar v. Madanlal Agarwalla, 1966 B.L.J. 133. 137.

P 183. 137.

13. Onkar Ganesh v. State, 1974 M. P. L. J. 429: 1974 Cr. L. J. 1200; Kanhaiya v. State of Rajasthan, 1976 Cr. L. J. 162 (Raj.): 1976 W.L.N. 160: 1976 Raj.L.W. 251.

14. Jalla v. Emperor, 1931 Lah. 278, 279: 131 I.C. 93; Maung Law v. Emperor, 1924 Rang. 173: 77 I.C. 429: I.L.R. 1 Rang. 609; Legal Remembrancer v. Lalit Mohan, 1922 Cal. 342: I.L.R. 49 Cal. 167 Cal. 342: I.L.R. 49 Cal. 167.

such state of affairs in which the accused can be said to have come into the hands of a police officer, or can be said to have been under some sort of surveillance or restriction.15

The section does not insist on the informant being in the custody of the Police Officer 'investigating the offence to which the information relates.' Thus, if the information lead to the discovery of a relevant fact, given to such officer, the same will be admissible under the section.16

As soon as an accused or suspected person comes into the hands of a police officer, he is, in the absence of clear and unmistakable evidence to the contrary, no longer at liberty and is therefore in custody within the meaning of sections 26 and 27.17 Where at the time the accused makes a statement, the police arrives on the spot, the custody of the police is commenced.18

In a Bench decision of the Madras High Court, in (In re) Ramachandra¹⁹ it was held after a review of the relevant decisions:

"....... We see no reason at all why the expression 'relating to police custody' occurring in section 27 of the Indian Evidence Act should be rigidly interpreted. After all, what the spirit of the language employed appears to imply is, that, where a person submits himself to the custody of a police officer, with the consciousness that temporarily at least he is in such custody, or under such control, whether formally authorised in some manner or otherwise, the information given by him to such officer, leading to the discovery of a relevant fact, may be proved within the scope of the section. To limit the meaning of the expression further, by imposing conditions as to the time of arrest, the existence or absence of a formal magisterial order authorising police custody, or interrogation, etc., does not seem to be justified either by the context, or by any inherent feature of the scheme of sections 25 and 26, to which section 27 clearly constitutes a proviso or exception." See the decision of the Supreme Court in Ramkishan v. State of Bombay.20

The term 'custody', used in the section, has to be interpreted within wide limits.21 The section doubtless applies only when the person is in the custody of the police and stands accused of an offence. The term 'accused' has how-

 ⁽Mst.) Maharani v. Emperor, 1948
 All 7: 1947 A.L.J. 265; Chhotey
 Lal v. State of U.P., 1954 All, 687:
 1954 A.L.J. 93.

State of Mysore v. Rangaiah, (1965)
 Mys. L. J. 158: 1966 M.L.J. (Cr.) 4: 1966 Cr.L.J. 848.
 Maunglay v. Emperor, A.I.R. 1924

Rang. 173.

^{18.} Choda Atchenah. In re, (1867) 3 M.H.C.R. 318.

^{19. (1960) 1} M.L.J. 112; (1960) M.L. J. (Cr.) 127.

^{20. 1955} S.C.J. 129: (1955) 1 S.C.R. 903: A.I.R. 1955 S.C. 104: 57 Bom, L. R. 600: 1955 M.W.N. 146: 1955 All. W. R. (Sup.) 41: (1955) 1 M.L.J. (S.C.) 66: 1955 Cr. L.J.

^{21.} See also (In re) Mannem Edukondalu, A.I.R. 1957 A.P. 729; 1957 Cr.L.J. 1086; Ram Singh v. State, 1958 All.L.J. 660: A.I.R. 1959 All. 518; (In re) Krishna Pillai, (1961) 1 M.L.J. 307 at 311.

ever been broadly construed. In consequence it has been held that even during the course of the investigation under S. 154, Criminal Procedure Code, that is to say, from the time of the commission of the offence, whoever are shown or have come to the knowledge of the police as offenders or suspected offenders, are deemed to be 'accused' persons within the meaning of this section, even though they might have been released under Sec. 169 or Sec. 170, Criminal Procedure Code. Therefore, a person who is not named in the first information report as culprit but is arrested subsequently, is still an 'accused' within the meaning of sections 167 and 169, Criminal Procedure Code, whether he be forwarded to the Magistrate or not. A statement by him leading to discovery would hence be admissible.²²

- 18. Information given by more than one accused. Where a fact is discovered in consequence of information received from one of several persons charged with an offence, and when others give like information, the fact should not be treated as discovered from the information of them all. It should be deposed that a particular fact has been discovered from the information of AB, and this will let in so much of the information as relates distinctly to the fact thereby discovered.²³ In the case of R. v. Babu Lal,²⁴ Straight, I., observed as follows:
 - "I have more than once pointed out that it is not a proper course, where two persons are being tried, to allow a witness to state 'they said this', or 'they said that', or the 'prisoners then said'. It is certainly not at all likely that both the persons should speak at once, and it is the right of each of them to have the witness required to depose as nearly as possible to the exact words he individually used. And, I may add, where a statement is being detailed by a constable as having been made by an accused, in consequence of which he discovered a certain fact, or certain facts, the strictest precision should be enjoined on the witness, so that there may be no room for mistake or misunderstanding..... In detailing statements of this kind which are alleged to have led to discovery, it is of the essence of things that what each prisoner said should be precisely and separately stated. If the evidence was not clear upon this point, and the witness refused to be more explicit, the Judge should have paid no attention to it."

In a later case, it was held, that where two prisoners gave information which led to the arrest of another person, it is only the information given first which can be admitted under this section and that the information given by each should be precisely and separately stated.²⁵ Once property has been discovered in consequence of information received from a suspected person, it cannot be re-discovered in consequence of information received from another suspected person. It is only the information that was given by the first person, and which led to the actual discovery which may be proved under the

Srcenivasulu, In re, A. I. R. 1958
 A.P. 37. Sce also State v. Mohd. Husain, I.L.R. 1959 Bom. 1244:
 A.I.R. 1959 Bom. 534.

^{23.} R. v. Ramchurn, (1875) 24 W. R.

Cr. 36. 24. (1884) 6 A. 509 (F.B.) at pp. 549,

^{25.} Ram Singh v. R., 1916 Lah. 433 (2): 34 I.C. 993.

terms of this section.¹ If the statement made by the first accused could have resulted in the discovery, if it was pursued by merely postponing the discovery to enable the other accused to make a similar statement and to point out the place, it cannot be said that the discovery was in consequence not only of the statement of the first accused, but also that of the second accused.²

When a fact is once discovered in consequence of information received from some source, any further information subsequently received from any other source cannot be said to be the information whereby the fact is discovered. But the mere plurality of informations received before discovery shall not necessarily take any of these informations out of the section. In a suitable case, it is possible to ascribe to more than one accused the information which leads to the discovery.3 Joint or simultaneous statements of the accused persons are not inadmissible in evidence.4 "If the prosecution are in a position to establish that the statements of the action which led to the discovery were actually made or took place, simultaneously we do not think that evidence in regard to the simultaneous statements or the simultaneous action would be entirely shut out by the provisions of Sec. 27, Evidence Act, but there must be clear and satisfying evidence on this point such as will enable the Court to decide and to give specific direction to the jury whether the evidence is admissible against both the accused or against either and if so against which.5 It is immaterial whether the information is given by one person or two persons. What is of importance is that the information should be precise in the sense that one accused gave a particular part of the information and the other accused gave the other part of the information so that a definite part can be attributed to a particular accused and proved against him. Otherwise, no portion of the joint statement can be proved under this section. In the instant case two material objects were alleged to have been recovered in pursuance of the joint statement but as it was not clearly specified in that statement as to which accused's information caused the recovery of which material object, the joint statement could not be proved. The recoveries or discoveries in the case only meant that the accused knew the whereabouts of the material objects; no more importance could be attached to them.6

Simultaneous statements are not 'per se inadmissible' in evidence, and are liable to be considered, if the discovery made in consequence thereof

^{1.} Budha v. Emperor, 1922 Lah, 315; 64 I.C. 502; Kudaon v. Emperor, 1925 Nag. 407: 91 I.C. 236; Poshaki v. State, 1953 All. 526; 1953 A.L.J. 115; Emperor v. Shivputraya Baslingaya, 1930 Bom, 244: 126 I.C. 876; 32 Bom.L.R. 574; Adam Khan v Crown, 1927 Lah. 739; 101 I.C. 488; (In re) Sheik Mahaboob, 1942 Mad. 532 (1): 201 I.C. 524: 1942 M.W.N. 377; Durlay Namasudra v. Emperor, I.L.R. 59 C. 1040: 138 I.C. 116: 1932 Cal. 297; Narayan v. State, 1953 Hyd. 161; I. I.R. 1953 Hyd. 32; see also Putu v. Emperor, 1945 O. 235: 219 I.C. 486.

Koli Mala Bijal v, State. 1954 Kutch
 1954 Cr.L.J. 801; see also Lachhman Singh v. State, 1952 S.C.

^{167: 1952} S.C.J. 230: 1952 A.L.J. 437: (1952) 2 M.L.J. 100: 1952 Gr.L.J. 863: I.L.R. 1952 Punj. 278

Naresh Chandra v. Empero., 1942
 Cal. 593, 603: F.L.R. (1942) 1
 Cal. 436: 204 I.C. 111. See also Ranchod v. State, A.I.R. 1956 M. B. 262.

State Government of M.P. v. Choteylal Mohanlal. 1955 Nag. 71: 1.
 L.R. 1955 Nag. 169: 1955 N.L.J.
 289; Harmal v. State, 1971 A.L.J.
 529: 1971 A.W.R. (H.C.) 327: 1971 Cr.L.J. 1215.

Abdul Kader v. Emperor, 1946 Cal. 452; 228 I.C. 24: 50 C.W.N. 88.

Rama Shetty v. State of Kerala, 1971 Ker. L. T. 244. 246 and 247.

affords a guarantee about the truth of the statements.7 Relying on the observations of Straight, J.,8 a Bench of the Oudh Chief Court held:

"The use of the word 'a person' in singular, we think, is somewhat significant and we are inclined to the view that the word was used in singular designedly because we cannot conceive the joint statement of a number of persons can be said to be an information received from any particular one of them. When a fact is discovered in consequence of information received from one of several persons charged with an offence, and when others give like information, it is impossible to treat the discovery as having been made from the information received from each one of them."

This Section contemplates statements by individual accused and the discovery which may follow such statements. A joint statement of several accused or joint recovery of articles by several persons, is not contemplated. A joint statement followed by a joint recovery is not admissible against either of the accused.10 But the words 'a person' in Sec. 27, Evidence Act, do not, in any way, exclude admission of information from more than one person simultaneously, provided it fulfils the requirements of this section. Section 13 (2), General Clauses 'Act, provides that words in the singular shall include the plural and vice versa, provided there is nothing repugnant in the subject or context. There is nothing repugnant in the provisions of this Section for acceptance of statement jointly made by more than one person, provided that facts discovered in consequence thereof afford some guarantee about truthfulness of their statements. It will depend on the facts of each case.11 The question came up for consideration, but was left undecided in Lachman Singh v. The State12 where their Lordships of the Supreme Court observed at page 170 of A.I.R.:

"It seems to us that if the evidence adduced by the prosecution is found to be open to suspicion, and it appears that the police have deliberately attributed singular confessional statements relating to facts discovered to different accused persons, in order to create evidence against all of them, the case undoubtedly demands a most cautious approach. But as to what should be the rule, when there is clear and unimpeachable evidence as to independent and authentic statements of the nature referred to in Sec. 27, Evidence Act, having been made by several accused persons, either simultaneously or otherwise, all that we wish to say is that as at present advised we are inclined to think that some of the cases relied upon by the learned counsel for the appellants have perhaps gone further than is warranted by the language of Sec. 27, and it may be that on a suitable occasion in future those cases may have to be reviewed."

State Government of M.P. v. Choteylal Mohanlal, I.L.R. 1955 Nag. 169: 1955 N.L.J. 239: 1955 Nag. 71.

^{8.} Quoted in previous paragraph.

Puttu v. Emperor, 1945 Oudh 235: 219 I.C. 486.

Mohan v. State, 1957 Raj.L.W. 401;
 see also K. Valayan v. State of Kerala, A.I.R. 1960 Ker. 238: 1960

Ker.L.J. 109.

State Government of M.P. v. Choteylal Mohanlal. I.L.R. 1955 Nag. 169; 1955 N.L.J. 239; 1955 Nag. 71.

^{12. 1952} S.C. 167: 1952 S.C.J. 230: 1952 A.L.J. 437: (1952) 2 M.L.J. 100: 65 M.L.W. 429: 1952 Cr.L. J. 863: I. L. R. 1952 Punj. 278.

In Motilal v. State,13 it was observed:

"No principle in support can be found for the view that the statements of two or more accused leading to the discovery of a relevant fact will be admissible only if they are simultaneously made. The statement nevertheless remains the statement of two or more persons, whether made simultaneously or one after the other, and, if it is admissible against all those who made the statement, if made simultaneously, it is equally admissible if made one after the other, provided always that the statements made by those accused which are to be admitted relate distinctly to the discovery and not re-discovery of the relevant fact."

In Babu v. State,14 it was observed:

"A general statement made by more than one accused persons cannot be said as leading to discovery. It is imperative that before any such statement is held admissible under this section, it must be precisely known as to what specific statement was made by a particular accused. The joint statement of two accused on the basis of which dead body was recovered is inadmissible under this section but the fact of recovery as a consequence of digging out the field by the accused persons is relevant under section 8.'

When it is uncertain as to who gave what information first and the statements of the accused were not recorded, evidence of discovery cannot be used against any accused.15

A fact which is discovered once cannot be rediscovered and just as it is difficult to conceive a simultaneous and joint statement by more than one accused, it is equally difficult to conceive a simultaneous and joint discovery of a fact by them.16

19. "So much of such information may be proved." This portion of the section seems to be based on the following statement in Sec. 902 of Taylor's Evidence: "So much of the confession as relates distinctly to the fact discovered by it may be given in evidence, since this part of the statement, for the reasons already given, cannot have been false. The earlier rule in England admitted the facts, but excluded the accompanying statements,17

Where property is discovered in consequence of an inadmissible confession, so much of the confession as strictly relates to the discovery is admissible, for this portion at least cannot be untrue; but independent statements, not qualifying or explaining the fact, though made at the same time, are rejected.18

^{13.} A.I.R. 1959 Pat. 54: I.L.R. 38

Pat. 151. 14. 1972 All. W.R. (H.C.) 105: 1972 All. Cr. R. 68: 1972 All.L.J. 291: 1972 Cr.L.J. 815 (A.I.R. 1958 All. 467 held not good law in view of A.I.R. 1955 S.C. 104).

^{15. (1972) 1} Cut.L.R. (Cr.) 101. 16. Hemat Ramji v. State, (1975) 16

Guj.L.R. 782: 1975 Mah.Cr.R.

^{17.} R. v. Warwickshall, (1783) 1 Leach

R. v. Gould, (1840) 9 C. & P. 364
 see Phipson. Ev., 11th Ed., pp. 368-369; Sukhan v. Emperor, 1929 Lah 344: I.L.R. 10 Lah, 283: 115 L.C. 6: 30 Cr.L.J. 414 (F.B.).

The confirmation of the information admits the part confirmed, and that only. According to Prof. Wigmore "this falls something short of the logic of the case; for a confirmation on material points produces ample persuasion of the trustworthiness of the whole. It can hardly be supposed that at certain parts the possible fiction stopped and the truth began, and that by a marvellous coincidence the truthful parts are exactly those which a subsequent search (more or less controlled by chance) happened to confirm. Such a differentiation is purely artificial, and corresponds to no actual mental processes, either of the confessor or of the hearer. If we are to cease distrusting any part, we should cease distrusting all."19

But, if all that is required to lift the ban under the two preceding sections be the inclusion in the confession of information relating to an object subsequently produced, it seems reasonable to suppose that the persuasive powers of the police will prove equal to the occasion, and that in practice the ban will lose its effect.20 The protection given to the accused by these sections should not be dependent on the ingenuity of the police officer or the folly of the prisoner in composing the sentence which conveys the information;21 hence, the limitation in the section. The intention of the Legislature in enacting this Section was that the minimum portion of a confession made to a police officer, or of information given to him should be admitted into evidence, which might reasonably be held to relate distinctly and positively to the fact discovered, and which is necessary to be proved in order adequately to explain such discovery.²² The words "so much of such information" and "distinctly" are very important. They limit what may be proved against the accused. The whole of the statement of the accused is, therefore, not admissible under the section, but only that portion of it can be proved against him, which has led to the discovery of the fact deposed to, and which relates distinctly to the fact discovered, that is to say, only that portion of the accused's statement can be admitted which was the direct or immediate cause of the discovery of the fact deposed to. Anything which is not directly or clearly connected with or which is not the immediate cause of the discovery is not admissible.23 To be admissible, under this section, the information must not only be such as has caused the discovery of the fact, but must "relate distinctly" to the fact discovered. The word "relate" means to "have reference to" or "to connect"; and the word "distinctly" means clearly, unmistakably, decidedly or indubitably. To put it in different language the information must be clearly connected with the fact.24 The word "thereby" in "fact thereby discovered" refers to that portion of the information only which may be held to be the proximate cause of discovery.25

22. Emperor v. Chokhey, 1937 All. 497, 500 : I.L.R. 1937 All, 710 : 170 I.

24. Ibid, Sukhan v. Emperor.

^{19.} Wigmore, s. 857.20. Pulukuri Kottayya v. Emperor, 1947 P.C. 67.

^{21.} See Sonaram v. Emperor. 1931 Pat. 145: I.L.R. 10 Pat. 153: 131 I.C. 797: 32 Cr.L.J. 792: 12 P.L.T. 481; Phulua v, Emperor, 1936 Nag. 23: 161 I.C. 8: 37 Cr.L.J. 460; Naresh Chandra Das v. Emperor, Cal. 593; I.L.R. (1942) 1 Cal. 436: 204 I.C. 111: 75 C.L.J. 507: 46 C.W.N. 180; Sukhan v, Emperor, 1929 Lah. 344: I.L.R. 10 Lah. 283: 115 I.C. 6: 30 Cr. L. J. 414: 30 P.L.R. 197 (F.B.).

C. 453: 38 Cr.L.J. 910: 1937 A. L.J. 715: 1937 A.W.R. 616.

^{23.} Sukhan v. Emperor, 1929 Lah, 344: I.L.R. 10 Lah, 283: 115 I.C. 6: 30 Cr.L.J. 414: 30 P.L.R. 197 (F.B.); Ganau Chandra Kashid v. Emperor. 1932 Bom. 286: I.L.R. 56 Bom. 172: 137 I.C. 174: 33 Cr. L.J. 396: 34 Bom.L.R. 303; Rama Shidappa Thorali v. State, 1952 Bom. 299: I.L.R. 1952 Bom. 662: 1953 Cr.L.J. 1219: 54 Bom.L.R. 316 (F.B.).

Naresh Chandra Das v. Emperor, 1942 Cal. 593, 605; J.L.R. (1942) 1 C. 436; 204 I.C. 111.

Assistance in the construction of the words "as relates distinctly to the fact thereby discovered" may be derived from a consideration of the principle upon which the enactment contained in this section is founded. Statements admissible under this section are so admissible because the discovery rebuts the presumption of falsity arising from the fact of their being made under inducement, or to the police, or to others while in police custody. The discovery proves not that the whole, but that some portion of the information given, is true, namely, so much of the information as had led directly and immediately to, or was the proximate cause of, the discovery; only such portion of the information is guaranteed by the discovery, and hence only such portion of the information is admissible. A prisoner's statement as to his knowledge of the place, where a particular article is to be found, is confirmed by the discovery of that article, and is thus shown to be true. But any explanation as to how he came by the article, or how it came to be where it is found, is not confirmed by the discovery, and as the presumption of falsity as to these other statements is not rebutted, therefore proof of them is prohibited. Information as to the past user, or the past history, of the object produced is not related to the discovery in the setting in which it is discovered.1 In the words of West, I.: "It is not all statements connected with the production of finding of property which are admissible; those only which lead immediately to the discovery of property and so far, as they lead to such discovery, are properly admissible..... Other statements connected with the one thus made evidence, and so mediately are not to be admitted....."2 The relevancy of mediate connection appears to be the ratio decidendi of the case. R. v. Pagare3 in which a wider construction was put on the words "as relates distinctly" so as to admit not only so much of the information as leads directly and immediately to the discovery of the fact, but also the portion which leads mediately by way of explanation. Though Brodhurst, J., in referring to this case in R. v. Babu Lal,4 says that no difference is noticeable in the rulings of R. v. Pagare, supra; R. v. Jora Hasji, supra and R. v. Pancham, as to the extent to which statements or confessions of accused persons can be proved by a police officer, under this Section, it is, however, submitted that the ruling in R. v. Pagare, supra, is not reconcilable with the priciples laid down in R. v. Jora Hasji, R. v. Rama,7 R. v. Babu Lal,8 Adu v. R.,9 R. v. Commer,10 and R. v. Nana11 and is indeed virtually overruled by Adu v. R.,12 referred to in Legal Remembrancer v. Chema.13 In the last cited case, it was said per Banerjee, J.: "The view I take is in no way inconsistent with that taken by the Court in Adu v. R., as the part of the information or statement that is here used as evidence against the accused under Sec. 27, relates distinctly to the fact thereby discovered and does not go beyond it." (p. 416) but "other statements not necessarily or directly connected with the fact discovered are not to be admitted, as this would rather be an evasion than a fulfilment of the law which is designed to guard prisoners accused of offences against unfair practices on the part of the police. For ins-

^{1.} Pulukuri Kottaya v. Emperor, 1947

P. C. 67.

2. R. v. Jora Hasji, (1874) 11 Bom. H.G.R. 242, 244.

^{3. (1873) 19} W.R.Cr. 51.

^{4. (1884) 6} A. 509 (F.B.) at p. 518.

^{(1882) 4} A. 198.

^{6. (1874) 11} Bom. H. C. R. 242,

^{7. (1878) 3} B. 12, 17,

^{(1884) 6} A. 509 (F.B.). (1885) 11 C. 635. (1888) 12 M. 153. (1889) 14 B. 260. 9. 10.

^{11.}

^{12.} Supra.

^{(1897) 25} C. 413; see The Madras 13. Law Journal, April, 1895, p. 129. et seq.

tance, a man says: 'You will find a stick at such and such a place. I killed Rama with it.' A policeman, in such a case, may be allowed to say he went to the place indicated, and found the stick; but any statement as to the confession of murder would be inadmissible. If instead of 'you will find', the prisoner has said: 'I placed a sword or kn'fe in such a spot', where it was found, that, too, though it involves an admission of a particular act on the prisoner's part, is admissible, because it is the information which has directly led to the discovery and is thus distinctly, and independently of any other statement connected with it. But if, besides this, the prisoner has said what induced him to put the knife or sword, where it has been found, that part of his statement as it has not furthered, much less caused, the discovery, is not admissible."14 In Queen-Empress v. Nana,15 it was held that only that portion of the accused's statement can be admitted in evidence as sets the police in motion and leads to the discovery of the property. In some cases, a view was formerly taken that where the admissible portion of an accused's statement cannot be separated from the inadmissible portion, the whole of the statement must be admitted under this section.16 But this view was expressly dissented from by a Full Bench of the Lahore High Court in Sukhan v. Emperor17 which has been approved by their Lordships of the Privy Council in Pulukuri Kottaya v. Emperor.18 Even if a single statement contains more information than what is necessary for the discovery, the statement is not to go in as a whole, nor is it to go in as a statement at all, but what is admissible is the particular information given by the statement which led to the discovery.19 In Ganuchandra Kashid v. Emperor,20 which has also been approved by their Lordships of the Privy Council in Pulukuri Kottaya v. Emperor,21 a Bench of the Bombay High Court consisting of the Chief Justice Sir John Beaumont, who subsequently delivered the judgment of their Lordships of the Privy Council in Pulukuri Kottaya v. Emperor, and Mr. Justice Broomfield held that where the accused gives his information in the form of a compound statement, the Judge must before he records it as evidence or leaves it to the jury, divide the sentence into what are really its component parts and only admit that part which has led to the discovery of the particular fact. Only so much of the statement is admissible as relates distinctly to the fact discovered. Therefore, once a relevant fact is discovered by reacon of a statement made by the accused to a police officer. the Court must scrutinise the statement in order to find out which portion of that statement bears a distinct relationship to the discovery of the fact. Any relationship to the fact is not sufficient. The Legislature has emphasised that the relationship must be distinct; it must be unmistakable and unequivocal.22 In Harnam Singh v. Emperor,23 a Bench of the Lahore High Court held that "The whole of the information, including the confessional portion thereof

R. v. Jora Hasji, (1874) 11 Bom. H.C.R. 242 at pp. 244, 245.
 14 Bom. 260 (F.B.).

⁽In re) Sogiamuthu Padayachi, 1926 Mad. 638: I.L.R. 50 M. 274: 93 I.C. 42: 27 Cr.L.J. 394; Lalji Dusadh v. Emperor. 1928 Pat. 162: I.L.R. 6 Pat. 747: 106 I.C. 698: 29 Cr.L.J. 106; Harnam Singh v. Emperor, 1928 Lah, 308: I.L.R. 9 I.ah. 626: 111 I.C. 561: 29 Cr.L. J. 881: 29 P.L.R. 679. 17. 1929 Lah. 344.

^{18.} A.I.R. 1947 P. C. 67.

Naresh Chandra Das v. Emperor,
 1942 Cal. 593: I.L.R. (1942) 1 C.
 436: 204 I. C. 111. See also
 Anna v. State. 1956 Hyd. 99.

^{20. 1932} Bom. 286: I.L.R. 56 Bom. 172: 137 I.C. 174: 33 Cr.L.J. 396: 34 Bom.L.R. 303.

A.I.R. 1947 P.C. 67.
 Rama Shidappa Thorali v. State, 1952 Bom. 299: I.L.R. 1952 Bom. 662: 1953 Cr.L.J. 1219: 54 Bom. L.R. 316 (F.B.). 23. 1928 Lah, 308,

given by the prisoner, which relates to the fact, includes not only the concrete thing discovered by the investigating officer, but also its description as given by the accused including its connection with the crime which is under investigation." But this case was overruled by a Full Bench of the same Court in Sukhan v. Emperor.24 Again a Full Bench of the Madras High Court in Athappa Goundan v. Emperor25 held that any information which served to connect the object discovered with the offence charged was admissible under this section on the ground that the fact deposed to, and the fact discovered obviously must be relevant and the fact or thing discovered can only be relevant, if it is connected with the offence of which the accused is charged; and the confession in the section is a confession of the offence charged, and not of anything else. Holding that this was wrong, their Lordships of the Privy Council observed in Pulukuri Kottaya v. Emperor:1 "Their Lordships are unable to accept this reasoning. The difficulty, however great, of proving that a fact discovered on information supplied by the accused is a relevant fact can afford no justification for reading into Sec. 27, something which is not there, and admitting in evidence a confession barred by Sec. 26. Except in cases in which the possession, or concealment, of an object constitutes the gist of the offence charged, it can seldom happen that information relating to the discovery of a fact forms the foundation of the prosecution case. It is only one link in the chain of proof, and the other links must be forged in manner allowed by law." In the case before the Privy Council, the statement used by the accused which was challenged was, "I stabbed Sivayya with a spear. I hid the spear in a yard in my village. I will show you the place." The Privy Council held that the whole of the statement was inadmissible with the exception of the first part, viz. "I stabbed Sivayya with a spear." Therefore, their Lordships held that the statements "I hid the spear in a yard in my village", and "I will show you the place," were both inadmissible statements. The reason why looking to the judgment of the Privy Council, their Lordships held that the statement "I hid the spear in a yard in my village" was admissible was that this statement led to the discovery of the fact that the accused had knowledge that the spear was hidden in the yard in the village, and as that was a fact discovered, the statement relating to that discovery was admissible, and the statement relating to the discovery of that knowledge was "I bid the spear in a yard in my village." In a Full Bench case of the Bombay High Court,2 it was observed: "Apart from the decision of the Privy Council, it is difficult to understand, once it is conceded that the knowledge of the accused may be a fact which can be discovered within the meaning of Sec. 27, how it is possible to argue that the source of the knowledge of the accused is not distinctly related to the discovery with regard to his knowledge. The accused may say "I hid a particular object in a particular place." The accused may say "X or Y told me that a particular object is hidden in a particular place and therefore I believe it is there, and I am prepared to point the place out." Either of the two statements is distinctly related to the fact of the knowledge of the accused with regard to the place where a particular object is concealed.

^{24. 1929} Lah. 344. 25. 1937 Mad. 618: I.L.R. 1937 Mad. 695: 171 I.C. 245: 38 Cr.L.J. 1027: (1937) 2 M.L.J. 60: 1937 M.W.N. 442; 46 L.W. 152 (F.

A.I.R. 1947 P.C. 67 at p. 71; Saturughana v. State. (1969) 35 Cut. L.T. 351.

Rama Shidappa Thorali v. State,
 I.L.R. 1952 Born, 662: 54 Born.
 L. R. 316: 1952 Born, 299 (F.B.).

The use of the words "so much of such information" in the section postulates that long and detailed statements unconnected with any fact thereby discovered are not to be proved.3

The portion not admissible under this section cannot be let in under Sec. 39 as being necessary to explain the portion admissible under this section. Sec. 39 cannot be invoked for the purpose of letting in a confession in respect of which the bar created by Secs. 24, 25 and 26, Evidence Act, has not been removed by Sec. 27. It was never intended that a matter which has been expressly ruled out should be allowed to come in the garb of an explanatory statement.4 In the Full Bench case of Queen-Empress v. Nana5 the statement attributed to the accused was "Yes, I have kept it. I will point it out. I have buried it in the field." And the Full Bench consisting of Sir Charles Sargent, Chief Justice, and Mr. Justice Bayley, Mr. Justice Scott, Mr. Justice Jardine and Mr. Justice Parsons held that the statement was admissible with the exception of the first part, viz., "Yes, I have kept it." The Full Bench was not troubled by the consideration which weighed with the Judges in Rang Rao Dinyanu Nikam v. States that in considering the relationship which a portion of the statement bears to the discovery the authorship of the concealment should be ruled out in admitting the statement. In this particular statement, before the Full Bench. the accused admitted his own responsibility for burying the object in the field, and yet that statement was considered admissible because, according to the Full Bench, it was that statement which led to the discovery of the object, and now in view of the Privy Council decision it also led to the discovery of the knowledge of the accused that the object was buried in the field. It would be difficult to take the view that the Privy Council has in any way impaired the authority of this Full Bench decision. Far from impairing it, it has supplied a further argument to strengthen and consolidate the decision which has stood as good law since 1889.7

.Information by the accused to an investigating officer was that after killing the deceased and throwing him down from a bridge, he kept concealed the necklace snatched from the deceased. Only the portion of the information relating to the concealment of the necklace is admissible in evidence.8

8. Adinath Chakraborty v. State, 1967 Cr.L.J. 125; A.I.R. 1967 Tripura

^{3.} Mangal Singh Sonelal v. Emperor, A.I.R. 1948 Nag. 78, 79.

^{4.} Sukhan v. Emperor, 1929 Lah. 344:

Karam Din v. Empero.,
1929 Lah. 338.
5. 14 Bom. 260 (F.B.).
6. 1952 Bom. 72; I.L.R. 1952 Bom.
201; 1953 Cr.L.J. 334: 53 Bom.L.
R. 834; which was overruled in
Rama Shidappa Thorali v. State,
I.L.R. 1952 Bom. 662; 54 Bom.L.
R. 316; 1952 Bom. 299 (F.B.).
7 Rama Shidappa Thorali v. State,

Rama Shidappa Thorali v. State, supra. See also Emperor v. Chokhey, 1937 All. 497; I.L.R. 1937 A. 710; 170 I.C. 453; Sukhan v. Emperor, supra: Sonaram Mahton v. Emperor. 1931 Pat. 145: I.L.R. 10 Pat. 153: 131 I.C. 797: 32 Cr.L.J. 792: 12 P. L. T. 481; Amiruddin Ahmed v. Emperor, 1918 Cal. 88: I.L.R. 45 Cal. 557: 19 Cr.L.J.

^{305: 44} I.C. 321; Mohammad Ilyas v. State, 1950 All, 615; Public Prosecutor v. Oor Goundan, 1948 Mad. 242: 49 Cr.L.J. 256: (1947) 2 M.L.J. 427: 1948 M.W.N: 60: 60 L.W. 729; In re Vellingiri, 1950 Mad. 613: 51 Cr.L.J. 1531: (1950) 1 M.L.J. 467: 1950 M.W.N. 297; Public Pro-467; 1950 M.W.N. 297; Public Prosecutor v. India China Lingiah, 1953 M.W.N. 918; A.I.R. 1954 M. 483; Ram Richhpal v. State. 1954 Punjab, 97; I.L.R. 1954 Punjab 876; 1955 Cr.L.J. 626; 56 Punj.L.R. 23 (F.B.); Mangal Singh v. Emperor, 1948 Nag. 78; I.L.R. 1948 Nag. 57; 49 Cr.L.J. 66; 1948 N.L.J. 36; Mathurdhana v. State. 1956 Bom. 86: Mathurdhana v. State, 1956 Bom

19-A. Two statements by accused: Admissibility of. It is the first statement made by an accused leading to a recovery of an incriminating article which is admissible in evidence. If the police already knew where an incriminating article is lying as a result of interrogation of the accused, the repetition of the statement, after witnesses are called, would not make the statement before the witnesses admissible in evidence.9 But in certain circumstances, such a statement may be admissible. If the information derived as a result of interrogation was merely vague and the precise information was received subsequently as a result of the statement made by the accused in the presence of witnesses, the subsequent statement would be admissible in evidence. Like wise if the previous statement made to the investigating officer merely indicated a willingness to disclose where the incriminating articles were lying and the actual information about the place was given in a subsequent statement made in the presence of witnesses, the subsequent statement would be admissible if the incriminating articles are recovered in pursuance of the statement. Where, however, the accused has already disclosed the place where the incriminating articles are lying in the course of interrogation to the investigating officer and he gets the statement repeated in the presence of witnesses in order to incorporate it in a memo and to give it greater authenticity, the subsequent statement would not be admissible.10

The distinction between 'statement' and 'information' should be borne in mind. Information is actually the content or substance of a statement and may be the same in several statements which may substantially be repetitions. The discovery should be the direct consequence of this or that information. If the accused makes a statement before a Police Officer and repeats it before the Panchas, the repetition does not affect the value of the information given, even if the discovery was in consequence of the second statement.11

Where by questioning the accused in police custody information was obtained as to where certain incriminating articles were kept and it was in consequence of this statement, and not by any subsequent statement that those articles were discovered, it is the first statement alone that is relevant under the section.12

20. "Whether it amounts to a confession or not." Where any fact is discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, that part of the information as relates distinctly to the fact thereby discovered can be proved whether it amounts to a confession or not. The expression "whether it amounts to a confession or not" has been used in order to emphasize the position that even though it may amount to a confession that much information as relates distinctly to the fact thereby discovered can be proved against the accused.18

^{9.} Public Prosecutor v. B. Subba Reddy, A.I.R. 1938 Mad, 15; In re K. Chenna Reddy, A.I.R. 1940 Mad. 710; In re Dasu Ram, A.I.R. 1952 Raj. 20; Vinayak V. Joshi v. State, 1968 Cr.I. J. 372; A.I.R. 1968 Punj. 120, 124; Karan Singh v. State of U.P., 1972 All.W.R. (H. C.) 192; 1972 All. Cr. R. 125.

^{10.} Vinayak V. Joshi v. State, supra.
11. State of M.P. v. Dhannalal Moruji, 1967 Jab. L.J. 1053, 1059.
12. Benedict v. State of Kerala, 1967

Kev.L.T. 466.

^{13.} Ram Kishan Mithan Lal Sharma v. State of Bombay, 1955 S.C. 104, 115, 116: 1955 S.C.J. 129: 1956 Cr.L. J. 196: 1955 A.W.R. (Sup.) 41: 57

Therefore, if part of the statement distinctly relates to the discovery, the statement will be admissible wholly and the court cannot exercise a part of it because it is of a consessional nature. Where in a burglary case the accused in police custody made a statement to the police that he would show the place 'where he had hidden them', namely, the ornaments and that statement led to the discovery of the stolen ornaments, the Supreme Court held that the whole of the statement distinctly related to the discovery and was admissible under the section.14 The words 'whether it amounts to a confession or not' are to be read as qualifying the word 'information' in the immediately preceding context, not the words 'so much'; and the effect is that, although ordinarily a confession of an accused while in custody would be wholly excluded, yet if, in the course of such a confession, information leading to the discovery of a relevant fact has been given, so much of the information as distinctly led to this result may be deposed to, though, as a whole, the statement would constitute a confession which the preceding sections are intended to exclude.15

21. Admissibility against co-accused: Secs. 27 and 30. In some cases it was held that a confession admissible under Sec. 27 is not only evidence against the accused making it, but that it can also be taken into consideration against his co-accused under Sec. 30.16 But the Full Bench case of the Madras High Court has been overruled by their Lordships of the Privy Council in Pulukuri Kottaya v. Emperor.17 So far as the Bombay High Court is concerned, it has held that a statement by an accused admissible under Sec. 27 would not be admissible against his co-accused. Some of the other High Courts also have taken the same view.19 Statements by an accused which do not relate distinctly to the fact discovered thereby, but involve other accused are not admissible against the latter.20

Bom. I. R. 600; (1955) 1 M. L. J. (S.C.) 66; 1955 M.W.N. 146; Hanna v. State, 1957 Jab.L. J. 460; Murugan, In re, A.I.R. 1958 M. 451; Pakhar Singh v. State, A.I.R. 1958 Punj. 294; Delhi Administration v. Balakrishan, 1972 Cr.L.J.
1; 1972 U. J. (S.C.) 103; 1972 S.
C. Cr.R. 144; (1972) 1 S.C.J.
347; 1972 M.L.J. (Cr.) 205; A.I.R.
1972 S.C. 3; Public Prosecutor v.
V. Viswanathachari, 1972 Cr.L.J.
779; A.I.R. 1972 Gauhati 7 (By the fact discovered in consequence of information, it acquires hall-mark of truth).

14. K. Chinnaswami Reddy v. State of A.P., 1963 Andh.L.T. 111; 1963 A.W.R. (H.C.) 56; 1963 (1) Cr. L.J. 8: (1962) 2 Ker.L.R. 364: A. I. R. 1962 S.C. 1788, 1793; Dhoi v. State, 32 Cut. L. T. 1083, 1087 (theft of ornaments—ornaments concealed)

R. v. Jora Hasji, (1874)
 H.C.R. 242, 244, and see R. v.

Rama Birapa, (1878) 8 B. 12, 17. 16. Sankappa Rai v. Emperor, I.L.R.

31 Mad. 127: 18 M.L.J. 66; Emperor v. Shivabhai 1926 Bom. 513: 97 I.C. 660; Periya Swami Moopan v. Emperor, 1981 Mad, 177; I.L.R. 54 Mad. 75; 129 I.C. 645; Athappa Goundan v. Emperor, 1937 Mad. 618: I.L.R. 1937 Mad. 695: 171 I.C. 245 (F.B.); In re Pullannagari Rami Reddy, 1941 Mad. 238: 195 I. G. 53: 52 L.W. 420, but it cannot be treated as substantive evidence against the co-accused; (In re)
Mariappan, 1947 Mad. 264: I.L.R.,
1947 Mad. 433: 228 I.C. 153.
17, 1947 P.C. 67: 74 I.A. 65: I.L.R.

1948 Mad. 1: 230 I.C. 135.

Mathurdhana v. State, 1956 Bom.

Ramhit v. Emperor, 1922 All. 24: 65 I.C. 849: 23 Cr.L.J. 193: 20 A.L.J. 178; Satish Chandra v. Emperor, 1945 Cal. 137: I.L.R. (1944) 2 Cal. 76: 219. I.C. 310; Babulal v. Emperor, 1946 Nag. 180: I.L.R. 1945 Nag. 931: 222 I.C. 389.

20. (In re) Abdul Basha Sahib, 1941 Mad. 316: I. L. R. 1940 Mad. 1028; 193 I.C. 814.

- 22. Witnesses to recovery memo. It is not required that witnesses to a recovery memo under the section should be witnesses of the locality. Section 100 (old Section 103), Cr. P. C., does not in terms apply to such a recovery; it is confined only to searches made under Chapter VII of the Code of Criminal Procedure.21
- 28. Confession made after removal of impression caused by inducement, threat or promise, relevant. If such a confession as is referred to in section 24 is made after the impression caused by any such inducement, threat or promise has, in the opinion of the Court, been fully removed, it is relevant.
 - s. 3 ("Relevant"). s. 24. (Confession caused by inducement). s. 3 ("Court").

Steph. Dig., Art. 22; Roscoe, Cr. Ev., 16th Ed,. 45-46; Taylor, Ev., 878; 3 Russ. Cr. 458-463; Phipson, Ev., 11th Ed., 358; Wills, Ev., 3rd. Ed., 312; Field, Ev., 6th Edn., 107.

SYNOPSIS

- General, inducement. 4. Confession, whether voluntary, is a question of fact. Principle. 3. Confesson unaffected by original
- 1. General. The law relating to confessions is contained generally in Sections 24 to 30 of this Act and Sections 162 and 164 of the Code of Criminal Procedure. Section 24 excludes confessions caused by certain inducements, threats and promises. Section 27 is in the form of a proviso, and partially lifts the ban imposed by Sections 24, 25 and 26.

If the confession is caused by any inducement, threat or promise, as contemplated by Section 24 of the Act, the whole of the confession is excluded by Section 24.22 But, if such a confession, as is referred to in Section 24, is made after the impression caused by any such inducement, threat or promise has in the opinion of the Court, been fully removed, it is relevant and admissible as provided in this Section.

2. Principle. If a confession has been obtained from the prisoner by undue means, any statement made by him under the influence of that confession cannot be admitted as evidence.28 But a confession falling under this section is deemed to be voluntary, and is relevant, since it is the result of free determination, unaffected and uninduced by the original threat or promise.24

"Fully" means thoroughly, completely, entirely, so that no impression created by the inducement or torture be left.25

(Cr.) 134: 1966 Cr.L.J. 100: A.I. R. 1966 S.C. 119. 3 Russ. Cr. 458.

24. See notes, post and Introduction, ante; as also Sec. 24, ante; Steph-Dig. Art. 22.

25. Bhagirath v. State of M. P., A.I.R. 1959 Madh, Pra. 17: 1958 M.P.L. J. 745.

^{21.} State v. Mukandilal, 1967 Cur. L.J. 682: 69 Punj.L.R. 935, 939.

22. Aghnoo Nagesia v. State of Bihar, (1966) 1 S.C.R. 134: (1965) 2 S.C. A. 367: 1966 S.C.D. 202: (1966) 1 S.C.J. 193: (1965) 2 S. C. W. R. 825: (1966) 1 Andh. L. T. 430: 1965 A.W.R. (H.C.) 648: 1965 B. L.J.R. 865: 1966 M.P.L.J. 49: 1966 Mah.L.J. 113: 1966 M.L.J.

3. Confession unaffected by original inducement. The section forms an exception to the law provided by the twenty-fourth section1 and, being a qualification of that section, should be read together with it. The impression caused by inducement may have been removed by mere lapse of time, or by an intervening act, such as a caution given by some person of superior authority,2 to the person holding out the inducement. An inducement may continue to operate on a man's mind for a considerable time after it was made,3 but, on the other hand, it may be altogether removed by subsequent statements which precede the confession and which clearly inform the defendant that he must expect no temporal advantage from making one.4 Thus, where a Magistrate tells a prisoner that, if the latter would confess he would use his influence to obtain a pardon for him, but, afterwards, he receives a letter from the superior authority refusing the pardon, which letter the Magistrate communicates to the prisoner, a confession subsequently made is admissible.5 It is for the Court to decide, under all the circumstances of each particular case, whether the improper influence was totally removed before the confession was made. In this, as well as in other respects, the admissibility of the confession is a question for the Judge.6 This section cannot be applied where there is every reason to believe that the warning conveyed by the Magistrate did not remove the impression caused by the inducement.7 Where the court is satisfied that the influence had really ceased, the confession can be admitted.8

Ed., pages 360 et. seq.
3. Wills, Ev., 3rd Ed. 312, 313.
4. Ib. R v. Clewes. (1830) 4 C. & P.

7. Nazir v. Emperor, 1933 All. 31: I. L.R. 55 All. 91: 143 I.C. 67.

11th Ed., 358, and where held not to have ceased, see Roscoe, Cr. Ev., 16th Ed., 45: Phipson, Ev., ib. and R. v. Mst. Luchoo, 5 N.W.P. 86, 88 (1873) (Where a confession had been made upon the inducement held out by the police that nothing would happen if the prisoner confessed, and the prisoner made two different confessions, the one before the Magistrate and the other before the Sessions Judge, who accepted both confessions, but did not record any opinion on the point, the Appeal Court held that it was not prepared to say that the confession made before the Sessions Judge was made after the impression caused by the promise had been fully removed): Reg v. Navroji, 9 Bom.H.C.R. 358, 370 (1872) (where an inducement was held out to the prisoner in his house and he was immediately after taken to Traffic Manager of a Railway, in whose presence he signed a receipt for a certain sum of money, Sargent, C. J., held that it would be impossible to held that the impression was removed in the short interval which elapsed between the inducement and the signing of the receipt); R. v. Sherrington, (1838) 2 Lewin, C.C., 123; R. v. Ganesh, 50 C. 127; see also Shobha Param v. State of M. P., A. I. R. 1959 Madh. Pra. 125; 1958 M.P.L.J 752.

^{1.} R. v. Pancham, (1838) 4 A. 198, 201.

^{2.} R. v. Lingate, 1 Phillips, Ev., 414: Roscoe, 16th Ed., 45 (the prisoner on being taken into custody had been told by a person who came to assist the constable, that it would be better for him to confess, but on his being examined before the committing Magistrate on the following day, he was frequently cautioned by the Magistrate to say nothing against himself; a confession under these circumstances before the Magistrate was held to be clearly admissible): R. v. Bate, (1871) 11 Cox, C.C. 686; R. v. Rosier, 1 Phillips., Ev., 414; Roscoe, Cr. Ev., 16th Ed., 45; R. v. Howes, (1834) 6 C. & P. 404: see Phipson Ev., 11th Edn. 358: Norton Ev., 166, 167; as to the statutory form of caution see the Rules of the Judges formulated in 1912 cited in Phipson Ev., 11th

R. v. Clewes, (1830) 4 C. & P. 221;
 see also R. v. Howes, (1834) 6 C & P. 404. 6. 3 Russ. Cr. 458.

^{8.} For cases where the inducement has been held to have ceased, see Roscoe, Cr. Ev. 16th Ed., 45: Phipson, Ev.,

There ought to be good evidence to show that the influence had ceased. In R. v. Sherrington9, Patteson, J., rejected a second confession saying, "there ought to be strong evidence to show that the impression under which the first confession was made, was afterwards removed, before the second confession can be received. I am of opinion in this case, that the prisoner must be considered to have made the second confession, under the same influence as he made the first; the interval of time being too short to allow of the supposition that it was the result of reflection and voluntary determination." If a man is told by a person in authority that, if he gives a true account of the matter, he will be pardoned, that is a continuing offer, the thread of which continues unbroken until it is accepted by the confession which completes the bargain, unless there is some circumstance, which breaks it, as to show that the inducement no longer operates, and that the person confessing has no longer any hope of gaining anything from the authorities by making a confession. The question whether the confession was made after the impression caused by the inducement, threat or promise had been fully removed is one of fact and depends for decision on the facts and circumstances of each particular case. Where the accused was for 12 days in police custody, during which he had time to reflect, it was held, that this detention did not necessarily lessen the influence which had been brought to bear on him.11

In an English case, Regina v. Smith, 12 immediately after stabbing a fellow-soldier, the accused was, along with others in the regiment, put up on parade. The Sergeant told them that he would keep them there until he was told as to who killed the deceased. Then the accused confessed to the Sergeant about his stabbing the deceased. Next day he admitted the offence to a Sergeant of the Special Investigation Board. It was held, that the first confession had been tainted, but that the threat which had occasioned it, did not persist, when the second statement was made, because the effect of the original inducement had spent out. Therefore the second confession was held to be admissible.

- 4. Confession, whether voluntary, is a question of fact. A confession is extraordinary type of evidence. Under this Act, it is relevant and admissible, and can, in some cases, be used to found a conviction on it, provided it is not hit by any of the Sections 24, 25 or 26 of the Act. Thus, a confession is relevant and admissible, if the Court is satisfied that it has been made voluntarily, that is, after the impression, caused by any such inducement, threat or promise, as is referred to in Section 24, has been fully removed. Whether a confession is voluntary or not is a question of fact. 18
- 29. Confession otherwise relevant not to become irrelevant because of promise of secrecy, etc. If such a confession is otherwise relevant, it does not become irrelevant merely because it was made under a promise of secrecy, or in consequence of a deception practised on

 ^{(1838) 2} Lewin, G.C., 123, cited in Roscoe, Cr. Ev., 16th, Ed., 46; 3 Russ. Cr. 458,

Fatch Chand v. Emperor, 1925 All. 606: 86 I.C. 1001.

Naran v. Kutch Government, 1951
 Kutch 27: 52 Cr.L.J. 257.

^{12. (1959) 2} W.L.R. 623.

See Vali Isa Mahmed v. State, A. I.R. 1963 Guj. 135; 1963 Guj.L.R. 1052; following Sarwan Singh v. Stat: of Punjab. A.I.R. 1957 S.C. 637.

the accused person for the purpose of obtaining it, or when he was drunk or because it has made in answer to questions which he need not have answered, whatever may have been the form of those questions, or because he was not warned that he was not bound to make such confession, and that evidence of it might be given against him.

S. 3 ("Relevant.") S. 21 (Proof of admissions against per-S. 123 (Criminating answers). sons making them). S. 3 ('Evidence."

Steph. Dig. Art. 24; Taylor, Ev. ss. 881, 882; Roscoe, Cr. Ev., 16th Edn., 47; Phipson, Ev., 11th Edn., 356; Wills, Ev., 3rd Edn., 314; Phillips and Arnold, Ev., 420, 421; Norton, Ev., 167; Best, Ev., s. 529; Cr. P. C., (Act V of 1898), ss. 163, 343 (Secs. 163 and 316 of Cr. P. C. 1973); Wigmore, Ev., s. 823; Joy's Confessions, 50.

SYNOPSIS

Principle.

Scope.

3. Non-invalidating origins of a confession.

4. Promise of secrecy.

5. Deception.

Drunkenness. 7. Interrogation,

8. Want of warning.

1. Principle. In order that a confession should be invalidated, there must be an inducement operating to influence the mind of the accused either by hope of escape, or through fear of punishment connected with the charge. Such inducement must relate to the charge and reasonably imply that the position of the accused with reference to it will be rendered better or worse according as he does, or does not, confess. If the confession be obtained by any other influence, it will not be invalidated (though its weight may be affected,14 however much it would have been more proper not to have exerted such influence, and however much the statement itself may become liable to suspicion). The present section states certain non-invalidating origins of a confession. In none of the instances given is there any inducement, relating to the charge, held out to the accused.15 The circumstances mentioned do not affect the testimonial trustworthiness of the confession. A confession becomes relevant only when it is shown that it was voluntarily made and that it was true.16

Extra-judicial confessions made on three different occasions successively if found to be voluntary and witnesses proving them not discredited, can be held to be true.17

2. Scope. The opening words of this section are: "If such a confession". The opening words of the preceding Sec. 28 are: "If such a confession as is referred to in section 24." Grammatically it would appear

R. v. Spilsbury, (1836) 7 C. & P. 187: v. post; Best, Ev., s. 529.
 Norton, Ev., 167: see Sec. 24, ante: Taylor Ev., S. 881: Best Ev., s. 529: see notes to R. v. Gavin (1885) 15 Cox, 656; and R. v. Bracken-

bury, (1893) 17 Cox. 628. S. K. Banerjee v. D Banerji, 77 Cal. W.N. 94: A. I. R. 1974 Cal. 61 16. (S.B.).

Daskandha v. State, (1976) 42 C.
 L.T. 499; 1976 Cr.L.J. 2010.

that the confession, referred to in this section, is also such a confession as is referred to in Sec. 24. In other words, the confession referred to in both Sections 28 and 29 is the same, and the words "as is referred to in section 24" are omitted in this section only for the sake of brevity. The words "is otherwise relevant" may mean "relevant otherwise than as a confession," but, in the context of this section, it would appear that they mean "not irrelevant under the previous sections." In Emperor v. Jamuna Singh.18 Ray, J., has interpreted the opening clause of this section in the sense that this section covers the field of confessions other than those dealt with in its preceding sections, or in other words, extra-judicial confessions, so that there would be no clash between this section and Sec. 164 of Cr. P. C.; on the other hand, in Rangappa v. State;19 it has been held that, in the context, this opening clause refers to confessions which have been dealt with in the preceding sections and it postulates that they are admissible under the said sections. It is with such confessions that Sec. 29 deals.

- 3. Non-invalidating origins of a confession. The principle of testimonial untrustworthiness being the foundation of exclusions, the confessions should be taken into account unless their cause was such that the accused was likely to have been induced to untruly confess.20 The test of exclusion is: "Human nature being what it is, were the prospects attending confession (involving the equalization or averaging of the benefit of realizing the promise or the benefit of escaping from the threat, against the drawbacks moral and legal, of furnishing damaging evidence), as weighed at the time against the prospects attending non-confession (involving a similar averaging) such as to have created, in any considerable degree, a risk that a false confession would be made? Putting it more briefly and roughly, was the inducement such that there was any fair risk of a false confession?"21 The non-invalidating origins of a confession, which are mentioned in this section are:
 - (a) promise of secrecy;
 - (b) deception;
 - (c) drunkenness;
 - (d) interrogation;
 - (e) want of warning.

But there may be others. So what the accused has been overheard muttering to himself or saying to his wife, or to any other person in confidence, will be receivable in evidence.22

4. Promise of secrecy. This does not make the confession inadmissible, though a confidence is thus created in the mind of the prisoner and he

 ^{19. 1947} Pat. 305; I.L.R. 25 Pat. 612,
 19. 1954 Bom, 285; I.L.R. 1954 Bom, 484; 56 Bom.L.R. 115,
 20. Wigmore, Ev., S. 823.
 21. Wigmore, Ev., S. 824.

^{22.} R. v. Simons, (1834) 6 C. & P. 540; R v Sageena, (1867) 7 W. R. Cr. 56: but not what he had been heard to say in his sleep.

is thrown off his guard. A confession is not excluded because of any breach of confidence, or of good faith which may thereby be involved.23 It is a mistaken notion that the evidence of confessions and facts which have been obtained from prisoners by promises or threats is to be rejected from a regard to public faith; no such rule ever prevailed. Confessions are received in evidence, or rejected as inadmissible, under a consideration whether they are or not entitled to credit.24 The true question seems to be-does such confidence render it probable that the prisoner should be thus induced untruly to confess himself guilty of a crime of which he was innocent?25 Where A was in custody on a charge of murder, B, a fellow prisoner, said to him, "I wish you would tell me how you murdered the boy-pray split", and A replied, "Will you be upon your oath not to mention what I tell you," and B went upon his oath that he would not tell, and A then made a statement; it was held that this was not such an inducement to confess as rendered the statement inadmissible.1 Where the accused made a confession to an officer of his regiment, who promised secrecy, if truth were told, it was held that the confession was admissible.2

- 5. Deception. Obtaining of a confession by deception, if otherwise relevant, does not make it irrelevant. Where a prisoner in jail on a charge of felony, asked the turnkey of the jail to put a letter into the post for him, and after his promising to do so, the prisoner gave him a letter addressed to his father, and the turnkey, instead of putting it into the post, transmitted it to the prosecutor, it was held that the contents of the letter were admissible in evidence against the prisoner as a confession, notwithstanding the manner in which it was obtained.4 In another case, artifice was used to induce prisoner to suppose that some of his accomplices were in custody under which mistaken supposition he made a confession, and it was admitted in evidence.4
- 6. Drunkenness. Whether the prisoner be made drunk for the purpose, or with the motive, of getting a confession, or he makes the confession while he has made himself drunk, is immaterial. In all such and the like cases, the confession is equally receivable.
- 7. Interrogation. A confession cannot be rejected merely because it has been elicited by questions put to the prisoner, whoever (subject to the provisions of the twenty-fifth and twenty-sixth sections),6 may be the interrogator, and the form of the question is immaterial, it may be in a leading form

^{23.} Wigmore, Ev., S. 823 (a).

^{24.} R. v. Warickshall, (1783) 1 Leach

^{25.} Joy on Confessions, 50.

^{1.} R. v. Shaw. (1834) 6 C. & P. 372; R. v. Nabadwip, (1868) 1 B.L.R. Cr. 15, 23; and where a witness promised the accused that what the prisoner said should go no further, the confession was received; R. v. Thomas, (1837) 7 G. & P. 817.

^{2.} R. v. Mohammad Baksh, 4 Cr. L. J. 49: 8 Bom. L. R. 507.

^{3.} R. v. Derrington, (1826) 2 C. & P. 418; R. v. Nabadwip, supra.

^{4.} R. v. Burley, 1 Phillips and Arn. 420; see also R. v. Ramchurn, (1873) 20 W.R. Cr. 33 in which the decep-

tion practised consisted of statement made by the police officer to the prisoner that the latter's brother-inlaw had given out that he was

^{5.} R. v. Spilsbury, (1836) 7 C. & P.
187 in which case Coleridge, J.
said, "This (the fact that prisoner was drunk) is a matter of observation for me upon the weight that ought to attach to this statement when it is considered by the jury." See Best, Ev., s. 529.

^{6.} As to answers given to the police not amounting to a confession of guilt, see R. v. Nabadwip, 1868) 1 B.L.R. Cr. 15, 20.

or even assume the prisoner's guilt.7 In Ibrahim, v. R.8 Lord Sumner reviewed the earlier authorities, and observed that there was no settled practice with respect to the admissibility of confessions made by persons in response to questions put to them while in custody. His Lordship observed: "The English law is still unsettled, strange as it may seem, since the point is one that constantly occurs in criminal trials. Many Judges in their discretion, exclude such evidence, for they fear that nothing less than the exclusion of all such statements can prevent improper questioning of prisoners by removing the inducement to resort to it. This consideration does not arise in the present case. Others, less tender to the prisoner or more mindful of the balance of decided authority, would admit such statements, nor would the Court of Criminal Appeal quash the conviction thereafter obtained, if no substantial miscarriage of justice had occurred."

Apart from the cases, Rule 3 of the Judges' Rules, formulated in 1912, provided that persons in custody should not be questioned without the usual caution being first administered. The Royal Commission of Police Powers and Procedure in 1929 recommended that rigid instructions should be issued to the police that no questions (with unimportant exceptions) should be put to a prisoner in custody with reference to any crime or offence with which he was charged. This recommendation was adopted by the Home Secretary in a Police Circular issued with the approval of the Judges in 1930. In a case in the Calcutta High Court it was held that the mere fact that a statement had been elicited by a question did not make it irrelevant as a confession, though the fact that it was so elicited might be material to the question whether such statement was voluntary.9 And a confession elicited by the questions put by a Magistrate has been held admissible in England.10 In India, the law expressly provides for the examination of the accused person by the court.11 When the confession is contained in an answer given by a witness to a question put to him in the witness-box, the provisions contained in Sec. 132, post, must be borne in mind.

8. Want of warning. A voluntary confession, too, is admissible, though it does not appear that the prisoner was warned, and even though it appears on the contrary that he was not so warned.12 Section 164 (2) of the Code of Criminal Procedure provides that the Magistrate shall, before recording a confession made to him during the course of an investigation under Chapter XII of the Code, explain to the person making it that he is not bound to make a confession and that if he does so it may be used as evidence against him. There is a conflict of authority as to whether this provision overrides the present section. In some cases, it has been held, that Sec. 164 (2), Cr. P. C.. does not override the present section and that even if the provisions of Sec. 164 (2), Cr. P. C., are not complied with, the confession is admissible. In other words, according to them a confession otherwise admissible does not be-

Taylor Ev., s. 881.
 1914 P.C. 155: 23 1.C. 678: 18 C. W.N. 705: 1 L.W. 989.

Barindra v. R., (1969) 37 C. 467.
 R. v. Rets, (1834) 7 C. & P. 606;
 R. v. Ellis, I Ry. 5 I. 432; cited in · I.R. Cr. 15, R. v. 3

Cr. P. C. Sec, 342 old (S. 313)

^{12.} Taylor, Ev., ss. 881, 882; R. v. Nabadwip, (1868), 1 B.L.R. Cr. 15 the decision in which on this point has been followed by the present section.

come inadmissible merely because the accused was not warned that he was not bound to make the confession and that, if he does so, it may be used as evidence against him.18 In In re Karunthambi,14 it has been held, that though Sec. 29, Evidence Act, makes a confession made by an accused person who had not been warned according to the provisions of Sec. 164, Cr. P. C., admissible in evidence still the Court must find out how far such a confession can be acted upon. In Rangappa v. State15 also, it was observed that though mere noncompliance with the provisions of Sec. 164, Cr. P. C., does not render the confession inadmissible, if the irregularity appears to the Court to introduce an element of doubt as to whether the confession was voluntary, the Court would not hesitate to reject a confession as being inadmissible on the ground that it is not voluntary. In Emperor v. Jamuna Singh,16 Bennett, J. was inclined to the view that the direction in the opening words of Sec. 164 (3), Cr. P. C., 1898 [now Sec. 164 (2) of Cr. P. C., 1973] was not mandatory, but directtory only, and that that section and the present section could be read together. Ray, I., was of opinion that the present section should be taken to cover the field of confessions other than those dealt with in its preceding sections, or, in other words, extra-judicial confessions, and taken in this way there is no conflict between the section and Sec. 164, Cr. P. C. But this view has been expressly dissented from in Rangappa v. State.17 On the other hand, a Full Bench of the Orissa High Court has held that where the requirements of Sec. 164 (3), Cr. P. C., 1898 [now Sec. 164 (2) of new Cr. P. C., 1973] have not been substantially complied with, what purports to be a confessional statement cannot be treated as a validity recorded confession which could be made use of under Sec. 26, and there is thus no scope for invoking the aid either of the present section or of Sec. 533 (new Sec. 463), Cr. P. C., to cure the defect.18 As observed by Das, J., in the case last cited: "The position, therefore, as I conceive it, is that a magisterial confession can be proved only by the record of that confession, and that the record cannot go in against the accused at the trial, unless it is one that is made in substantial compliance with the provisions of Sec. 164, Cr. P. C., including the fair belief of the recording Magistrate as to the voluntary character of the confession, arrived at on a judiciál approach. But once the record goes in, it is for the accused to make out or for the Court to find the appearance of vitiating circumstances mentioned in Sec. 24 in order to exclude it." In a later decision,19 the Rajasthan High Court has held that although in view of the specific provisions of Sec. 29 the mere absence of warnings would not make the confession recorded under Sec. 164, Criminal Procedure Code inadmissible, the Court has to be satisfied that the accused knew that he was not bound to make the confession and that if he did so, it would be given in evidence against him before he made the confession. Also see the undernoted case.20

Vellamoonji Goundan v. Emperor,
 1932 Mad. 431; I.L.R. 55 Mad. 711;
 137 I.C. 863; Lal Singh v. Emperor,
 1938 All. 625; I.L.R. 1938 All. 875: 178 I.C. 694; Emperor v. Nanua, 1941 All. 145; I.L.R. 1941 All. 280: 193 I.C. 873; Rangappa v. State, 1954 Bom. 285; I. L. R. 1954 Bom. 484; 56 Bom. L. R.

^{14. 1950} Mad. 579; (1950) 1 M. L. J. 659: 1950 M.W.N. 293.

 ^{15. 1954} Bom. 285.
 16. 1947 Pat. 305; I.L.R. 25 Pat. 612.

^{17. 1954} B. 285.

Bala Majhi v. State of Orissa, 1951 Orissa 168; I.L.R. 1951 Cut. 65 (F.B.).

^{19.} Dhula v. State, A.I.R. 1957 Raj. 141: 1957 Raj. L. W. 223. 20. State of Orissa v. Jayadhar, 1975 Cut. L. R. (Cri.) 433: I. L. R. (1975) Cut. 1557.

The Criminal Procedure Code²¹ enacts that no police officer or other person shall prevent, by any caution or otherwise, any person from making in the course of any investigation under Chapter XII, any statement which he may be disposed to make of his own free will.

30. Consideration of proved confession affecting person making it and others jointly under trial for same offence. When more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the Court may take into consideration such confession as against such other person as well as against the person who makes such confession.

²²[Explanation. "Offence", as used in this section, includes the abetment of, or attempt to commit, the offence. 123

Illustrations

- (a) A and B are jointly tried for the murder of C. It is proved that A said: "B and I murdered C." The Court may consider the effect of this confession as against B.
- (b) A is on his trial for the murder of C. There is evidence to show that C was murdered by A and B, and that B said: "A and I murdered C." This statement may not be taken into consideration by the Court against A, as B is not being jointly tried.

s. 3 ("Court")

s. 3 ("Proved").

Norton, Ev., 169, Cunningham, Ev. 26, 27, 148.

SYNOPSIS

1. Principle. Scope of the Section.
 Evidence of accomplice. 4. Self-exculpatory or inculpatory statement of accused. (a) General. (b) When retracted. 5. Construction of the Section.6. "Trial jointly."7. Trial when begins. 8. Plea of guilty. (a) General. (b) Proper cause when one of the several accused pleads guilty. 9. "For the same offence." 10. The Explanation. "Confessions." 12. "Affecting himself and some others",

- 13. "Madey" 14. "Proved."
- 15. "Court".
- "May take into consideration." 16. How the confession can be used?

 - (a) General.(b) To corroborate other evidence.
 - (c) To corroborate approvers and accomplices.
 - (d) Nature and extent of corroboration required.
- 17-A. Use of statement of an accused against co-accused.

 - 18. Retracted confession. 19. "As against such other person as well as against the person who makes such confession."
- 20. Conclusion.
- 21. Sec. 163 (Act 2 of 1974). 22. Ins. by Indian Evidence (Amendment) Act 3 of 1891, S. 4.
- 23. Cf the Indian Penal Code (Act 45 of 1860), Explanation 4 to S. 108.

- 1. Principle. When a person makes a confession, which affects both himself and another, the fact of self-implication takes the place, as it were, of the sanction of an oath, or, is rather supposed to serve as some guarantee for the truth of accusation against the other.24 For, when a person admits his guilt and exposes himself to the pains and penalties provided therefor, there is a guarantee for his truth.25 To amount to such a guarantee, the statement must amount to a confession on the part of the maker with respect to the offence with which all are charged. The guarantee, however, is a very weak one, for, the fact of self-inculpation is not, in all cases, a guarantee for the truth of a statement, even as against the person making it, much less is it so as against another. Further, a confession may be true so far as it implicates the maker, but may be false and concocted through malice and revenge so far as it affects others. While such a confession deserves ordinarily very little reliance, it is nevertheless impossible for a Judge to ignore it, and he need no longer pretend to do so, the provisions of this section being inserted for the purpose of relieving him from the attempt to perform an intellectual impossibility.2 In the undernoted case,3 the Court observed: "We have not taken this confession into account against any of the co-accused, inasmuch as Habib certainly did not intend to implicate himself, though he actually did so." It is doubtful whether the Court laid this down as a point of law. But, if it did, the Act says "affecting himself" that is (it is submitted), affecting in fact whatever the intention may have been. The fact, however, that the confession was not intended to implicate the maker of it may go to the weight of the evidence.
 - 2. Scope of the Section. This section was introduced for the first time in this Act and marks a departure from the Common Law of England. The section applies to confessions, and not to statements which do not admit the guilt of the confessing party. It seems to be based on the view that an admission by an accused person of his own guilt affords some sort of sanction in support of the truth of his confession against others as well as himself. But, a confession of a co-accused is obviously evidence of a very weak type. It does not indeed come within the definition of "evidence" contained in Sec. 3 of the Act. It is not required to be given on oath, nor in the presence of the accused, and it cannot be tested by cross-examination. It is a much weaker type of evidence than the evidence of an approver which is not subject to any of those infirmities. This section, however, provides that the Court may take the confession into consideration and thereby, no doubt, makes it evidence on which

25. R. v. Daji, (1882) 6 B. 288, 291,

per West, J. 1. Bhadreswar v. R., 1928 Cal. 416 (2): 109 I.C. 351; R. v. Ganraj; (1879) 2 A. 444; the test is- is the statement sufficient by itself to justify the conviction of the maker; ib,

2. See remarks on this section in Cunningham's Evidence, 26, 27, 148. 3. Hayat v. Emperor, 1922 Lah. 119

(2): 68 I.C. 401,

^{24.} R. v. Belat. (1873) 19 W. R. Cr. 67; per Phear, J.; R. v. Jagrup, (1885) 7 A. 646, 648. per Straight. J.: "The object sought by the rule of law is a safeguard for sincerity and for information". R. v. Nur, (1883) 8 B. 223, 227; per West, J. Ill; Khuban v. Emperor, 1930 All. 29: 120 I. C. 257. For instances of application of the section see Radhi v. R. 1924 Nag. 27: 75 I. C. 701; Suka v. R. 1924 Pat. 347: 75 I. C. 705; Sheo Amber v. R. 1925 Oudh 295: 77 I. C. 439; (In re) Lilaram, 1924 Mad. 805; 81 I.C. 817; Sheroo v. R., 1925 Nag. 78: 81 I. C.

^{891;} Mahadeo v. R. 1923 All. 322; I.L.R. 45 All. 323; 76 I. C. 1025; Mahmud v. R. 1921 Sind 129; 81 I. C. 62; Ramhit v. R., 1922 All. 24; 65 I. C. 849.

the Court may act; but the section does not say that the confession is to amount to proof. Clearly, there must be other evidence. The confession is only one element in the consideration of all the facts proved in the case; it can be put into the scale and weighted with the other evidence.4

It may be that the confession made by a co-accused is a datailed statement and it may attribute to the other co-accused a major part in the commission of the offence. And it may also be that if the confession be found to be voluntary and true, so far as the part played by the accused making the confession himself is concerned and so it may be not unlikely that the confessional statement in regard to the part played by his other co-accused may also be true; and in that sense, the making of the confession may raise a serious suspicion against the co-accused persons. But the true legal approach must be adopted and suspicion, however grave, must not be allowed to take the place of proof. The confession of a co-accused person cannot be treated as substantive evidence. It can be pressed into service only when the Court is inclined to accept other evidence and feels the necessity of seeking for an assurance in support of its conclusion deducible from the said evidence. In criminal cases, there is no scope for applying the principle of moral conviction or grave suspicion. Where the other evidence adduced against an accused person is unsatisfactory, and the prosecution seeks to rely on the confession of a co-accused person, the presumption of innocence which is the basis of criminal jurisprudence assists the accused person and compels the Court to render the verdict that the charge is not proved against him, and so, he is entitled to the benefit of doubt.5 It is obvious that the confession of an accused cannot be used as a substantive piece of evidence against the co-accused.6 In dealing with a criminal case, where the prosecution relies upon the confession of one accused person against another accused person, the proper approach to adopt is to consider the other evidence against such an accused person and if the said evidence appears to be satisfactory and the Court is inclined to hold that the said evidence may sustain the charge framed against the said accused person, the Court should turn to the confession with a view to assure itself that the conclusion which it is inclined to draw from the other evidence is right. The principle is, that where there is evidence against the co-accused sufficient, if believed, to support his conviction, then the kind of confession described in this section may be thrown into the scale as an additional reason for believing that evidence.7 In other words, a confession of a co-accused can only be used to lend assurance to other independent evidence, sufficient for sustaining a conviction. If there is

Haricharan v. State of Bihar. (1964)
 S.C.R. 623: 1964 S.C.D. 956: (1964)
 S.C.J. 454: (1964)
 S.C. W.R. 446: I.L.R. 43 Pat. 544: 1964

 Public Prosecutor v. Shaik Ibrahim, A.I.R. 1964 A. P. 548: (1964) 2 Andh, W. R. 43.

 Dewan Chand v. The State, A.I.R. 1965 Orissa 66.

^{4.} Bhuboni Sahu v. The King. 1949 P.C. 257; 76 I.A. 147, the observations in which have been cited with approval in Kashmira Singh v. State of M. P., A.I.R. 1952 S.C. 159 and followed in subsequent decisions; see, for instance. Sudhir Chandra Das v. State, A.I.R. 1971 Tripura 8, 12 and 13.

B.L.J.R. 510: 1964 (2) Cr.L.J. 344: 1964 Cur.L.J. (S.C.) 208: 1964 M.L.J. (Cr.) 535: A.I.R. 1964 S.C. 1184: State of Rajasthan v. Chhuttanlal, 1970 Cr.L.J. 1206: I.L.R. (1969) 19 Raj. 747: Bhulakiram Koiri v. State, 73 C.W.N. 467: 1970 Cr.L.J. 403.

no indepedent evidence, establishing the guilt of the other co-accused, the confessional statement of one of them cannot be used against the others.8

The scope of this section was explained by the Supreme Court in Kashmera Singh v. State of Madhya Pradesh,9 as follows:

"Where there is evidence against the co-accused sufficient, if believed, to support his conviction, then the kind of confession described in Sec. 30 may be thrown into the scale as an additional reason for believing that evidence The proper way to approach a case of this kind is, first, to marshal the evidence against the accused excluding the confession altogether from consideration and see whether, if it is believed, a conviction could safely be based on it. If it is capable of belief independently of the confession, then of course it is not necessary to call the confession in aid. But cases may arise where the Judge is not prepared to act on the other evidence as it stands, even though, if believed, it would be sufficient to sustain a conviction. In such an event, the Judge may call in aid the confession and use it to lend assurance to the other evidence and thus fortify himself in believing what without the aid of the confession he would not be prepared to accept."

The Court must insist on independent evidence which, in some measure, implicates the other co-accused. The facts and circumstances must raise not a mere suspicion but prove beyond doubt the co-accused persons' complicity in the Mere suspicion is not proof, and the extra-judicial confession of an accused, involving the other co-accused, cannot be utilised against them in the absence of other independent evidence.10 Indeed, the confession of a co-accused is not evidence within section 3 of this Act. It can be considered under this section, only after other evidence has been considered and found to be satisfactory.11

The section does not limit itself to confessions made to Magistrates nor do the earlier sections do so. Hence there is no bar to its proper application to a statement containing admissions constituting guilt in answer to a notice under section 171A of the Sea Customs Act, 1878, if after scrutiny they are found to be voluntary.12 Confession made by a co-accused implicating himself and the accused can be used for the purpose of opposing the bail application of the accused.13

3. Evidence of accomplice. An accomplice, being a participant in the crime, his testimony suffers from infirmity, and casts doubt as to its truth-

Roshan Lal v. Union of India, A.I. R. 1965 H.P. 1.
 1952 S.G.R. 526: 1952 S.G.J. 201: 1952 A.W.R. 64: 1952 Gr.L.J. 839: (1952) 1 M.L.J. 754: 1952 M.W.N. 402: A. I. R. 1952 S. C. 159, 160; Budu Gouda v. State, A. I. R. 1965 Orissa 170: 31 Cut. I. T. 401: A. I. R. Orissa 170: 31 Cut.L.T. 401: A.I.R. 1965 Orissa 170.

^{10.} Budu Gouda v. State, 31 Cut.L.T. 401; A.I.R. 1965 Orissa 170.

Mohan Singh v. State, A.I.R. Punj. 291: 66 P.L.R. 1230.

^{12.} Haroon Haji Abdulla v. State of

Maharashtra, (1968) 2 S.C.R. 641; Maharashtra, (1968) 2 S.C.R. 641; 1968 S.C.D. 391: (1968) 2 S.C.J. 534: (1968) 1 S.C.W.R. 243: 70 Bom.L.R. 540: 1970 M.P.L.J. (S. C.) 537: 1968 M.L.J. (Cr.) 591: 1968 M.L.W. (Cr.) 116: 1968 Cr. L.J. 1017: A.I.R. 1968 S. C. 832, 835. The corresponding provision in the Customs Act, 1962, is in Section 108. the power now being conferred only on a Gazetted Officer of Cus-

^{13.} State of Bihar 7. Pyara Singh, 1973 B. L.J.R. 696,

fulness. Therefore, ordinarily, the Court should not accept his testimony unless there are other circumstances in the case, or other independent evidence lending assurance that the evidence given by the accomplice is truthful, unless there may be no necessity of any corroborative evidence, under the circumstances of a particular case. Each case would, however, depend upon its own facts. No hard and fast rule can be laid down. The usual rule of prudence, that has ripened more or less into a rule of law, is that an accomplice is unworthy of credit unless corroborated in material particulars by other evidence.14 The statement made by one accomplice is not strengthened by concurrent statements of any number of accomplices.15

The evidence of an accomplice, since he is a witness examined in the Court like any other witness, is a substantive piece of evidence, while the confession of a co-accused stands on a different footing, since it is not evidence within Section 3 of this Act. 16

4. Self-exculpatory or inculpatory statement of accused. (a) General. A self-exculpatory statement of an accused cannot be treated as a confession. It can be used only as an admission as against the person making it. It cannot be used as evidence at all against the other accused.17

Self-inculpatory statements of accused persons, however, amount to confessions and fall within this section. If however only a part is inculpatory and the rest exculpatory it cannot be relied upon either against them or against co-accused.18

(b) When retracted. Where the confession does not inculpate its author, it is not a confession which can be held admissible.19 A retracted confession made by an accused, which does not inculpate him in the offence, cannot be treated as evidence, against the other co-accused.20

A confession can only be taken into consideration against the co-accused under this section, which requires that the confession must implicate the maker

 Laxman Padma v. The State, I.L.R.
 1965 B. 648: A.I.R. 1965 B. 195: 67 Bom.L.R. 317; see Bhuboni v. The King, L.R. 76 I.A. 147; A. I.R. 1949 P.C. 257; Badri Ram Didwania v. State of Bihar, 1967 Cr.L. J. 1179 : A.I.R. 1967 Pat. 283, 284.

Yaqub Khan Ahmad Khan v. State of M.P., 1977 M.P.L.J. 523.
Laxman Padma v. The State, supra:

see also Haricharan v. State of Bihar, A.I.R. 1964 S.C. 1184; Kashmira Singh v. State of Madhya Pradesh, (1952) 3 S.C.R. 520: A.I.R. 1952 S.C. 159: 1952 Cr.L.J. 839: 1952 M.W.N. 402: 1952 A.W.R. (Sup.) 64: (1952) 1 M.L.J. 754. State v. Manindra Nath. A.I.R.

1960 C, 183; Irfan Ali v. State, 1970 All.Cr.R. 498; 1970 A.W.R. (H.

C.) 679 ': 1970 Cr. L. J. 603, 608 (evidence other than confession not sufficient in itself for finding of guilt); State v. Roop Singh, 1966 Raj.L.W. 382, 391; Emperor v. Chatterpal Singh, A.I.R. 1930 Oudh 502; Baldeo Gwala v. State of Assam, 1977 Cr. L.J. 1516.

 Baldeo Gwala v.
 1977 Cr. L.J. 1516. State of Assam,

19. Pakala Narayana Swami v. Emperor, A.I.R. 1939 P.C. 47; Balbir Singh v. State of Punjab. A.I.R. 1957 S.

C. 216: 1957 Cr.L.J. 481.

20. See Balbir Singh v. State of Punjab, supra; Rema Naik v. State, A.I.R. 1965 Orissa 31: 30 Cut.L.T. 517: State of Kerala v. Mathachan, 1969

Ker.L.T. 566.

substantially to the same extent as the other accused person against whom it is sought to be taken into consideration.²¹ The position of the retracted confession is a fortiori still worse.22

A confession, falling within the section, is admissible against the other accused, and can be taken into consideration not only against the maker of the confession but also against his co-accused, even though it is retracted against all. The amount of credibility to be attached to a retracted confession depends upon the circumstances of each particular case. It must, however, be corroborated.23

5. Construction of the Section. The general rule of English law24 and the rule, which prevailed in India prior to the passing of this Act,25 is and was, that confession of an accused person is only evidence against himself and cannot be used against others. This section forms an exception to this rule,1 It is a very exceptional, indeed an extra-ordinary, provision, by which something which is not evidence may be used against an accused person at his trial. Such a provision must be used with the greatest caution and with care to make sure that it is not stretched one line beyond its necessary intention.2 The grounds upon which it has been enacted have been adverted to; but the weakness of the guarantee afforded by self-implication and the dangerous and exceptional character of the evidence require that this section should be construed very strictly,2 and accordingly, such a construction has been applied to each of its terms. Thus it was held, that a person who pleads guilty is not being "tried jointly"; that the prisoners must be legally tried jointly, and at

Pakala Narayana Swami v. Emperor,
 A. I. R. 1939 P. C. 47; Balbir Singh v. State of Punjab, A. I. R. 1957 S.C. 216 at p. 223: 1957 Cri. L. J. 481. But see note 12, post. 22. Netar Pal v. The State, 1959 S. C.

^{22.} Netar Pal V. The State, 1959 S. C.
Punj. 397: 66 P.L.R. 530.

23. Ram Prakash v. The State, 1959 S.C.
R. 1219: 1959 S.C.A. 524: 1959
S.C.J. 181: I.L.R. 1959 Punj. 25:
1959 A.W.R. (S.C.) 152: 1959 Cr.
L.J. 90: 1959 M.L.J. (Cr.) 51:
A.I.R. 1959 S.C. 1, 3; In re Balan alias Balusami Mudale, 1973 Cr.L.J. 1311 (Mad.); State of Assam v. V. U. N. Rajkhowa, 1975 Cr. L. J. 354.

Roscoe, Cr. Ev., 16th Ed., 52. Taylor,
 Ev., S. 871. Phipson, Ev., 11th
 Ed., 354; Powell, Ev., 9th Ed. 113,

^{25.} R. v. Kally, (1866) 6 W.R. Cr. 84; R. v. Busiruddi, (1867) 8 W.R. Cr. 35; R. v. Durbaroo Dass, (1870) 13 W. R.Cr. 14: R v. Sadhu, (1874) 21 W.R.Cr. 69, 71: per Phear, J. The provision contained in the section is a new one there being no similar rule either in Act II of 1855, or in the Criminal Procedure Code of

^{1.} Coutts-Trotter. C J., of the Madras High Court thought that it was a

most unsatisfactory section, and was a needless tampering with the wholcsome rule of the English Law that a confession is only evidence against the person who makes it, Lilaram Gaganmull, in re. 1924 Mad, 805; 81 I.C. 817; 25 Cr. L.J. 1041;

²⁰ L.W. 202.

2. Periyaswami Moopan v. Emperor, 1931 Mad. 177; I.L.R. 54 Mad. 75: 129 I.C. 645: 32 Cr.L.J. 448: 59 M.L.J. 471: 1930 M.W.N. 858: 32 M.L.W. 527: followed in (In re) Malayara Seethu, 1955 Mys. 27: 1956 Cr.L.J. 372.

^{3.} Periyaswami Moopan v. Emperor, 1931 Mad. 177: I.L.R. 54 Mad. 75: 129 I.C. 645: 32 Cr.L.J. 448: 59 M.L.J. 471: 1930 M.W.N 858: 32 L.W. 527; (In re) Marudamuthu Padayachi, 1931 Mad. 820; I.L.R. 54 Mad. 788: 134 I.C. 63: 32 Cr.L.J. 1099: 61 M.L.J. 358: 1931 M.W.N. 886: 34 L. W. 162: Baboo Singh v. Emperor, 1936 Oudh 156: 159 I.C. 875: 37 Cr.L.J. 163: 1936 O.W.N. 64; (In re) Malayara Seethu, 1955 Mys. 27: 1956 Cr. L. J. 372; R. v. Jaffiir (1873) 19 W.R.Cr. 57, 64; per Glover, J. R. v. Malappa, (1890) 14 Ind. Jur, N. S. 19; see R. v. Sadhu (1874) 21 W. R. Cr. 69; Norton, Ev. 169.

the same time, that the words "same offence" exclude abetments and attempts; that the term "proved" is to be interpreted strictly; and that no weight is to be given to the confession as against any person other than the party making it, unless it is corroborated by independent testimony (v. post). This section must be read together with, and subject to, the provisions contained in Secs. 24-27, ante (v. post).

And it was held by the Madras High Court that under Sec. 27 and this section, a confession made by one accused can only be taken into consideration against another accused when such confession is the immediate cause of the discovery of some fact relevant as against the other accused, and a direction to the jury to take such a confession into consideration, when it is not the immediate cause of such a discovery, is a misdirection.4

6. "Tried jointly". It is not sufficient that the co-accused should be tried jointly; in fact they must be legally tried jointly.5 The section applies only to cases in which the confession is made by a prisoner tried at the same time with the accused person against whom the confession is used.6 Thus, if the person making the confession was dead, and was never brought to trial, his confession would not be admissible under this section as the confession of a co-accused.7 But where, during the course of a joint trial of two accused, one died, but before his death his confession had been put on the record, it was held that the confession could be used against the other accused.8 Where, in the course of a joint trial of two accused, the case of one of them is treated as a separate one, and there is no more a joint trial, the confession of one cannot be taken into consideration against the other at his separate trial.9 The confession of an approver can be used under this section only when he is being tried jointly with the prisoners, and not after he has become approver and removed from the dock.10

Where a person is fully tried jointly with another and dies before judgment is pronounced, his confessional statement becomes relevant under this section read with section 32 (3) post.11

7. Trial when begins. Under the Cr. P. C. of 1898 the trial began in a case exclusively triable by a Court of Session, only after the charge was framed by the committing Magistrate,12 and in a warrant case when the accused was

Sankappa v. R., (1908) 31 M. 127.
 M. L. J. 66.
 R. v. Jagat, (1894) 22 C. 50, 72, 73.

8. Ram' Sarup Singh v. Emperor, 1937

339: 41 C.W.N. 183.

9. Ramudu Iyer v. Emperor, 1923 Mad. 365: 72 I.C. 538: 24 Cr. L. J. 426: 44 M.L.J. 243: 17 L.W. 370.

- 10. Sheobhajan Ahir v. Emperor, 1921
 Pat. 499; 2 P.L.T. 125.

 11. Haroon Haji Abdulla v. State of
 Maharashtra, (1968) 2 S.C.R. 641;
 1968 S.C.D. 391; (1968) 2 S.C.J. 534: (1968) 1 S.C.W.R. Bom. L. R. 540: 1968 Cr.L.J. 1017: 1968 M.L.J. (Cr.) 591: 1968 M.L. W. (Cr.) 116: A.I.R. 1968 S. C. 832, 835.
- 12. Palaniandy Goundan v. Emperor, 32 Mad. 218; 1 I.C. 54; 9 Cr.L.J.

As to what persons may be tried jointly see S. 239, Cr. P. C. 1898 corresponding to Sec. 223 of Act 1973.

R. v. Jagat, (1894) 22 C. 50, 72, 73.
 Dengo Kandero v. Emperor, 1938 Sind 94; 175 I.C. 99; 39 Cr. L. J. 515; see also Achhay Lal Singh v. Emperor, 1947 Pat. 90: I.L.R. 25 Pat. 347: 228 I.C. 567: 48 Cr.L.J. 242: 27 P.L.T. 298: 1947 P.W.N.

called upon to plead to a charge.13 In a summons case, the trial may be said to begin when the accused is brought before the Magistrate.14 The wording of Sec. 271, Cr. P. C., 1898 (now Secs. 226 and 229 of 1973 Code) relating to trials before the High Courts and Courts of Session, indicated that the trial commences with the arraignment of the accused, that is to say when the charge is read out to the accused and he is called upon to plead it.15 A distinction must be drawn between trials in warrant cases and sessions trials. The word "trial" in Sec. 350, Cr. P. C., 1898 (now Sec. 326 of new Cr. P. C. of 1973), covers the whole of the proceedings in a warrant case,16 and it should be read in the same sense in the present section. The Legislature contemplated the taking of proceedings and the hearing of evidence against two or more men jointly, and not merely the concluding stage of the proceedings after the framing of the charge.

The position under the new Cr. P. C., 1973 with respect to commencement of a case exclusively triable by a Court of Session is changed. The Magistrate does not frame a charge in such a case. Under section 228 of new Cr. P. C. the Sessions Judge has the power to transfer the case to the Chief Judicial Magistrate, if in his opinion the offence is triable by a Magistrate. The trial in a case exclusively triable by a Sessions Court will begin only when under section 228 the Sessions Judge frames charge and calls upon the accused to plead to it.

8. Plea of guilty. (a) General. Such proceedings and such taking of evidence cannot be said to occur in a Sessions Court against a man who pleads guilty at the outset and is convicted, and the distinction, therefore, is more apparent than real. Where one of the accused confesses, but wishes to produce evidence in mitigation of sentence, and so the Magistrate convicts and sentences him forthwith, the confession can be taken into consideration against the co-accused.17

Upon the question, whether, if one of several prisoners pleads guilty, such person can be held to be "tried jointly" with the rest so as to let in his confession against the others who have claimed a trial, three positions arise:

(i) A prisoner pleads guilty at the trial and is thereupon convicted and sentenced; in such a case, he cannot be said to be jointly tried with the other prisoners committed on the same charge who plead not guilty;18

13. Manna v. Emperor, 9 N.L.R. 42: 19 I.C. 326: 14 Cr. L. J. 230.

Sitao Jholia v. Emperor, 1943 Nag. 36 at 49; I.L.R. 1943 Nag. 73: 205 I.C. 161; 44 Cr.L.J., 287; 1948 N.L. J. 16.

^{15.} Per Cornish, J., in Emperor v. John McIver 1936 Mad. 353 at 357: 162 I.C. 592: 37 Cr.L.J. 637: 70 M.L. J. 635: 1936 M.W.N. 281: 43 L. W. 548.

^{16.} Sahibdin v. Emperor, 1922 Lah. 49:

^{1.} L. R. 3 Lah. 115; 23 Cr. L. J. 830. 17. Fakhruddin v. Emperor. 1925 Lah. 435; I. L. R. 6 Lah. 176; see also Ram Kishan v. Emperor. 1928 Lah.

^{880; 111} I.C. 387; 29 Cr.L.J. 835. 18. R. v. Kalu, (1874) 11 Bom. H. C. R. 146: Venkatasami v. R., (1883) 7 M. 102; Weir, 3rd Ed., 491; R. v. Chand, (1890) 14 Ind. Jur. N.S. 125; R. v. Pirbhu, (1895) 17 A, 524; (1895) A.W.N. 111; it is not quite clear whether in the three last-mentioned cases the prisoners were immediately convicted and sentenc-ed on pleading guilty, but it seems so; R. v. Chinfia, (1899) 23 M. 151, 154; Mohammad Yusuf v. Emperor, 1931 Cal. 341; I.L.R. 58 Cal. 1214; 131 I.C. 142; 32 Cr.L.J. 667; 35 C.W.N. 490.

- (ii) the prisoner's plea of guilty is not accepted by the Court; in such case, such prisoner is still being jointly tried with the rest, 19 for a criminal trial does not end with a plea of guilty, 20 all that is incumbent on the Court is to record the plea of guilty, and it is not obligatory on the Court to convict the prisoner on his plea of guilty, conviction on a plea of guilty being discretionary; 21
- (iii) a co-accused pleads guilty and the Court accepts the plea and directs his removal from the dock and the trial proceeds against the remaining prisoners; in such case a confession made by him is not admissible against the other accused under this section.²²

There may, however, be a doubt, where none of these courses has been explicitly adopted, but the accused who has pleaded guilty is left in the dock merely to see what the evidence will show as against him, though the Court intends ultimately to convict him on the plea of guilty. In such a case, it would not be fair to allow his confession to be considered as against his coaccused, for that would be in effect to comply with the form of justice while violating it in substance.23 The mere fact that a prisoner, who has pleaded guilty, is not immediately convicted and sentenced, but is kept in the dock with the prisoners who are being tried, until the close of their trial, cannot render his confession admissible, for immediate conviction and sentence are not necessary to exclude a confession by a co-prisoner who has pleaded guilty.24 So, where the Judge keeps the prisoner in the dock, unconvicted and unsentenced, merely because of the possibility that the evidence elicited at the trial might enable the Court to determine whether to pass a sentence of death or transportation, his confession cannot be considered as against his co-accused, transportation for life, his confession cannot be considered as against his coaccused, as there is, in fact, under such circumstances after the plea of guilty, no joint trial.25

In a case in the Madras High Court, a distinction was drawn between a trial before a Sessions Court where a prisoner, who pleads guilty at the outset and is convicted on his plea, cannot be tried jointly with others against whom the trial proceeds, and a trial before a Magistrate. In this case, all the

Confirmation case No. 22 of 1893;
 cited in R. v. Pahuji, (1894) 19
 Bom. 195, 198; R. v. Chinna, (1899)
 M. 151.

R. v. Chinna, (1899)
 dissenting from R. v. Lakshmayya, (1899)
 M. 491.

21. Shanker v. Emperor, 1926 All, 318: 93 I.C. 241; 27 Cr.L.J. 449; 24 A. I. J. 318; R. v. Chinna, 23 Mad. 151; Laxmya Shiddappa v. Emperor, 1917 Bom. 220; 40 I.C. 699; 18 Cr. I. J. 699; 19 Bom. L.R. 356; Hasaruddin v. Emperor, 1928 Cal. 775; Gobrey v. Emperor, 1943 Oudh 409; 208 I.C. 397; 44 Cr.L.J. 775; 1943 O.W.N. 312.

R. v. Keramat. (1911) 38 C. 446:
 12 I.C. 87: 16 C.W.N. 49.

R. v. Chinna. (1899) 23 M. 151, 154; R. v. Paltua. (1900) 23 A. 53; R. v. Kheoraj, (1908) 30 A. 540: 5
A.L.J. 505: 8 Cr.L.J. 380; but see first case; Mahadeo v. R., 1923 All. 322: I.L.R. 45 All. 323: 76 I.C. 1025: 25 Cr.L.J. 305: 21 A.L.J. 179; Mahammad Yusuf v. Emperor, 1931 Cal. 341: 131 I. C. 142: Amdu Miyan v. Emperor, 1937 Nag. 17: 166 I.C. 582, 587: 38 Cr. L.J. 237, 251 (F.B.); and as to English rule on this point see R. v. Gould, (1840) 9 C. & P. 364.
24. R. v. Pahuji, (1894) 19 B. 195, 197; see Subrahmania v. R., (1901) 25

24. R. v. Pahuji, (1894) 19 B. 195, 197; see Subrahmania v. R., (1901) 25 M. 61 when an accused person pleads guilty nothing remains to be tried as between him and the Grown but see R. v. Kalu. (1874) 11 Bom. H.C.R. 146; R. v. Ram Saran, (1886) 6 A.W.N. 259.

25. lb.

accused were tried jointly before the Magistrate and some confessed the crime and implicated their co-accused in statements under Sec. 347 of the Criminal Procedure Code (Act V of 1898) (Sec. 323 Cr. P. C. 1973), and after their statements had been recorded and the evidence for the prosecution closed, pleaded guilty under Sec. 255 of that Code (Sec. 246 of new Cr. P. C. of 1973); it was held that these statements were admissible under this section.¹

A confession, made by a co-accused with B in a dacoity case, is not admissible under this section against B in a proceeding under Sec. 110, Cr. P. C., 1973, though admissible against him as well as against the confessor in the dacoity case,² even if the co-accused be his son.³

(b) Proper course when one of the several accused pleads guilty. When one of several prisoners pleads guilty and the plea is accepted, the proper course for the Court, before whom the trial of the other is pending, is to sentence him and either to put him aside,4 or to remove him from the dock and call him as a withness,5 but it is improper to leave him in the dock unconvicted merely to see what the evidence will show,6 or to keep him in the dock (whether he be convicted or not), and either to read out his confession made previously, or to allow a person to give an account of what the prisoner had told him,7 or to take a statement which he makes.8

But the Court has a discretion to accept the plea or not, and the Court may not act on a plea of guilty, even if it is satisfied that the accused has fully understood the charge and the implications of the plea, and hold it desirable to hold a trial, exercising the discretion given to it under Sec. 229, Cr. P. C., 1973 in favour of the accused. Such cases may be even of murder.9 In such cases, the plea remains a plea of guilty, and the

 Allahadia v. State, 1959 A. L. J. 840.

 R. v. Kalu Patil, (1874) 11 Bom. H.G.R. 146; R. v. Chinna Pavu chi, (1899) 23 M. 151.

Venkatasami v. R., (1883) 7 M.
 102, 104; R. v. Pahuji, (1894) 19
 Bom. 195, 197, 198; R. v. Chinna, supra; Quaere: whether co-accused can be examined as a witness after conviction and before sentence, see

R. v. Annaya, (1901) 3 Bom.L.R. 437. Where two prisoners are tried together for different offences committed in the same transaction, it is improper and illegal to examine one prisoner as a witness against the other. In the matter of A. David, (1880) 6 C.L.R. 245, referred to in Bishnu Banwar v. R., (1896) 1 C.W.N. 35.

R. v. Pahuji, supra, R. v. Chinna, (1899) 23 M. 151, 154; but see R. v. Kalu, supra; R. v. Ram Saran, (1886) 6 A.W.N. 259.

Venkatasami v. R., supra, 103.
 R. v. Pirbhu, 17 A. 524: (1895) A. W.N. 111.

9. Emperor v. Chinia, (1906) 8 Bom. L.R. 240; Laxmya Shiddappa v. Emperor, 1917 Bom. 220; 40 I.C. 699; 19 Bom. L. R. 356; Abdul Kader v. Emperor, 1947 Bom. 345; 229 I.C. 244; 48 Cr. L. J. 329; 49 Bom. L.R. 25; sce also Lahori v. Emperor, 1925 All. 647; 89 I. C. 260; 23 A.L.J. 587; Hasaruddin Mohammad v. Emperor, 1928 Cal. 775; 115 I.C. 582; Achar Sanghar v. Emperor, 1934 Sird 204; 153 I.C. 288.

Bali Rcddy (in re), 1914 Mad. 45;
 1.L.R. 38 Mad. 302: 22 I.C. 157;
 15 Cr.L.J. 13; per Ayling, J., distinguishing R. v. Pahuji, (1894))
 19 B. 195 and R. v. Pirbhu, (1895)
 17 A. 524 as relating to trials before Sessions Courts, and R. v. Lakshmayya. (1899) 22 M. 491, as based on them; see also Fakruddin v. Emperor, 1925 Lah. 435; I.L.R. 6 Lah. 176; Ram Kishan v. Emperor, 1928 Lah. 880: 111 I.C. 387; 29 Cr. L. J. 835; I.L.R. (1974) 2 Delhi 706.
 Mafizuddin v. R., 1921 Cal. 557; 61 I.C. 793; 22 Cr.L.J. 441; 25 C.

Mafizuddin v. R., 1921 Cal. 557;
 61 I.C. 793; 22 Cr.L.J. 441; 25 C.
 W.N. 239; (1921) 33 C.L.J. 70
 and see Amirullah v. R., 1919 Cal,
 69; 49 I.C. 649; 20 Cr.L.J. 201;
 (1917) 22 C.W.N. 408.

trial proceeds for the purpose of ascertaining the circumstances which had resulted in the death, and to find out whether the accused can, in law, be said to have committed murder.10 If the plea of guilty is not accepted and the court proceeds with the trial, the accused does not cease to be an accused, and there is a joint trial of all the accused within the meaning of this section. And any confession, made by the accused pleading guilty, may be used against the other accused.11 The co-accused can challenge the plea of guilty.12

- 9. "For the same offence". The meaning of this expression is an offence coming under the same legal definition, out of the same transaction,18 or the same substantive offence,14 or the same specific offence.15 The words "same offence" mean an identical offence, and not an offence of the same kind. So, where two persons are jointly tried, one for an offence under Sec. 457/380, Penal Code, and the other for an offence under Sec. 411 of the Penal Code, they cannot be said to be tried for the same offence, and a confession made by one of them cannot be taken into consideration against the other. 16 In a Madras case, it was held, that persons under trial for a major offence should also be deemed to be charged with and tried for any minor offence or offences, constituted by the particular ingredients of the major offence which may be proved.17 But, this has been dissented from in Gangavva, in re,18 in which two persons were accused of an offence under Section 302, I.P.C., arising out of a single transaction, but one of them made a confession of an offence under Sec. 201; the confession of that one person, it was held, could not be used against the other, with regard to the charge under Sec. 302.19
- 10. The Explanation. Prior to the insertion of the Explanation to this section, the commission of an offence and the commission of its abetment were held to be different offences. Thus, it had been held that, upon the trial of A for murder, and of B for abetment thereof, a confession by A implicating B could not be taken into consideration against B under this section.20 Act III of 1891 has, however, by the insertion of the Explanation to this section, altered the law in this respect. But this Explanation applies only to cases where one person is charged with an offence, and another is actually charged with and tried for, abetment of it,21 or attempt to commit it. Where there

Per Rajadhyaksha, J., in Abdul Kader v. Emperor, 1947 Bom. 345, 359: 229 I.C. 244.

Pahuji, I.L.R. (1894) 19 Bom, 195. Mahadeo v. The King, 1936 P.C. 242: 163 I.C. 681: 38 Bom. L. R.

1101.

R. v. Malappa, (1890) 14 Ind. Jur. N.S. 19, 20; R. v. Nur Mohd., (1883) 8 B. 223, 226; Bhansali Babu v. State of Kutch, 1951 Kutch 74; 52 Cr. L. J. 1473; Bhagi v. Crown, 1950 H.P. 35; 51 Cr.L.J. 1004.

14. Badi v. R. (Infra): see also Deputy Legal Ramembrancer v. Karuna,

(1894) 22 C. 164, 173.

Badi v. R., (1884) 7 M. 579: 2
 Weir. (1886) 742; R. v. Malappa,

Kundan v. Emperor, 1948 Sind 65: 49 Cr. L. J. 207; Gour Chandra v. King-Emperor, 1929 Cal. 14: 115 I.G. 359.

Manick Padayachi (in re), 1921 Mad, 490; 72 I.C. 497; 14 L.W. 474. 1946 Mad. 124; I.L.R. 1946 Mad. 593; 224 I.C. 74; (1945) 2 M.L.J. 479; 1945 M.W.N. 722.

 R. v. Nur Mohd. (1883) 8 B. 223.
 Badi v. R., (1884) 7 M, 579; and see R. v. Jaffin, (1873) 19 W. R. Cr. 57; Badi v. R. (supra); R. v. Amrita, (1873) 10 Bom. 497, 499.

Deputy Legal Remembrancer v. Karuna, (1894) 22 C. 164, 173.

Shanker v. Emperor, 1926 All. 318; 93 I.C. 241: 24 A.L.J. 318; R. v. Paltua, I.L.R. 23 All. 53; R. v. Chinna, I.L.R. 23 Mad. 151; R. v.

is a joint trial of accused persons under entirely different sections of the Penal Code, the confession of a co-accused cannot be taken into consideration against the other.22 But, if a joint trial has commenced in which the prisoners are charged under different sections, and afterwards the charge is altered, so that all the prisoners are then tried under the same section, their confessions may be admissible against each other. Thus, where A and B were being jointly tried before a Court of Session, the first for murder, and the second for abetment of murder, a confession made by A that he himself had committed the murder, at the instigation of B, was put in as evidence against A. Subsequently, the charge against A was altered to one of abetment of murder, and the Sessions Judge under the authority of this section, used the confession against both and convicted them. The High Court held that the original and amended charges were so nearly related that the trial might, without any unfairness, be deemed to have been a trial on the amended charge from the commencement; and that no objection having been taken by B, who was represented by a Vakil, to the admissibility of A's confession against him when the charge against A was altered, the Sessions Judge was justified in using the confession against B also.23

Persons against whom proceedings are being jointly taken under Sec. 116 Cr. P. C., 1973 (Sec. 117, Cr. P. C., 1898), in one and the same inquiry cannot be said to be on their joint trial for the same offence within the meaning of this section.²⁴

In proceedings under Sec. 110, Cr. P. C., 1973, against two persons, a confession made by one of them when they were co-accused in another case cannot be used against the other.²⁵ A confession made by an accused being tried for an offence under Sec. 411, I. P. C., cannot be used against another accused who is being tried under Sec. 414, Penal Code.¹ Where certain persons were being tried for an offence punishable under Sec. 201, Penal Code, and one of them was also charged with an offence under Sec. 304 of the Code, it was held that they were all tried jointly for the offence under Sec. 201, and that a confession made by one of them that the offence under that section was committed, could be read against the other accused.²

11. "Confession". As has already been observed this section was introduced for the first time in the Evidence Act of 1872, and marks a departure from the Common law of England. It will be noticed that the section applies to confessions, and not to statements which do not admit the guilt of the confessing party.³ If the accused does not incriminate himself in the case, the statement cannot be said to be a confession.⁴

R. v. Bala (1880) 5 B. 63; R. v. Amrita, (1873) 10 Bom. H.C.R. 497, 499; Deputy Legal Remembrancer v. Karuna, (1894) 22 C. 164, 73; Badi v. R. (1884) 2 Weir, 742; R. v. Malappa, (1890) 14 Ind. Jur. N. S. 19.

^{23.} R. v. Govind, (1874) 11 Bom. H. C. R. 278.

Sarju v. Emperor, 1919 All. 220:
 I.I. R. 41 All. 231; 49 I.C. 654;
 but see Richpal Singh v. Emperor, 1934 All. 927; 152 I.C. 881; 1934 A.
 L.J. 1170.

Mafizuddin Khan v. Emperor, 1921
 Cal. 557; 61 I.C. 793; 25 C.W.N.

^{239;} see also Amirullah Pramanik v. Emperor, 49 I.C. 649; 22 C.W. N. 408.

Mewo Badal v. Emperor, 1936 Sind 236: 166 I.C. 37.

Mirza Zahid Beg v. Emperor, 1933 All, 91; 173 I.C. 838; 1937 A.L.J. 1253.

Bhuboni Sahu v. King, 1949 P.C. 257; 76 I.A. 147; 51 Bom.L.R. 955.

Sohar Singh v. State of Bihar, 1966
 B.L. J.R. 861, 866; Krishna Narain
 v. State of U. P., 1976 All Cr. C.
 46; 1976 All L.J. 321; 1976 Cri. L.
 J. 503.

The word "confession" must be construed as meaning the same in this section as in the twenty-fourth, twenty-fifth and twenty-sixth sections.5 'The subject of incriminatory statements which fall short of full admissions of guilt has been already dealt with. To use the words of Mr. Justice Straight:

"What was intended by Sec. 30 was that where a prisoner-to use a popular phrase-'makes a clean breast of it', and unreservedly confesses his own guilt, and at the same time implicates another person who is jointly tried with him for the same offence, his confession may be taken into consideration against such other person as well as against himself, because the admission of his own guilt operates as a sort of sanction which to some extent takes the place of the sanction of an oath, and so affords some guarantee that the whole statement is a true one. But where there is no full and complete admission of guilt, no such sanction or guarantee exists, and for this reason the word 'confession' in Sec. 30 cannot be construed as including a mere inculpatory admission which falls short of being an admission of guilt."6

It was at one time thought that the word "confession" includes a statement by an accused "suggesting the inference that he committed" the crime but now it is settled law that a confession must either admit in terms the offence, or, at any rate, substantially all the facts which constitute the offence. A statement that contains self-exculpatory matter cannot amount to a confession, if the exculpatory statement is of some fact which, if true, would negative the offence alleged to be confessed.7

A mere admission, from which no inference of guilt follows, is not within this section,8 though it implicates others, and is evidence, therefore, only against the maker. Before a statement can be taken into consideration against a fellow prisoner, it must amount to a "confession" on the part of the maker with respect to the offence with which all are charged.9 A statement of an accused person, "taken with the other evidence might well seem to establish the case against him. But when the statement is to be used against

R. v. Jagrup, (1885) 7 A. 646, 648.
 R. v. Jagrup, (1885) 7 All. 646: (1885) 5 A.W.N. 131; Sheo Ambar v. Emperor. 1925 Oudh 295: 77 I.

^{7.} Pakala Narayana Swami v. Emperor. 1939 P.C. 47, 52; 66 I.A. 66; I.L.R. 1939 Kar. 123; I.L.R. 18

Pat. 234: 180 I.C. 1.

8. Sheo Ambar v. R., 1925 Oudh 295: 77 I.C. 439.

R. v. Mohesh. (1873) 19 W.R. Cr. 16; R. v. Jaffir, (1873) 19 W.R. Cr. 57; R. v. Belat, (1873) 19 W.R. Cr. 67; R. v. Amrita, (1873) 19 W.R. Cr. 67; R. v. Amrita, (1873) 10 Bom. H.C.R. 497, 500, 501; R. v. Kukree, (1874) 21 W.R. Cr. 48; R. v. Banwaree, (1874) 21 W. R. Cr. 53; R. v. Naga. (1875) 23 W.R. Cr.

^{24;} R. v. Keshub. (1876) 25 W. R. Cr. 8; R. v. Baijoo. (1876) 25 W. R. Cr. 43; R. v. Ganraj, (1879) 2 A. 444; R. v. Mulu. (1880) 2 A. 646; R. v. Daji. (1882) 6 B. 288; Noor v. R., (1880) 6 C. 279; Bishan v. R., (1904) 2 All L.J. 53; Sital v. R., 46 C. 700; 54 I.C. 53: A.I.R. 1920 C. 300, cited under Sec. 10 Quaerc-As to the correctness of the decision of R. v. Bakur Khan, (1873) 5 N.W.P. 213, the statement in which case, it is submitted, did not amount to a confession; Shahebar Ma v. R. (1913) 18 C.L.J. 590; Krishna Narain v. State of U. P., 1976 All Cr. C. 46: 1976 All L. J. 321; 1976 Cri.L.J. 503.

those jointly charged and tried with him, it must be a confession in the strict sense of the term. Its inherent quality must be that of a confession". Where the inherent quality of the statement by the prisoner is not a confession, it cannot be used against the other accused.10 "This Court has already had occasion in more than one case to point out that confessions which are made use of under the thirtieth section of the Evidence Act, in the first place, can only be used so far as they make the confessing prisoner guilty of the offence for which all are being tried, and, secondly, cannot stand higher than the evidence of an accomplice."11 The test which Sec. 30 of the Evidence Act intended should be applied to a statement of one prisoner proposed to be used in evidence as against another, is to see whether it is sufficient by itself to justify the conviction of the person making it of the offence for which he is being jointly tried with the other person or persons against whom it is tendered. In fact, to use a popular and well understood phrase, "the confessing prisoner must tar himself and the person or persons, he implicates, wits one and the same brush."12

To render the statement of one person, jointly tried with another for the same offence, liable to consideration against that other, it is necessary that it should amount to a distinct confession of the offence charged, and for which they are being tried jointly. The test is to see, whether the statement of one prisoner, proposed to be used in evidence against another, is sufficient, by itself, to justify the conviction, of the person making it, for the offence for which he is jointly tried with the other person against whom it is tendered, and this is in accord with the decision of the Privy Council cited above. A plea of guilty under Sec. 229 [27] (2)], Cr. P. C., 1898, is not a confession, such as is dealt with in the Act in respect of relevance or irrelevance. It is a statement which, if accepted by the Court, amounts to a waiver on the part of the accused of trial in which a confession might be utilized in evidence. As to whether a statement admissible under Sec. 27 is admissible against a co-accused, see notes under Sec. 27, ante.

A statement by an accused under section 164. Cr. P. C., admitting his presence at the place of occurrence but exculpatory in nature does not amount to

R. v. Amrita, (1873) 10 Bom.H.C.
 R. 497, 500, 501: the passage in quotation marks as per West. I.

tation marks as per West, J.

11. R. v. Naga, (1875) 23 W.R. Cr. 24 per Phear, J.

12. R. v. Ganraj, (1879) 2 A. 444 at p.

^{12.} R. v. Gantaj. (1879) 2 A. 444 at p. 446 per Straight, J., the same argument was offered, but not accepted in R. v. Bakur, 5 N.W.P. 213; Raghunath v. Emperor, 1926 Nag. 119: 89 I.C. 516; Dr. Jainand v. Rex., 1949 All. 291: 1949 A.L.J. 60: 1949 A.W.R. (H.C.) 13; Ram Bharose v. Rex., 1949 All. 132: 50 Cr.L.J. 144.

^{13.} R. v. Daji. (1882) 6. B. 288, and see Shankappa v. R., (1908) 31 M.

Mohammad Sabir v. R., 1950 A.
 W.R. 238; 1950 A.L.J. 140; Dr.

Jainand v. R., 1949 All. 291: 1949 A.L.J. 60: 1949 A.W.R. (H.C.)
13; Bhadreshwar v. Emperor, 1928 Cal. 416 (2): 109 I.C. 351; Mangal Singh v. Emperor, 1937 Lah. 127: I.L.R. 17 Lah. 547: 167 I.C. 861; Periyaswami Moopan v. Emperor. 1931 Mad. 177: I.L.R. 54 Mad. 75: 129 I. C. 645; (In re) Gangavva, 1946 Mad. 124: I.L.R. 1946 Mad. 593: 224 I.C. 74 (dissenting from Manicka Padayachi, in re, 1921 Mad. 490: 72 I.C. 497: 14 L.W. 474); Tikaram v. Emperor, 1939 Nag. 309: 184 I.C. 258: 40 Cr. L. J. 934: 1939 N.L.J. 469.

Sheo Charan v. Fmperor, 1926 Nag. 117: 90 I.C. 385: 21 N. L. R. 88.

Shyama Charan v. Emperor, 1934
 Pat. 330, 334; 151 I.C. 393.

a confession. What the accused stated against the other accused cannot be used as evidence against them.¹⁷

12. "Affecting himself and some others". From consideration of the principle upon which this kind of evidence is admitted, it is plain that a statement, which entirely exonerates the maker and inculpates his fellow-prisoner, is not within the section, 18 inasmuch as it does not amount to a confession of the maker's own individual guilt of the offence for which he and the others are jointly tried; nor is such a statement one which affects himself and others but the latter only. Such a statement can afford no guarantee whatever of its own truth, being made without either the sanction of an oath, or of that substitute for that sanction which consists in the self-inculpation of the maker, in short, without the application any test of truth whatever. 19

The section covers the case where the confession indirectly affects a co-accused.²⁰ There is a divergence of opinion as to the extent to which the confession must affect the maker. In some cases, the rule has been stated to be as—"that before a confession of a person jointly tried with the prisoner can be taken into consideration against him, it must appear that that confession implicates the confessing person substantially to the same extent as it implicates the person against whom it is to be used, in the commission of the offence for which the prisoners are being jointly tried".²¹ It is this self-implication, which is supposed to afford a guarantee for the truth of the statement.

Again, "this section must be interpreted to mean that the statement of fact made by the prisoner, which amounts to a confession of guilt on his part, may be taken into consideration, so far, and so far only, as that particular statement of fact itself extends against the other prisoner, who are being tried as well as himself, for the offence which is thus confessed. I think the two illustrations which are given to section bear out this view. If this be so, we must be careful not to apply statements made by R.I.D. before the Magis-

Chintamani Das v. State, 36 Cut.
 L.T. 823: 1970 Cr.L.J. 906: A.I.
 R. 1970 Orissa 100, 104.

^{18.} R. v. Keshub, (1876) 25 W.R. Cr. 8; R. v. Belat, (1873) 19 W.R. Cr. 67; R. v. Banwarre, (1874) 21 W. R. Cr. 53; R. v. Ganraj, (1879) 2 A. 444; R. v. Mulu, (1880) 2 A. 646; R. v. Daji, (1882) 6 B. 288; Noor v. R., (1880) 6 C. 279; Bishan v. R., (1904) 2 All L. J. 53; see also R. v. Mohesh, (1875) 19 W.R. Cr. 16; R. v. Amrita, (1873) 10 Bom. H.C.R. Cr. 497; R. v. Khukree, (1874) 21 W.R. Cr. 48; R. v. Baijoo, (1876) 25 W. R. Cr. 43; Emperor v. C. E. Ring, 1929 Bom. 296: I.L.R. 53 Bom. 479: P20 I.C. 340: 31 Bom.L.R. 545; State v. Manindra Nath, A. 1. R. 1960 Cal. 183 (but it can be used as an admission against himself).

R. v. Belat. (1873) 19 W.R. Cr.
 67, per Phear, J.; Krishna Narain
 v. State of U. P., 1976 All Cr. C.
 46: 1976 All L.J. 321; 1976 Cri. L.
 I. 503.

J. 503.
 R. v. Shivabhai, 1926 Bom. 513:
 I.L.R. 50 Bom. 683: 97 I.C. 660.

R. v. Belat, (1873) 19 W.R. Cr. 67: 10 B.L.R. 453, per Phear, J., followed in R. v. Gamraj, (1879) 2 A. 444; R. v. Mulu, (1880) 2 A. 646; R. v. Babajibin. (1890) 14 Ind. Jur. N.S. 175; see R. v. Mohesh, (1873) 19 W.R. Cr. 16; Kunja Sabudhi v. Emperor, 1929 Pat. 275; I.L.R. 8 Pat. 289: 116 I.C. 770; Sheroo v. Emperor, 1925 Nag. 78: 81 I.C. 891; Sheo Charan v. Emperor, 1926 Nag. 117: 90 I.C. 385: 21 N.L.R. 88; Nawab v. Emperor, 1935 Lah. 35: 159 I.C. 381; Kunhaman v. State of Kerala, 1974 Ker. L. T. 328.

trate, against other prisoners than himself further than those same statements amount in themselves to a confession of guilt on his part.22 "Neither can the statement of one prisoner be taken as evidence against another prisoner under Sec. 30 of the Evidence Act, unless the parties are admittedly in pari delicto, when, that is, the confessing prisoner implicates himself to the full as much as his co-prisoner whom he is criminating."23 The ratio decidendi of the above cases is, that statements which inculpate the maker more than, or equally with, others alone can afford any satisfactory guarantee of their truth.

In one case the Allahabad High Court held that a confession in which the maker thereof assigns to himself a minor or subordinate part in the transaction and the major part to his companion, cannot be used against the latter.24 But, in a subsequent case,25 it has been held that there is nothing in the terms of the section which suggests that a confession is not admissible in evidence against a person who is being tried jointly for the same offence with a man who has made the confession, if the confession minimises the guilt of the person who makes it and exaggerates the guilt of the other. The section says that the confession must affect them both. It does not say that it must affect them both equally. Similarly, in another case,1 it has been held, that all that is necessary for a confession to be admissible against a co-accused is that the maker should inculpate himself in all the offences in which he implicates the other co-accused, and it is not necessary that he should ascribe to himself as major a part in the commission of the crime as he ascribes to the other coaccused. The explanation to the section makes it clear that an attempt to commit the offence, and an abetment of the offence are included in the term 'offence'. So, even if the maker implicates himself only in an attempt to commit, or, in the abetment of, the offence, or a minor part in the commission of the offence, the admissibility of the confession against the other accused is not affected. The Calcutta High Court held, in one case,2 that a retracted confession of an accomplice attributing a major part in the crime to his companion is for all practical purposes of no value at all against a co-accused. But,

24. Shambhu v. Emperor, 1932 All. 228: 1.L.R. 54 All. 350: 135 I.C. 838: 1932 A.L.J. 162. 25. Mirza Zahid Beg v. Emperor, 1938

All, 91; 173 I.C. 838; 1937 A.L.J. 1253; State v. Mohanlal, A.I.R.

1958 Raj. 338; I.L.R. (1957) 7 Raj. 944: 1958 Cr. L. J. 1540. 1. Mohammad Sabir v. R., 1950 A. W. R. 238 at p. 243: 1950 A.L.J. 140; see also Ram Bharose v. Rex, 1949 All. 132: 50 Cr.L.J. 144.

2. Emperor v. Kausar Ali, 1944 Cal.

249: 216 I.C. 129.

^{22.} R. v. Mohesh, 19 W. R. Cr. 16, 23, per Phear. J., Mangal Singh v. Emperor, 1937 Lah. 127; I.L.R. 17 Lah. 547; 167 I.C. 861. But see for statement before Magistrate under 347 (S. 332. now) of the Criminal Procedure Code; Bali Reddi In re 1914 Mad. 45; I.L.R. 38 Mad. 302; 22 I.C. 157.

^{23.} R. v. Baijoo, (1876) 25 W. R. Cr.
43, per Glover J., that is only when
the confession makes both equally
guilty of the offence. The rule is
laid down more broadly in R. v. Belat, supra, and the cases which follow it. A fortiori, a statement which implicates the confessing prisoner more than his co-prisoners would appear to come within this section (see R. v. Belat, supra in which Phear, J., seems to have thought admissible a statement by a prisoner which made certain of his fellows accessories before the fact, and not actual actors in the

transaction which constituted the foundation of the charge; Sheo Gharan v. Emperor, 1926 Nag. 117: 90 I.C. 385; 21 N. L. R. 88; see however as to this R. v. Nur, (1883) 8 B. 223, 227 in which the confession tended to reduce the guilt of the maker to that of a subordinate agent of another as principal; cf also R. v. Govind, (1874) 11 Bom. H.C.R. 278.

in a subsequent case,3 the same Court held that a confession, if it is a confession, is admissible in evidence under this section, whether the confessing accused ascribes to himself a major or minor part in the crime. Whether it has any value or not is a different matter. Where several accused were charged under Sec. 302 of Penal Code and one of them made a confession of an offence punishable under Sec. 201, the Madras High Court held that the confession could not be taken into account against the other accused with regard to the charge under Sec. 302.4 In one case, it was held, that the confession was admissible in respect of the offence under Sec. 201.5

The Patna High Court also has held that the law does not go so far as to require that the confession should claim for its maker the leading part in the crime.6 In some cases it has been held, that, if there are more offences than one for which certain persons are being tried jointly, and the confessing accused implicates himself and some other accused in one of such offences and does not implicate himself in the other offence, such a confession can be taken into consideration against the other co-accused, so far as that offence is concerned for which the confessing accused implicated himself as well as the other co-accused

It has, however, been held by the Allahabad High Court that where more persons than one are being tried jointly for offences, one of which is major, and the other is minor offence, and those offences are inter-connected, if the person who makes the confession does not incriminate himself, so far as the major offence is concerned, it cannot be said that the confession affects him as well as others, and that the confession could not, therefore, be taken into consideration against the co-accused.8 Lastly, no guarantee whatever is afforded by a statement which entirely exonerates the maker, and such a statement is therefore in all cases inadmissible. The Supreme Court has laid down the law in Balbir Singh v. State of Punjabo thus: (i) A confessional statement of one accused can be taken into consideration against the other accused, if the conditions laid down in this section are fulfilled. (ii) One of the conditions is that the confession must implicate the maker substantially to the

Dhannapati De v. Emperor, 1946
 Cal. 156; I.L.R. (1944) 2 Cal. 312: 225 I.C. 153.

 ⁽In re) Gangavva. 1946 Mad. 124;
 I.L.R. 1946 Mad. 598; 224 I.C. 74;
 (1945) 2 M.L.J. 479; 1945 M. W.
 N. 722; 58 L.W. 625; see also (In re) Govindu Subbaramayya, 1937 Mad. 321; 169 I.C. 372; 38 Cr. L. J. 753; (1937) 1 M.L.J. 750; 1937 M.W.N. 178; Periyaswami Moopan v. Emperor, 1931 Mad. 177; I.L.R. 54 Mad. 75: 129 I.C. 645: 32 Cr. L.J. 448: 1930 M.W.N. 858.

^{5.} Syed Husain Sahib v. Emperor, 1927 M.W.N. 1283.

^{6.} Emperor v. Sadasibo Majhi, 1939 Pat. 35; I.L.R. 18 Pat. 82: 178 I. C. 130; 39 Cr.L.J. 997; 5 B.R. 58;
19 P.L.T. 801; 1938 P.W.N. 754.
7. Sec Mirza Zahid Beg v. Emperor,

¹⁹³⁸ All. 91: 173 I.C. 838; Mangal Singh v. Emperor, 1937 Lah. 127: I.L.R. 17 Lah. 547: 167 I.C. 861: 38 Cr.L.J. 472; 38 P.L.R. 1018; Mian Khan v. Crown, 1923 Lah. 293; 85 I.C. 836; 26 Cr.L.J. 612; (In re) Manicka Padayachi, 1921 Mad. 490; 72 I.C. 497; 14 L.W.

^{8.} Dr. Jainand v. Rex, 1949 All. 291: 50 Cr.L.J. 498: 1949 A.L.J. 60: 1949 A.W.R. (H.C.) 13; affirmed in Mohammad Sabir v. Rex, 1950 A. W.R. 238: 1950 A.L.J. 140.

^{9.} A.I.R. 1957 S.C. 216, 223 and 224; Sami Kisan v. State. 32 Cut. L.T. 1140. 1148; State of Kerala Mathachan, 1969 Ker. L. T. 566; Shiv Kumar v. State of Gujarat, 11 Guj. L. R. 281, 283.

same extent as the other accused person. (iii) If he throws all the blame on the other, assigning to himself the role of an unwilling spectator then the confession cannot at all be used as against the other accused. (iv) But because there are differences between his confession and the confessional statement of the other accused, the confessional statements cannot be condemned out of hand, or in limine as untrue where some of the differences are immaterial, some others are due to the desire of the accused to throw the blame on the other and the rest stand clearly resolved by the other evidence in the case.

In conclusion, it is submitted, with respect, that the words 'affecting himself and some other of such persons', cannot, according to established canons of interpretation, be construed other than that the confession must affect them both, and no more.

13. "Made". This section applies only to confessions made before, and proved at, the trial.10 The confession may have been made at any time before or at the trial.11 There is no distinction between a confession made before the trial and that made in the course of trial. All that the section requires is that the confession, whenever made must be proved before it is taken into consideration against the co-accused.12

In Rijhumal Kundanmal v. Emperor,18 it was held that the statement must be made "in the same trial when both accused are charged with the same offence." A confession made by a person against whom an enquiry is being made under Sec. 476 (new Sec. 340), Cr. P. C. can be taken into consideration against other persons jointly tried with him.14 As will be seen presently, the weight of authority is in favour of the view that a statement made by a co-accused when examined under Sec. 342 (new Sec. 313), Cr. P. C. cannot be taken into consideration under this section.16 Confession made at the time of preliminary enquiry in open dock by one accused in the presence of another, and subsequently proved under Sec. 287, Cr. P. C., 1898 by the Magistrate's record of it can be taken into consideration against the other accused jointly tried, since the other accused is in no way prejudiced, as he has as much opportunity of explaining or rebutting it, as if it had been made before the preliminary inquiry, and proved at that enquiry.16 If confession made before the Magistrates outside India are proved against the persons making

N.S. 516.

^{10.} R. v. Ashootosh, I.L.R. (1878) 4 Cal. 483, 488 (F.B.); Govinda Naidu v. Emperor, 1929 Mad. 285; 118 I.C. 512; 30 Cr. L.J. 932; 1929 M.W.N. 391; Kunwar Sen v. Emperor, 1933 Oudh 86; I.L.R. 8 Luck. 286; 141 I.C. 192; 34 Cr.L.J. 124; 9 O.W. N. 1136; Mahadeo v. Emperor, 1923 All. 322; I.L.R. 45 All. 323; 76 I.C. 1025; 25 Cr.L.J. 305; 21 A. L.J. 179; (Mst.) Sumitra v. Emperor, 1940 Nag. 287; 190 I.C. 275; 41 Cr.L.J. 886: 1940 N.L.J. 343; but see William Cooper v. Empevor, 1930 Bom. 354; I.L.R. 54 Bom. 531: 127 I.C. 105: 31 Cr.L.J. 1137: 32 Bom. L.R. 747. 11. R. v. Tanya. (1890) 14 Ind. Jur.

Mst. Jena v. Mohd. Akbar Ali, 1976 Cri. L. T. 494; 1976 C.L.R. 19; 1976 Cri. L. J. 1947 (J. & K.).
 1937 Sind 218: 170 I.C. 746; 38 Cr.

L.J. 965.

Emperor v. Annaji Venkatesh, 1924
 Bom. 445; 87 I.C. 593; 26 Cr.L.J.
 993; 26 Bom. L.R. 614.

 ⁽Mst.) Sumitra v. Emperor, 1940
 Nag. 287: 190 I.C. 273: 41 Cr.L.J.
 886: 1940 N.L.J. 343, and other cases cited post.

^{16. (}In re) Velu Naicken, 1939 Mad. 737; 184 I.C. 302; 40 Cr.L.J. 913: (1989) 2 M.I..J. 202: 1939 M.W.N.

them, they will be taken into consideration against others who are being jointly tried for the same offence.17 There is nothing in this section which restricts the confession to one recorded before a Magistrate.18

In India, it is not necessary that the confession, to be taken into consideration, should have been made in the presence of the co-accused against whom it is offered in evidence.19

14. "Proved." Though this section allows a confession to be used against another prisoner although made in his absence, yet it requires that such confession should be "proved" as against the prisoner to whose prejudice it is to be used. Therefore, where two accused persons were jointly tried before the Sessions Judge on a charge of murder, and the Judge examined each of the accused in the absence of the other, making the latter withdraw from the Court during the examination of the former, though without objection from the pleaders of the accused persons, it was held that the examination of each accused could be used only against himself and not against his fellow accused.20 Provided a confession is only proved afterwards, it is immaterial whether or not the co-prisoners were present at the time of making it. When a confession is used for the purposes of this section, the person to be affected by it has a right to demand that it be strictly proved and shown to have been; in all essential respects, taken and recorded as prescribed by law.21 When a confession of one prisoner is taken in the absence of the other prisoners, and the latter have had no opportunity of denying or even of knowing what their fellow prisoner has said, such a confession cannot be said to have been "proved"; it is only after proper proof is given that it may be taken into consideration.22 What is contemplated is formal proof by the prosecution of a confession previously made, and not a statement made in the dock by one accused against the other in a joint trial.28

There is obviously a difference between proof of a confession and proof of a fact. The definition of the word "proved", given in Sec. 3, relates to proof of a fact in issue, and not a statement recorded by the Court in the presence of the persons under trial. The Section speaks of the proof of a confession and not proof of a fact in issue. The word "confession" used here clearly

^{17.} Govinda v. Emperor. 1921 Nag. 39:

⁶⁹ I.C. 257; 17 N.L.R. 113. 18. Athappa Goundan v. Emperor, 1937 Mad. 618: I.I.R. 1987 Mad. 595; 171 I.C. 245; 38 Cr.L.J. 1027; (1937) 2 M.L.J. 60: 1987 M. W. N. 442; 46 L.W. 152 (F.B.).

^{19.} H. C. Proceedings, 31st July, 1885, Weir, 3rd Ed.: 745; R. v. Lakshman. (1882) 6 B. 124, 125; see R. v. Bepin. (1884) 10 C. 970, 974. Where it was held that in that particular case, the confessions of two of several accused persons. two of several accused persons, made in the absence of the others, were of no weight against the latter.

^{20.} R. v. Lakshman, (1882) 6 B. 124; following R v. Chandra Nath,

^{(1881) 7} C. 65: in these cases the confessions were objected to not merely because they were made during the absence of the co-prisoners, but because they were not afterwards "proved" in any way nor opportunity given to them to know what had been said against them.

^{21.} R. v. Chander. (1875) 24 W. R. Cr. 42 (Sec. 122, Cr. P. C.; 1872, (Sec. 164 Cr. P. C. 1973), i.e. in the manner provided by S.B. 345, 346 Cr. P. C. 1872 (Ss. 313, 281 Cr. P. C. 1973).

22. R. v. Lakshman, supra; R. v. Chandra Nath supra

dra Nath, supra.

^{28.} Mahadeo v. R., 1923 Al. 322; I.L. R. 45 All. 323; 76 I.G. 1025;25 Cr. I. J. 305; 21 A.L.J. 179.

means such a confession as is required to be proved at the trial as a part of the prosecution evidence. It cannot, therefore, signify any matter which comes on the record at the end of the prosecution evidence. A statement under Sec. 342 (new Sec. 313), Cr. P. C., comes after the prosecution has put forward the entire evidence, and the accused is asked to state only for the purpose of enabling him to explain any circumstances appearing in the evidence against him. The answers given by the accused can only be "taken into consideration" against him in the same inquiry or trial, although they can be 'put in evidence" for or against him in any other inquiry or trial for any other offence, but they cannot be taken into consideration under this section against the other accused.24

According to section 3 a fact is proved if after considering the matter before it the court believes it to exist. If the statement of accused is made before the Court in which he inculpates himself and the other accused, it is clearly a matter before the Court which it may believe to exist. Therefore such a statement is admissible against the co-accused under section 30. Of course the value to be attached will depend on the facts and circumstances of each case more particularly on the fact whether the co-accused had opportunity to rebut the same.25

The expression "proving a confession" is inapplicable to the procedure where the Judge asks questions and an accused gives explanations under a special section provided for the purpose. A confession recorded according to the provisions of the Criminal Procedure Code is not inadmissible because it may contravene the instructions of a Criminal Circular. Such a confession may be considered under this section.2

- 15. "Court". The word "Court" in this Section means not only the Judge, but, in a trial by a Judge with a jury, includes both the Judge and the jury.3
- 16. "May take into consideration". By this section, the Legislature has only bestowed a discretion upon the Court to take into consideration such

but see Nirmal Chandra De v. Emperor, 1927 Cal. 265: 100 I.C. 115: 28 Cr.L.J. 241: 31 C. W. N. 289; William Cooper v. Emperor. 1980 Bom. 354: I.L.R. 54 Bom. 531; 127 I.C. 105; 31 Cr. L.J. 1137; 32 Bom. L.R. 147; Dial Singh v. Emperor, 1936 Lah, 337; I.L.R. 16 Lah, 651; 161 I.C. 898: 37 Cr.L.J. 508: 37 P.L.R. 806; Public Prosecutor v. Begu Ram, 1973 Cr.L.J. 1761 (A.P.). 25. Mst, Jena v. Md. Akbar Ali Khan, 1976 Cr.L.T. 494: 1976 C.L.R. 19:

1976 Cr. L.J. 194 (J. & K.). Mahadeo Prasad v. R., 1923 All. 322: 76 I.C. 1025 [dissenting from

R v. Chinna, (1899) 23 M. 151].

2. Govinda v. R., 1921 Nag. 39: 69 I.
C. 257: 17 N.L.R. 113.

3. R. v. Ashootosh, (1878) 4 C. 483

(F.B.).

^{24.} Mst. Sumitra v. Emperor, 1940 Nag. 287. 291 : 190 I.C. 273 : 41 Cr.L.J. 886 : 1940 N.L.J. 343; Mahadeo v. R., 1923 All. 322, I.L.R. 45 All. 323: 76 I.C. 1025; 25 Cr. L.J. 305; 21 A. L.J. 179; R. v. Ashootosh, (1878) 4 Cal. 483 (F.B.) ;Priyaswami Moo-Cal. 483 (F.B.) ; Priyaswami Moopan v. Emperor, 1931 Mad. 177; I.L. R. 54 Mad. 75; 129 I.C. 645; 32 Cr. L.J. 448: 59 M.L.J. 471; 1930 M. W.N. 858; 32 L.W. 527; Kunwar Sen v. Emperor, 1923 Oudh 86; I. L.R. 8 Luck, 286; 141 I.C. 192: 34 Cr.L.J. 124; 9 O. W. N. 1136; Nawab v. Emperor, 1935 Lah, 35; 159 I. C. 381: 37 Cr. L. J. 75. ("Proved" 'means proved before prosecution case comes to an end): secution case comes to an end); Malla Mahmadoo v. State, 1952 J. & K. 49; Tahsinuddin Ahmad v. Emperor, 1940 Cal. 250: 188 I.C. 288: 41 Cr.L.J. 563; 44 C.W.N. 396;

confession.4 While, under Sec. 21, admissions (which include confessions) are relevant, and may be used against the persons making them. This section merely provides that the Court may take them into consideration against other persons; and this distinction is significant, and shows that, under this section, the Court can only treat a confession as lending assurance to other evidence against a co-accused.5 The law which prevailed before the passing of this Act required a conviction to be based on evidence excluding from that term the statements of the character mentioned in this section.6 And, in so far as a statement by a witness only is "evidence" according to the definition given of that term when used in this Act, a confession by an accused person, affecting himself and his co-accused, is not "evidence" in that special sense.7 "It does not indeed come within the definition of 'evidence' contained in Sec. 3 of the Act. It is not required to be given on oath, nor in the presence of the accused, and it cannot be tested by cross-examination. It is a much weaker type of evidence than the evidence of an approver which is not subject to any of those infirmities."8 The words "may take into consideration", do not mean that the confession is to have the force of sworn evidence.9 But such a confession is nevertheless evidence in the sense that it is a matter which the Court, before whom it is made, may take into consideration in order to determine whether the issue of guilty is proved or not.10 It can be put in the scale and weighed with other evidence.11 The wording, however, of this section (which is an exception) shows that such a confession is merely to be an element in the consideration12 of all the facts of the case; while allowing it to be so considered,

Bhuboni Sahu v. The King, 1949
 P.C. 257, 260: 76 I.A. 147.

9. R. v. Nirmal, (1900) 22 A. 445.
10. (In re) B. K. Rajagopal. 1944 Mad.
117, 120: I.L.R. 1944 Mad. 308: 211
I.C. 367: 56 L.W. 737 (F.B.); R.
v. Ashootosh (1878) 4 C. 483 (F.
B.); R. v. Babar, (1915) 42 C. 789;
28 I.C. 657: A.I.R. 1915 C. 731

v. Ashootosh (1878) 4 C. 483 (F. B.); R. v. Babar, (1915) 42 C. 789; 28 I.C. 657; A.I.R. 1915 C. 731 v ante S. 3, see next note.

11. Bhuboni Sahu v. The King, supra.

12. Proceedings 24th January, (1873) 7 Mad. H. G. R. App. 15. With respect to the words "taken into consideration," see R. v. Chundur, (1875) 24 W.R.Cr. 42; R. v. Naga, (1875) 23 W.R.Cr. 24; In -R. v. Bayaji, (1886) 14 Ind. Jur. N. S. 384 followed in R. v. Khandia, (1890) 15 B. 66, it was held that the words "taken into consideration" in S. 30 of the Evidence Act mean "taken

R. v. Sadhu. (1874) 21 W.R.Cr. 69, 71; per Phear J.; Gobarya v. Emperor, 1930 Nag. 242: 125 I.C. 673: 31 Cr.L.J. 881: 26 N.L.R. 229 (F.B.); (MacNair, A.J.C. dissenting).

^{5.} R. v. Lalit, (1911) 38 C. 559.

^{6.} v. ante "construction."

Proceedings 24th January, (1873) 7
Mad.H.C.R. App. 15 (a conviction founded on such confession
alone is a case of "no evidence and
bad in law"). R. v. Kaliyappa,
(1883) Weir, 3rd Ed., 494 (although
confessional statements may be considered, they cannot be accepted as
evidence of any fact necessary to constitute the offence): R. v. Bayaji,
(1886) 14 Ind, Jur. N.S. 384 (the
statement of a co-accused is not
technically "evidence" within the
definition given in Sec. 3 v. post);
R. v. Khandia, (1890) 15 B. 66 rereferred to in R. v. Nirmal, (1900)
22 A. 445, 447 (conviction held to be
bad, as though a confession could be
taken into consideration, it was not
evidence within the definition given
by S. 3 and could not, therefore
alone form the basis of a conviction); R. v. Naga, (1875) 23 W.R.
Cr. 24; R. v. Chundur, (1875) 24
W.R. Cr. 42; R. v. Narain, mention-

ed in R. v. Ashootosh, (1878) 4 Cal. 483, the Legislature avoids saying that confessions of this sort are "evidence" and may be used as "evidence"; it says merely the Court "may take into consideration" such confessions); R. v. Dip., (1915) 37 A. 247; 28 I.C. 663; A.I.R. 1915 A. 221; 76 I.A. 147; S.C. Das v. State of Meghalaya, 1971 Cr. L.J. 1232 (Assam).

it does not do away with the necessity of other evidence.13 For even when regarded as evidence and taken at its highest value, it is of too weak a character to found a conviction upon it alone, and hence corroboration should be required in all cases even if, instead of being the statement of a fellow-prisoner, it had been evidence given on oath and on examination as a witness it would not have been anything other than the evidence of an accomplice, which, in general, requires corroboration to gain its acceptance,14 and if the testimony of an accomplice given before the Court under the sanction of an oath and a process of careful examination, and capable of being tested by cross-examination, is yet by its nature such that, as against an accused, it must be received with caution; still more so must be the confession of a fellow-prisoner which is only the bare statement of an accomplice, limited to just so much as the confessing person chose to say, and guaranteed by nothing except the peril into which it brings the speaker and which it is generally fashioned to lessen. 15

Though, in strictness, a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice,16 yet Sec. 133 applies only to accomplices, as such, and not confessing co-prisoners whose statements do not stand upon the same but on a lower footing than the testimony of an accomplice.17 And although the instance of corroboration which is appended to illustration (b) of Sec. 114 is corroboration to be found in

> into consideration" for the purpose of arriving at a conclusion of fact, and though a co-accused's statement is not technically evidence within the definition given in S. 3, it may still be used quantum valeat for the basis of a reasonable inference, and if a jury thinks it sufficiently supported by a partial, or qualified admission of guilt on the part of the accused himself and by admitted physical facts pointing to his connection with the crime imputed to him, they are not precluded by law any more than by reason from a finding of guilty thus sustained."

finding of guilty thus sustained."

13. Giddigadu v. R., (1909) 33 M. 46:
Bhuboni Sahu v. The King, 1949 P.C.

Bhuboni Sahu v. The King, 1949 P.C. 257, 260: 76 I.A. 147.

Bhuboni Sahu v. The King, 1949 P.C. 257, 260: 76 I.A. 147; Kashmira Singh v. State of Madhya Przdesh, 1952 S.C. 159: 1952 S.C.J. 201: (1952) 1 M.L.J. 754: 1952 M.W.N. 402: 1952 Cr.L.J. 839: 1952 All. W.R. (Sup.) 64; Rameshwar v. State of Rajasthan, 1952 S.C. 54: 1952 S.C.J. 46: 1952 Cr.L.J. 347: (1952) 1 M.L.J. 440: 1952 M.W.N. 150: 65 L.W. 351; Thanuvan v. State, 1955 T.C. 87: 1955 Cr.L.J. 847; Krishnabiharilal v. State, 1956 M. B. 86; R. v. Mohesh, (1873) 19 W. R. Cr. 16, 25; R. v. Makappa, (1874) 11 Bom. H.C.R. 196, 198; R. v. Naga. (1875) 23 W. R. Cr. 24; R. v. Ashootosh (1878) 4 C. 483; R. v. Sabit, 43 B. 739: A.I.R. 1919 B. 164: 51 I.C. 657: 21 Bom.L.

R. 448; see Ss. 133, 114 post, What

corroboration is necessary depends on the facts of each case, ibid, Bhuboni Sahu v. The King, supra; Kashmira Singh v. State of M.P., supra; R. v. Sadhu, (1874) 21 W.R. Cr. 69, 71 per Phear, J. and see R. v. Naga, (1875) 23 W.R. Cr. see R. v. Naga, (1875) 23 W.R. Cr. 24: R. v. Bhawani. (1878) 1 A. 664; R. v. Ashootosh (1878) 4 C. 483; R. v. Bepin, (1884) 10 C. 970; R. v. Dosa, (1885) 10 B. 231: R. v. Krishnabhat, (1885) 10 B. 319; R. v. Ram Saran, (1886) 6 A.W.N. 259; R. v. Alagappan Bai, 2 Weir, (1886) 742; R. v. Babaji, (1888) 14 Ind. Jur. N.S. 175; R. v. Ganapahat, (1889) 14 Ind. Jur. N.S. 20 the corroborative evidence must be more corroborative evidence must be more cogent and should be more strictly examined by the Court than when an accomplice gives evidence as a witness; R. v. Babar, (1915) 42 C. 789; 28 I.C. 657; A.I.R. 1915 C. 731; Muthukumaraswami v. R. (1912) 35 M. 397 and see post, commentary on Sec. 133.

16. Sec. 133 post. R. v. Ashootosh, (1878) 4 C. 483 494, 496: per Jackson and Ainslie
II.: R. v. Babaji. (1888) 14 Ind
Jur. N.S. 175 (confession made by
accused persons at a joint trial can
not be treated as the evidence of accomplices against one another) Queen-Empress v. Lakshmayya, (1899) 22 M. 491, 493; Giddigad v. Emperor, (1909) 33 M. 46.

accounts of an occurrence given by accomplices, there is no indication that the Legislature intended in this passage by the term "accounts given by the accomplices" anything other than accounts given in due course of examination as witnesses. Therefore mere confessions of prisoners do not come within the scope of this legislative declaration,18 and there is no express provision in the Act to limit, in any case, the operation of the rule that confessions of prisoners, standing alone, are legally insufficient for conviction.

17. How the confession can be used? (a) General. The question then is, in what way can the confession of a co-accused be used in support of other evidence? Can it be used to fill in missing gaps? Can it be used to corroborate an accomplice or a witness who, though not an accomplice, is placed in the same category regarding credibility, because the Judge refused to believe him except in so far as he is corroborated? The matter was put succinctly by Sir Lawrence Jenkins in Emperor v. Lalit Mohan¹⁹ where he said that such a confession can only be used to "lend assurance to other evidence against a co-accused" or to put it in another way as Reilly, J., did in In re Periyaswami Moopan,20 thus: "The provision goes no further than this-Where there is evidence against the co-accused sufficient, if believed to support his conviction, then the kind of confession described in Sec. 30 may be thrown into the scale as an additional reason for believing the evidence." "Translating these observations into concrete terms they come to this: The proper way to approach a case of this kind is, first, to marshall the evidence against the accused excluding the confession altogether from consideration and see whether, if it is believed, a conviction could safely be based on it. If it is capable of belief, independently of the confession, then of course it is not necessary to call the confession in aid. But cases may arise where the Judge is not prepared to act on the other evidence as it stands, even though, if believed, it would be sufficient to sustain a conviction. In such an event the Judge may call in aid the confession and use it to lend assurance to the other evidence and thus fortify himself in believing what without the aid of the confession he would not be prepared to accept."21 Confessions of co-accused are not evidence but if there is other evidence on which a conviction can be based, they can be referred to as lending some assurance to the verdict.22 It cannot be

22. Nathu v. State of U. P., 1956 Cr. L.J. 152; A. I. R. 1956 S.C. 56; Haroon Haji Abdulla v. State of Maharashtra, (1968) 2 S.C.R. 641; 1968 S.C.D. 391; (1968) 2 S.C.J. 534; (1968) 1 S.C.W.R. 243; 70 Bom. L.R. 540; 1968 Cr. L.J. 1017; 1968 M.L.J. (Cr.) 591; 1968 M.L.J. (Cr.) 591; 1968 M.L.W. (Cr.) 116; A.I.R. 1968 S.C. 832, 837; Rabu Rao Bajirao Paril v. 832, 837; Babu Rao Bajirao Patil v. State of Maharashtra, (1971) 3 S.C.C. 432: 1971 S.C.G. (Cr.) 680: 1971 S.C.D. 347: (1971) 2 S.C. Cr. R. 437: 1971 Cr. App. R. (S.C.) 255: 1971 U.J. (S.C.) 387: 1971 Cr. L. J. 38; In re Balau v. Balusami Mudali, 1973 Cr. L.J. 1311; Ummed Mal v. State of Rajasthan, 1974 W.L.N. 495: 1974 Raj. L. W. 459: 1975 Cr. L.J. 928: Sudhir Chandra 1975 Cr.L.J. 923; Sudhir Chandra v. State, 1971 Cr.L.J. 86; A.I.R. 1971 Tripura 8; S. C. Das v. Meghalaya, 1971 Cr.L.J. 1232.

^{18.} R. v Sadhu, (1874) 21 W.R.Cr. 69; R. v. Ashootosh, (1878) 4 C. 483. 494. 496. 19. 38 Cal. 559 at p. 588. 20. 54 Mad, 75: 129 I.C. 645: A.I.R.

¹⁹³¹ M. 177.

^{21.} Kashmira Singh v. State of Madhya Pradesh, 1952 S.C. 159; Rattanlal v. Pradesh, 1952 S.C. 159; Rattanlal v. State, 1955 Punj. 110: 1956 Cr.L.J. 737: L. S. Raju v. State of Mysore 1953 Bom, 297; Ram Prakash v. State of Punjab, A.I.R. 1959 S. C. 1: 1959 Cr. L.J. 90: 1959 All. W.R. (H.C.) 152: 1959 M.L.J. (Cr.) 51: Nika Ram v. State of H.P., 1972 Cr. L. J. 204; I.L.R. 1974 (2) Delhi 766; Jogindra Nath v. State of Assam, 1977 Cr.L.J. 1309; Md. Yunus v. State of Bihar. 1977 Md. Yunus v. State of Bihar, 1977 Cr. L. J. 1243 (Pat.).

used to fill up the gaps in the prosecution evidence.23 But the Orissa High Court has decided in Padma v. State24 that the confession of a co-accused may be used as an adjunct or to fortify the other evidence and that a conviction could be based on such evidence. But such a confession cannot itself be substantive evidence.25 In a case of conspiracy where only circumstancial evidence is forthcoming, if broad features are proved by trustworthy circumstancial evidence connecting all the links of a complete chain then on isolated events the confessional statements of the co-accused lending assurance to the conclusions of court can be considered as relevant material.1

- (b) To corroborate other evidence. As regards its use to corroborate other evidence it was observed in Bhuboni Sahu's case2: "Their Lordships think that the view which has prevailed in most of the High Courts in India, namely, that the confession of a co-accused can be used only in support of other evidence and cannot be made the foundation of a conviction, is correct." Quoting this passage, Sir Trevor Harries, C. J., of the Calcutta High Court observed in a case: "It seems clear that the view of their Lordships was that a confession of a co-accused can be used to support other evidence. In other words, it can be used to corroborate other evidence. It might assist the Court in coming to the conclusion that the other evidence is true and therefore that an accused is guilty. It is one thing to say that a confession of a co-accused can be used to corroborate the other evidence, but it is entirely a different thing to say that that other evidence can be used to corroborate the confession of the accused. The learned Assistant Sessions Judge directed the jury that the other evidence could be used to corroborate the confession, but the correct direction appears to me to be that the confession may be used to corroborate the other evidence. In short the conviction must be based on the other evidence. The confession can only be used to help to satisfy a Court that the other evidence is true. What the learned Judge has suggested is that if the other evidence suggests to the Court that the confession of the co-accused is true, then a conviction can be based on the confession. That appears to me to be an incorrect statement of the law."3 In the light of this, the dictum of the Bombay High Court in Mahamad Tadvi v. State,4 that the confession of an accused "may be used as evidence against a co-accused provided it is corroborated in material particulars" is, it is submitted, wrong. The confessions of the co-accused cannot be used as evidence at all but they can be used only for the limited purpose of "lending assurance" if there is other evidence which, if believed, would support the conviction of an accused.5
 - (c) To corroborate approvers and accomplices. "Then, as regards its use in corroboration of accomplices and approvers. A co-accused who confesses is naturally an accomplice and the danger of using the testimony of one ac-

1. Baburao Baji Rao Patil v. State of Maharashtra, 1971 Cri.L.J. 38; 1971 S.C.C. 432.

Bhubani Sahu v. The King, A.I.R. 1949 P.C. 257. See also Pyli Yaccob

v. The State, supra.

4. 1956 Bom. 186.

Pyli Yacoob v. State, 1953 T. C. 466: I.L.R. 1952 T.C. 937; 1954 Cr. L.J. 1670. 24. I.L.R. 1958 Cut. 58.

^{25.} Ramchandra v. State, A.I.R. 1957 S.C. 381: 1957 Cr. L.J. 359: In re Thimma Reddi, A.I.R. 1957 A.P. 758; Bhaluka v. State, A.I.R. 1957 Orissa 172.

Gunadhar Das v. State, 1952 Cal. 618: 1953 Cr.L.J. 1343. See also Pyli Yacoob v. State, A.I.R. 1953 T.C. 466; I.L.R. 1952 T.C. 937; 1954 Cr.L.J. 1670.

^{5.} Bhima Shaw v. State, 1956 Orissa

complice to corroborate another has repeatedly been pointed out. The danger is in no way lessened when the "evidence" is not on oath and cannot be tested by cross-examination. Prudence will dictate the same rule of caution in the case of a witness who though not an accomplice, is regarded by the Judge as having no greater probative value. But all these are only rules of prudence. So far as the law is concerned, a conviction can be based on the uncorroborated testimony of an accomplice, provided the Judge has the rule of caution, which experience dictates, in mind and gives reasons why he thinks it would be safe in a given case to disregard it. The tendency to include the innocent with the guilty is peculiarly prevalent in India, as Judges have noted on innumerable occasions, and it is very difficult for the Court to guard against the danger The only real safeguard against the risk of condemning the innocent with the guilty lies in insisting on independent evidence which in some measure implicates such accused.'6

The confessions of prisoners are not sufficient corroboration of the testimony of an accomplice, either as the corpus delicti, or the identity of the person affected.7 For the corroboration which is needed of an accomplice's testimony is evidence which is independent of accomplices. But a confession of a prisoner, if given on oath, would only be the evidence of an accomplice, and as a mere confession it is even of less value, and hence it can never afford corroboration of the evidence of an accomplice, the tainted evidence of which is not made more trustworthy by a tainted confession (v. ante).

(d) Nature and extent of corroboration required. As regards the nature and extent of corroboration required in the case of accomplice evidence when it is not considered safe to dispense with such corroboration, their Lordships of the Supreme Court summarised the law as follows:

"Here, again, the rules are lucidly expounded by Lord Reading in Rex v. Baskerville.8 It would be impossible, indeed it would be dangerous, to formulate the kind of evidence which should, or would, be regarded as corroboration. Its nature and extent must necessarily vary with the circumstances of each case and also according to the particular circumstances of the offence charged. But to this extent the rules are clear.

"First, it is not necessary that there should be independent confirmation of every material circumstance in the sense that the independent

669.

R. v. Mohesh, (1873) 19 W.R. Cr.

^{6.} Kashmira Singh v. State of Madhya Pradesh, 1952 S.C.R. 526: 1952 S. C.J. 201: 1952 S.C.R. 526: 1952 S. C.J. 201: 1952 A.W.R. Supp. 64: (1952) 1 M.L.J. 754: 1952 M.W.N. 402: 1952 Cr. L.J. 839: A.I.R. 1952 S.C. 159, 161; Subodh Kumar Dhar Roy v. State, 1966 Cr.L.J. 323 (2) (Cal.), 327; State v. Roop Singh, I.L.R. (1966) 16 Raj. 152: 1966 Raj.L.W. 382, at pp. 390, 391; State of Kerala v. Mathachan, 1969 Ker. L.T. 566; Gopinathan v. State Ker. L.T. 566; Gopinathan v. State of Kerala, 1963 Cr.L.J. 92.
R. v. Jaffir. (1873) 19 W.R. Cr. 57;

 ^{21 25;} R. v. Malappa, (1874) 11
 Bom. H.C.R. 196; R. v. Krishna-Bom. H.C.R. 196; R. v. Krishna-bhat, (1885) 10 B. 319; R. v. Sadhu, (1874) 21 W.R. Cr. 69; R. v. Naga, (1875) 23 W.R. Cr. 24; R. v. Ram Saran, (1886) 8 A. 506; R. v. Baijoo, (1876) 25 W.R. Cr. 43; R. v. Budhu, (1876) 1 B. 475; R. v. Bepin (1884) 10 C. 970; R. v. Alagappan, (1886) Weir, (3rd Ed.) 742; R. v. Chand, (1888) 14 Ind. Jur. N.S. 125. (1916) 2 K.B. 658, at pp. 664 to

evidence in the case, apart from the testimony of the complainant or the accomplice, should in itself be sufficient to sustain conviction. As Lord Reading says:

'Indeed, if it were required that the accomplice should be confirmed in every detail of the crime, his evidence would not be essential to the case. It would be merely confirmatory of other and independent testimony.'

All that is required is that there must be

'some additional evidence rendering it probable that the story of the accomplice (or complainant) is true, and that it is reasonably safe to act upon it.'

"Secondly, the independent evidence must not only make it safe to believe that the crime was committed, but must in some way reasonably connect or tend to connect the accused with it by confirming in some material particular the testimony of the accomplice or complainant that the accused committed the crime. This does not mean that the corroboration as to identity must extend to all the circumstances necessary to identify the accused with the offence. Again, all that is necessary is that there should be independent evidence which will make it reasonably safe to believe the witness's story that the accused was the one, or among those, who committed the offence. The reason for this part of the rule is that,—

'a man who has been guilty of a crime himself will always be able to relate the facts of the case, and if the confirmation be only on the truth of that history, without identifying the persons, that is really no corroboration at all......It would not at all tend to show that the party accused participated in it.'

"Thirdly, the corroboration must come from independent sources, and thus ordinarily the testimony of one accomplice would not be sufficient to corroborate that of another. But of course the circumstances may be such as to make it safe to dispense with the necessity of corroboration, and in those special circumstances a conviction so based would not be illegal. I say this because it was contended that the mother in this case was not an independent source.

"Fourthly, the corroboration need not be direct evidence that the accused committed the crime. It is sufficient if it is merely circumstantial evidence of his connection with the crime. Were it otherwise,

'many crimes which are usually committed between accomplices in secret, such as incest, offences with females' (or unnatural offences) 'could never be brought to justice."

Rameshwar v. State of Rajasthan, 1952 S.C. 54, at pp. 57, 58: 1952 S.C.J. 46: 1952 M.W.N. 150: 1952 Cr.L.J. 547: (1952) 1 M.L.J. 440; see also L.S. Raju v. State of Mysore, 1953 Bom. 297 at 300, in which the four principles laid down by

Lord Reading in Rex v. Basker-ville, (1916) 2 K.B. 658 at pp. 664 to 669 have been set out; Badri Ram v. State of Bihar, A.I.R. 1967 Pat. 283: 1967 Cr. L. J. 1179; Sher Singh v. State, (1969) 71 P.L.R. (D) 198.

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A Full Bench of the Madras High Court has held that this section entitles the Court to take the confession into consideration in deciding whether it is safe to rely on the approver's evidence so far as it concerns the co-accused.10

accused against co-accused. 17-A. Use of statement of an The statement of an accused recorded under section 342 (new Sec. 313) Cr. P. C., can be regarded as evidence defined in section 3 ante and a conviction cannot be based merely on such a statement.11 But relying on the definition of 'proved' in section 3 ante, it can be used against the accused in aid of the prosecution case. Where such statement is exculpatory, it cannot be used against another accused in support of his conviction.12 Where there is no other item of evidence to connect the first accused with the crime, the statement of the second accused under section 342 (new Sec. 313), Cr. P. C. cannot be pressed into service in assessing the guilt of the first accused, for the confession of a co-accused can be invoked only to give additional strength or added assurance to other items of evidence led into the case already.13 The evidence given by D (co-accused of A) in an earlier dacoity case cannot be used as evidence against A in a later case as A had no opportunity to crossexamine D in the dacoity case nor can the statement of D as co-accused under section 342 (new Sec. 313) Cr. P. C., in the later case be used against A.14 Statement under Section 342 (new Sec. 313), Cr. P. C., by an accused, incriminating co-accused, cannot be used against co-accused.15

18. Retracted confession. The section makes no distinction between a retracted confession and an unretracted confession. Both are equally admissible and may be taken into consideration against the co-accused.16 A retracted confession is a weak link against the maker and more so against a coaccused.17 But the evidentiary value of a retracted confession as against the co-accused is considerably less, and in many cases it was held that the very

In re B.K. Raja Gopal, 1944
 Mad. 117; I.L.R. 1944 Mad. 308;
 211 I.C. 367; 45 Cr.L.J. 373; (1943)
 2 M.L.J. 634; 1943 M.W.N. 793;
 56 L.W. 737 (F.B.).
 Vijendrajit v. State of Bombay,
 1953 S.C.J. 328;
 1953 M.W.N. 552; 1953 Cr.L.J.
 1097; A.I.R. 1953 S.C. 247.
 Rajanikant Keshav v. State, 1967

12. Rajanikant Keshav v. State, 1967 Cr.L.J. 357; A.I.R. 1967 Goa 21, (F.B.), 25; Jogendranath v. Emperor, A.I.R. 1934 Cal. 724; see also Mannalal v. State, 1966 Raj.L.W. 460, 465.

 C.B. Kavier v. Food Inspector, 1967
 Ker. J. J. 887: 1967 M.L.J. (Cr.) 901: 1968 Cr.L.J. 347: A.I.R. 1968 Ker. 66, 69; following Haricharan v. State of Bihar, A.I.R. 1964 S. C. 1184.

14. Narayanaswami v. State of Maharashtra. (1968) 2 S.C.R. 88; 1968 S.C.D. 675; (1968) 2 S.C.J. 179; (1967) 2 S.C.W.R. 816; 1968 A.W. R. (H.C.) 353; 1968 Mah.L.J. 172;

1968 M.P.L.J. 90: 1968 Cr.L.J. 157: A.I.R. 1968 S.C. 609, 612. 15. Public Prosecutor v. B. Rama Murti,

1973 Cri. L.J. 1761 (A.P.).
16. Gour Chandra Dass v. Emperor,
1929 Cal. 14: 115 I.C. 359: 30 Cr.
Cr. L.J. 1017: A.I.R. 1968 S.C.

832 837.

L.J. 475; 32 C.W.N. 1004; Gangappa v. Emperor, 1914 Bom. 305; 38 Bom. 156; 21 I.C. 673; 14 Cr. L.J. 625; 15 Bom.L.R. 975; Partab Singh v. Emperor, 1925 Lah. 605 (2); I.L.R. 6 Lah. 415; 93 I.C. 978; 27 Cr.L.J. 514; Surjan Singh v. Emperor, 1932 Lah. 298; 136 I.C. 27; 33 Cr.L.J. 251; Nga (S.C.) 537; 1968 M.L.J. (Cr.) 591; 1968 M.L.W. (Cr.) 116; 1968 Pvattng v. Emperor, 1934 Rang. 30; 148 I.C. 1064; 35 Cr.L.J. 863. Haroon Haji Abdulla v. State of

17. Haroon Haji Abdulla v. State of Maharashtra, (1968) 2 S.C.R. 641: 1968 S.C.D. 391; (1968) 2 S.C.J. 534; (1968) 1 S.C.W.R. 243: 70 Bom.L.R. 540: 1970 M. P. L. J.

fullest corroboration was necessary before it could be acted upon.18 But, in view of the decisions of their Lordships of the Privy Council and the Supreme Court cited above, this is no longer good law. It is not legitimate to apply the rules of prudence requiring corroboration which relate to the sworn testimony of an accomplice or approver to the retracted confession of a confessing prisoner, and by means of the application of these rules impliedly make that retracted confession substantive evidence against the persons accused along with the confessing prisoner. 19 A retracted confession can be taken into consideration but only in support of other evidence and cannot be made the foundation of a conviction.20 The only use to which it can be put is that where there is independent evidence, against the co-accused sufficient, if believed, to support his conviction, the confession may be thrown into the scale as an additional reason for believing that evidence.21 In other words, the confession can be used to corroborate the other evidence and not vice versa. The conviction must be based on the other evidence corroborated by the confession. It cannot be based on the confession corroborated by the other evidence.22

Even if an inculpatory confession is retracted, corroboration is necessary.23

19. "As against such other person as well as against the person who makes such confession." The section must be read subject to the provisions contained in those which precede it. Therefore, a confession by one of several persons, which is inadmissible under Secs. 24-26, and when there is no "discovery" under Sec. 27, will be inadmissible under this section as against both the maker of it and the person implicated thereby. If it is not inadmissible, under Secs. 24-26 against the maker, it is admissible under this section provided that it satisfies its terms as well against the maker as against the other whom it affects. If, however, it is excluded by Secs. 24-26, but there is discovery under Sec. 27, then so much of the whole, as leads immediately to the discovery, is admissible thereunder, against the maker of the confession. As to its admissibility against co-accused, see notes under Sec. 27, ante, under the heading "Admissibility against co-accused: Secs. 27-30."

1976 O.J.D. 545. 19. Baboo Singh v. Emperor, 1936 O.W.

N. 64; 159 I.C. 875; A.I.R. 1936

Oudh 156.

20. Mohd. Hussain Umar v. K. S. Dalipsinghji. (1970) 1 S.C.R. 130: 1970 S.C. Cr. R. 76: 1970 S.C.D. 58: 72 Bom.L.R. 774: 1970 Cr. L.

J. 9: 1970 M.L.J. (Cr.) 68: A.I.R. 1970 S.C. 45, 46. 21. Ratanlal v. State, 1955 Punj. 110: 1956 Cr.L.J. 737; Jogendra Nath v. The State of Assam, 1977 Cr. L. J. 1309.

22. Gunadhar Dass v. State, 1952 Cal.

23. Pangambar Kalanjeet Singh v. State of Manipur, 1956 Cr.L.J. 126: A.I.R. 1956 S.C. 9; Thanganbul v. Government of Manipur, 1968 Cr. L.J. 514: A.I.R. 1968 Manipur 34, 40.

^{18.} See Yasin v. R., 28 Cal. 689; Emperor v. Kehri. 29 All. 434; 5 Cr. L.J. 360; (1907) 4 A.L.J. 310; Sheoratan v. Emperor, 1934 Oudh 418:151 I.C. 298: 35 Cr. L.J. 1290: 11 O. W. N. 1012; Kasimuddin v. Emperor, 1934 Cal. 853; 39 C.W.N. 27; Sheo Narain Singh v. Emperor, 1929
Pat. 212; I.L.R. 8 Pat. 262: 117
I.C. 43: 30 Cr.L.J. 716; (In re)
Peria Chelliah Nadar, 1942 Mad.
450: 202 I.C. 290: 43 Cr.L.J. 810;
(1942) 1 M.L.J. 503: 1942 M.W.N.
291; Bhimappa v. Emperor, 1945
Bom. 484: 222 I.C. 143: 47 Cr.
L.J. 252; 47 Bom.L.R. 648; Ghulam Mohammad v. Emperor, 1949 lam Mohammad v. Emperor, 1942 Lah. 271: 203 I.C. 488: 44 Cr.L. J. 77; In re Balan v. Balusami Mudali, 1973 Cri. L.J. 1311; State of Assam v. U. N. Rajkhowa, 1975 Cri. L.J. 354; State v. Beda Digal,

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A person, who is arrested by the police and subsequently turns approver, he is not a co-accused. Hence a statement made by such a person before a Magistrate after his arrest by the police is not admissible in evidence against the other accused,24

To sum up, the confession of an accused person, 20. Conclusion. that is permitted to be taken into consideration under this Section against his co-accused, must be of the offence for which the accused are being tried jointly. It means the joint trial must be of the very offence for which they are being tried jointly and cannot be of a minor offence or of any offence connected with that offence or of any other offence disclosed by the evidence. The test is, whether the person making such confession which is sought to be used against a co-accused could legally have been convicted on the basis of the confession of the crime with which he and his co-accused were charged.25 It is not the law, however, that unless the confessing person implicates himself as fully as he implicates his co-accused, the statement will not be admissible. All that is required is that the confessor shall substantially implicate its maker in regard to the crime with which he and his co-accused are charged. The law does not go so far as to require that the confession should claim for its maker the leading part in the crime. What is intended to be hit at is, a confession which does not implicate the author thereof but is merely an explanation exculpating himself from his alleged share of the offence which is not a confession at all. Therefore, a statement which is not self-exculpatory but which does minimise the part of the maker taken in the offence and which ascribes to himself a part much less important and much less effective than that ascribes to others named by him, is none the less a confession and as such is admissible in evidence under this Section.1

What happens to a confessional statement of a co-accused who dies before the completion of the trial? In Ram Sarup Singh v. Emperor,2 J was put on his trial along with L. The trial took place for some time and six months before the delivery of the judgment, when the trial had proceeded for more than a year, I died. Before his death his confession had been put on the record. It was held that the confession made by J was admissible in evidence and could be used against L. In Sat Deo v. Emperor,3 the confession of a co-accused was held inadmissible under this Section when he died before the completion of the trial.

^{24.} Thangbul v. Government of Manipur, 1968 Cr.L.J. 514; A. I. R. 1968 Manipur 34, 37.

^{25.} Balbir Singh v. Punjab State, A. I. R. 1957 S. C. 216; 1957 Cr. L. J. 48; Periyasami Mooppan v. Emperor, A.I.R. 1931 Mad. 177; 32 Cr. L. J. 448; 129 I. C. 645; Dhanapati De v. Emperor, A.I.R. 1946 Cal. 156; 47 Cr. L. J. 695; 225 I. C. 153; Emperor v. Bhagwandas, A.I.R. 1941 Bom. 50; 192 I. C. 671; I. L. R. Bom. 50; 192 I.C. 671; I. L. R. 1941 B. 27.

^{1.} Emperor v. Sadasibo, A.I.R. 1939 Pat. 35: 39 Cr.L.J. 997: I.L.R. 18 Pat. 82: 178 I.C. 130; Abdul Jalil Khan v. Emperor, A.I.R. 1930 All. 746; 32 Cr.L.J. 152; 128 I.C. 593; Dhanapati De v. Emperor, A. I.R. 1946 Cal. 156; 47 Cr.L.J. 695; 125 I.C. 153. 2. A.I.R. 1937 Cal. 39; 38 Cr.L.J. 339; 167 I.C. 162. 3. A.I.R. 1936 Oudh 164; 37 Ci.L.J.

^{182: 159} I.C. 919

The confession to be taken into consideration under this Section must be proved formally before the case for the prosecution comes to an end and as a part of the prosecution case, and so a confession made by the accused from the dock is not a confession proved within the meaning of the Section. There is a conflict of opinion between the Madras High Court and other High Courts on the one side and the Bombay and Lahore High Courts on the other side.4

In regard to a retracted confession, it may be taken into consideration against a accused by virtue of the provision under this Section. Its value is extremely weak and there can be no conviction without the fullest and strongest corroboration in material particulars. The amount of credibility to be attached to a retracted confession will depend upon the circumstances of each particular case.

The question whether a confession under Sec. 27, where it is admissible, can be taken into consideration under Sec. 29 has become practically an academic one after the circumscribing of the admissible evidence thereunder by reason of Pulukuri Kottaya's case.6 The confessional statement admissible under this section has become restricted practically to cases where the gist of the offence itself is possession. Confessional statement under Sec. 27 have been held to come within the terms of the Section. Cases are conceivable even after Kottaya's case where the participation of a co-accused is also a fact discovered, and it would be admission under this Section.7 The evidentiary value of a confession of a co-accused has been indicated by the Privy Council in Bhubonisahu v. The King.8 Such a confession can be used only to support the other evidence and cannot be the foundation of a conviction. It can be put into the scale and weighed with the other evidence. This Privy Council ruling has been approved by the Supreme Court in Kashmira Singh v. The State of M. P.9

31. Admissions not conclusive proof, but may estop. Admissions are not conclusive proof of the matters admitted, but they may operate as estoppels under the provisions hereinafter contained.

5. 17 ("Admission" defined). s. 115 (Estoppel).

s. 4 ("Conclusive proof.")

Gr.L.J. 508.

5. Ram Prakash v. State of Punjab, A.I.R. 1959 S.C. 1: 1959 S.C.J. 181: 1959 Gr.L.J. 90: 1959 M.L.J. (Gr.) 51: 1959 A.W.R. (H.C.) 152;

6. L.R. 74 I.A. 65: 230 I.C. 135: A.I. R. 1947 P.C. 67.

7. See Athappa Goundan v. Emperor,

7. See Athappa Goundan V. Emperor, A.I.R. 1937 Mad. 618 (F.B.): 38 Cr.L.J. 1027: 171 I.C. 245. 8. A.I.R. 1949 P.C. 257: 50 Cr. L. J. 872 (P.C.): 76 I.A. 147. 9. A.I.R. 1952 S.C. 159; Sudhir Chandra V. State, 1971 Cri. L. J. 86; A.I.R. 1971 Tri. 8.

^{4.} See Marudamuthu v. Emperor, A.I. R. 1931 Mad, 820; I.L.R. 54 M. 788: 134 I.C. 63: 32 Cr.L.J. 1099; Emperor v. Ashutosh, (1878) 4 Cal. 483; Sumitra v. Emperor, A. I. R. 1940 Nag. 287: 41 Cr.L.J. 886: 190 I.C. 273; Mahadeo Prasad v. Emperor, A.I.R. 1923 All. 322: 25 Cr.L.J. 305: 76 I.C. 1025; Contra: William Cooper v. Emperor, A. I. R. 1930 Bom. 354: 31 Cr.L.J. 1137: 197 I.C. 105: Dial Single v. Emperor. 127 I.C. 105; Dial Singh v. Emperor, A.I.R. 1936 Lah. 337: 37

Balbir Singh v. State, A.I.R. 1957 S.C. 216; A.N.T.O. Thaba v. State of Manipur, 1967 Cr.L.J. 1023; A. I.R. 1967 Manipur 11, 20; Sanu Kisan v. State, 32 Cut.L.T. 1140, 1148; In re Belan v. Balusami Mudali, 1973 Cri. L. J. 1311 (Mad.).

Taylor, Ev., ss. 817-819, 854-861: Norton, Ev., 151; Phipson, Ev., 11th Edn., 304; Roscoe, N.P. Ev., 62; Powell, Ev., 9th Edn., 422; Best Ev., ss. 529-

SYNOPSIS

1. Principle,

rests on person making the admis-

2. Evidential value of admissions.

5. Admissions in pleadings.

Effect of admissions.
 Burden of proving the contrary

in butter of proving the constant

1. Principle. The law favours the investigation of truth by all expedient methods. The doctrine of estoppel, by which further investigation is precluded, being an exception to the general rule, and being adopted only for the sake of general convenience, and for the prevention of fraud, should not be extended beyond the reasons on which it is founded. Therefore, admissions, whether written or oral, which do not operate by way of estoppel, constitute only prima facie and rebuttable evidence against their makers and those claiming under them, as between them and others. To

2. Evidential value of admissions. In cases, where it is proved that a party had certain admissions, it is necessary for him to prove that the admissions were erroneous and did not bind him. Indeed, an admission is the best evidence that an opposite party can rely upon, and, though not conclusive is decisive of the matter, unless successfully withdrawn or proved erroneous. If an admission is proved to be wrong, it is not binding on the maker. It has been held that a petitioner, who in a writ petition in the Supreme Court, clearly admits that as regards 20 acres of pasture lands, they are no doubt pasture lands but the same were used by him for the purpose of grazing his cattle, cannot turn round in a subsequent writ petition in the High Court and say that the admission was not correct. An admission,

10. Powell, Ev., 422: "Thus a receipt endorsed on a bill, and generally, all parol receipts are only prima facie evidence of payment ib. 289; in general, a person's conduct and language have not the effect of operating against him by way of estoppel." per Chamber, J., in Smith v. Taylor, 1 N.R. 210.

11. Narayan Bhagwant Rao v. Gopal,

v. Omkar Singh, I.L.R. 1968 Cut. 87; 34 Cut,L.T. 328; A. I. R. 1968 Orissa 99, 102; see also Mst. Gulkandi v. Prahlad, I.L.R. (1966) 16 Raj. 1047; 1967 Raj. L.W. 63; A.I.R. 1968 Raj. 51, 58; Wasiq Ali v. Director of Consolidation, 1973 All.L.J. 473; 1973 All.W.R. (H.C.) 634; I.L.R. (1973) 1 All. 721; A. I.R. 1974 All. 46; Ajit Prasad v. Nandini Satpathi, I.L.R. (1974) Cut. 64; A.I.R. 1975 Orissa 184; (1975) 1 Cut.W.R. 3; Kedar Nath v. State. 39 Cut.L.T. 774; A.I.R. 1974 Orissa 74; I.L.R. (1973) Cut. 96.

Molar v. Smt. Santo, 70 P.L.R.
 510, 513 (admission regarding ancestral nature of land made without previous knowledge and proved to be wrong).
 Gulabbhai Vallabhbhai Desai v. A.A.

 Gulabhai Vallabhbhai Desai v. A.A. Khan, Collector of Daman, A.I.R.
 1970 Con 50, 71

1970 Goa 59, 71.

^{11.} Narayan Bhagwant Rao v. Gopal, (1960) 1 S.C.R. 773: (1960) 2 S.C. A. 153: 1960 S.C.J. 263: A. I. R. 1960 S.C. 100; Purna Chandra Das v. Chandramani Dibya. A.I.R. 1968 Orissa 98 (partition suit—admission that properties purchased in the name of a certain person were joint family property); Duwan Moliko v. Bhagabat Biso, J.L.R. 1967 Cut. 106: 33 Cut.L.T. 688: 1967 Cr. L. J. 1036: A.I.R. 1967 Orissa 110, 111; Narasingmal Premchand v. C. I.T., Bihar and Orissa, (1969) 35 Cut. L.T. 1039; Ghasiram Majhi

without doubt, shifts the onus on to the person admitting the fact, on the principle that what a party himself admits to be true may reasonably be presumed to be so and until the presumption is rebutted, the fact admitted must be taken to be established.14 However, the question of ohus loses its efficacy, when it is never objected to and evidence is led by the parties, in which case, the Court has to adjudicate on the materials before it.15

Admissions are not conclusive, and unless they constitute estoppel, the maker is at liberty to prove that they were mistaken or were untrue.16 Admissions are mere pieces of evidence, and if the truth of the matter is known to both parties, the principle stated in Chandra Kunwar v. Narpat Singh,17 applies.

In order to properly appreciate the effect of admissions, it is necessary to consider the circumstances under which they were made.18 Thus, the value of an admission contained in a registered deed, formally executed by a party, with an endorsement showing that the executant was fully aware of the contents of the deed and executed it with due deliberation and full understanding, is considerable unless it is explained satisfactorily, and shifts the burden of proving the contrary on to the party which made that admission.19 So, where a donor makes the statement in a deed of gift that he or she was in possession and put the donee in possession, that is an admission of the donor of the fact of delivery of possession to the donee. The effect of this is only, that the person who contends to the contrary, namely, that no possession was delivered, should establish the contention. The admission is not "rebuttable or conclusive" on the question of delivery of possession.20

Whatever be the stage at which a document containing an admission is secured, the admission can be employed against the maker.21

3. Effect of admissions. This section deals with the effect, in respect of conclusiveness, of admissions, when proved. "An admission is not conclusive as the truth of the matters stated therein. It is only a piece of evidence, the weight to be attached to which must depend upon the circumstances under which it is made. It can then be shown to be erroneous or untrue, so long as the person to whom it was made has not acted upon it to his detriment, when it might be conclusive by way of estoppel."22 Every admission is

A. 258: 1964 A.L.J. 749.

21. Neminath Appayya v. Jamborao (1965) 1 Mys.L.J. 442: A.I.R.

1966 Mys. 154, 159. 22. Nagubai Ammal v. Shama Rac 1956 S.C.R. 451: 1956 S.C.A. 959 1956 S.C.C. 321: 1956 S.C.J. 655 I.L.R. 1956 Mys. 152: 1956 Andh

L.T. 1029; A.I.R. 1956 S.C. 598 599; Srinivas Ramchandra v. Vishni Nagesh, (1971) 2 Mys. L. J. 619.

Chandra Kunwar v. Narpat Singh,
 L.R. 34 I.A. 27: I.L.R. 29 A.
 184; cited in Kishori Lal v. Chalti Bai, 1959 S.C.J. 560; A.I.R. 1959 S.C. 504.

^{15.} Kishori Lal v. Chalti Bai, supra; Fullamoni Devi v. Natranand Sahu. 32 Cut.L.T. 876; A. I. R. 1967 Orissa 103, 104 (admission of adop-

^{16.} Trinidad Asphalt Co. v. Coryat, 1896 A.C. 587 relied on in Kishori Lal v. Chalti Bai, supra; Kedar Nath v. State, 39 Cut.L.Tr. 774: A.I.R. 1974 Orissa 74.

^{17.} L.R. 34 I.A. 27; I.L.R. 29 A. 184 (P.C.).

Kishori Lal v. Chalti Bai, supra.
 Bhola v. Man Matun, A.I.R. 1965

Johara Bibi v. Subera Bibi I.L.R. (1964) 2 Mad. 540; A.I.R. 1964 Mad. 373; 77 L.W. 212.

evidence against the person by whom it is made; but it is always for the Court to consider what weight, if any, is to be given to an admission, or any other evidence; it is not conclusive, merely because it is legally admissible.24 It is only so in certain cases, for instance, where it has been acted upon by the party to whom it was made.24 "A statement made by a party is not, ipso facto, conclusive against him, though it may be used against him and may be evidence more or less weighty, possibly even conclusive, according to the circumstances of each case, and the result come to by judicial investigation."25 Admissions are not conclusive proof of the matters admitted, though they may operate as estoppels, if the provisions regarding estoppels are fulfilled. They may become foundations of rights coupled with other facts. Short of those facts, they do not ripen into estoppels, and unless they reach that position, admissions are nothing more than items of evidence which are not in any sense final. They show, at the most, a party's inconsistency. Their value or weight is to be judged according to circumstances. "They have", as Wigmore says, "no quality of conclusiveness." Though admissions may be proved against the party making them, it is always open to the maker to show that the statements were mistaken or untrue, except in the case in which they operate as estoppels.2 The subject was clearly illustrated in the case of Heane v. Rogers,3 in which Bayley, J., observed:

"There is no doubt but that the express admissions of a party to the suit, or admissions implied from his conduct, are evidence, and strong evidence against him; but we think that he is at liberty to prove that such admissions were mistaken or were untrue, and is not estopped or concluded by them, unless another person has been induced by them to alter his condition; in such a case, the party is estopped from disputing their truth with respect to that person (and those claiming under him), under that transaction; but as to third persons he is not bound. It is a well-established rule of law, that estoppels bind only parties and privies, and not strangers."4

23. Bulley v. Bulley, (1875) L.R. 9 Ch. 739, 747; Ayetun v. Ram, (1869) 12 W.R. 156; Dolatsinghji v. Khachar, Mansur Rukhad, 1936 P.C. 150: 63 I.A. 248: I.L.R. 60 Bom, 634; 162 I.C. 17.

25. Ayetun v. Ram, supra, though written statements may be accepted

from accused as is the practice in Courts, under the Calcutta High Court they cannot take the place of evidence nor of examination con-templated by S. 342 of the Criminal Procedure Code. Amrita v. R., 1916 Cal. 188; I.L.R. 42 Cal. 957: 29 I.C. 513: 19 C.W.N. 676. dis-senting from R. v. Ansuiya, 1903 A.W.N. 1. 1. Baghel Singh v. Mihan Singh, 1953 Puni. 171; Gulam Nabi v. Union

Punj. 171; Gulam Nabi v.

of India, 1973 All L.J. 972.

2. S. Bhattacharjee v. Sentinel Assurance Co., Ltd., 1955 Cal. 594;
Narayanan v. Krishnan, 1955 T.C.
199. See S. 115, post and notes. thereto as to admissions which have been held to operate or not as estoppels.

3. (1829) 9 B. & C. 577, 586, 587. 4. See Janan v. Doolar, (1872) 18 W. R. 347; Ayetun v. Ram, (1869) 12 W.R. 156; Ram v. Pran, (1870) 13 Moo, I. A. 551; 15 W.R. (P.C.)

^{24.} Janan v. Doolar, (1872) 18 W.R.
347; Brojendra v. Chairman, Dacca
Municipality, (1873) 20 W.R. 223;
Yashvant v. Radhabai, (1889) 14
B. 312. An admission made by a party in other cases may be taken as evidence against him but cannot operate against him as an estoppel in case in which his opponents are persons to whom the admission was not made and who are not proved to have heard of it, or to have been in any way misled by it; or to have octed in reliance upon it, Chunder v. Pearee, (1866) 5 W.R. 209; see Oodey v. Ladoo, (1870) 13 Moo. I.A. 585, 600: 15 W.R. P.C. 16.

The doctrine, that a party is always at liberty to prove that his admissions were founded on mistake, unless his opponent has been induced by them to alter his condition, is as applicable to mistakes in respect of legal liability, as to those in respect of matters of facts.5 Where the defendant seeks to make use of statements which have been put in evidence, and to treat them as admissions by the plaintiff who put them in, it is competent for the plaintiff to show the real nature of the transaction to which they relate and to get rid of the effect of the apparent admissions.6

A gratuitous admission may be withdrawn unless there is some obligation not to withdraw it.7 Even if an admission was made with a fraudulent purpose, the party making it may show what was the real state of facts.8 So, where a trader, intending to defraud his creditors, delivered his goods to a friend, and made out an invoice to him and a receipt for a fictitious price, it was held open to him, when these documents were put in evidence, in an action brought by him to recover the goods from the pretended purchaser to show that they were untrue.9 And a party claiming under another, who has made admissions as to a transaction to which that other was a party, is at liberty to allege and prove that the admissions were made with a fraudulent purpose, and were not true, and to show the real nature of the transaction.10

> 14; Soojan v. Achmut (1874) 14 B.L.R. App. 3: 21 W.R. 414; Srinath Roy v. Bindoo, (1873) 20 W.R. 112; Brojendra v. Chairman, Dacca Municipality, (1873) 20 W.R. 223; Debia v. Bimola, (1874) 21 W.R. 422; Oodey v. Ladoo, (1870) 13 Moo. 1. A. 585, 599, 600: 15 W.R. (P.C.) 16; Luteefoonissa v. Goor Surun, (1872) 18 W.R. 485, 493, 494 (where the defendant seeks to make use of statements which have been put in evidence and to treat them as admissions by the plaintiff who put them in, it is competent for the plaintiff to show the real nature of the transaction to which they relate, and to get rid of the effect of the apparent admissions). See also Ushrufoonessa v. Gridharee, (1873) 19 W.R. 118, in which the Privy Council held that the fact of a party having admitted the execution of a deed in a former suit did not prevent her from contesting the validity of the transaction evidenced thereby and showing that it was colourable and not real and see generally as to the ordinarily inconclusive character of admission, Sreenath v. Monmohini, (1866) 6 W.R. 35; Gordon v. Bejoy, (1867) 8 W.R. 291; Grish v. Issur, (1869) 12 W.R. 226; Mohomed v. Mazhur, (1871) 15 W.R. 280; Komurrodeen v. Monye. (1871) 16 W. R. 220; Bodh v. Ganeshchander, (1873) 19

W. R. 356. 5. Newton v. Liddiard, (1848) 12 Q.B. 927; such a mistaken impression, however, will not exclude his admission, though it will impair its weight as evidence against him: Newton v. Belcher, (1848) 12 Q.B. 921 Taylor, Ev., s. 819; Roscoe, N. P. Ev. 62; 1 Phillips & Arn. 354; see Gopi v. Chundraolee, (1872) 19 W.R. 13: as to admission involving also Salah Bin Ahmed v. Abdullah Bin Ewaz, 1956 Hyd. 43; Mangru Rai v. Shivanand Lal, 1923 All. 575; 77 I.C. 875: Sita Ram v. Pir Baksh, 1931 Lah, 6: 130 I.C. 406.

Foolbibi v. Goor, (1872) 18 W.R.

7. Muhammad Imam Ali v. Hussain Khan, 26 Cal. 81 at 100: 25 I.A. 161: 2 C.W.N. 737; Budhu Ram v. Uttam Chand, 1928 Lah. 726: 109

8. Ram v. Pran, (1870) 13 Moo, I. A. 551; 15 W.R. (P.C.) 14; Sreenath Roy v. Bindoo, (1873) 20 W.R. 112; Brojendra v. Chairman. Dacca Municipality, (1873) 20 W. R. 223, 224; Debia v. Bimola, (1874) 21 W.R. 422; S. Bhattacharjee v. Sentinel Assurance Co., Ltd., 1955 Cal. 594.

9. Bowes v. Foster, (1858) 27 L.J. Ex.,

10. Srinath Roy v. Bindoo, (1873) 20 W.R. 112.

Admissions are not conclusive and may not, under certain circumstances, be taken even at their face value. The maker can prove that they are mistaken or untrue. They are mere pieces of evidence and their probative value may not be much, if the circumstances under which they are made, are by no means favourable. Thus, in Kishorilal v. Mt. Chalti Bai¹¹, the Supreme Court declined to act on the admission made by a widow who had been deserted by her own relations, about an adoption which had plainly been foisted on her by her husband's relations.

But, though a mere admission is not legally conclusive, the circumstances under, or the occasion upon, which it was made, or its formal and deliberate character, may entitle it to the greatest weight and may require very strong and clear evidence to rebut the inferences which may be drawn from it.12 Although it may be shown that the facts were different from what on a former occasion they were stated to be, and though it may be shown (if it were so) that a former statement is false, strong evidence may, under the particular circumstances, be required to prove that what the parties had deliberately asserted was altogether untrue.¹³ It is well established that what a party himself admits to be true may reasonably be presumed to be so.14 In Chandra Kunwar v. Narpat Singh,15 the Judicial Committee had to deal with the admission made by plaintiffs in some deeds to which the defendant was not a party. Their Lordships observed that the party making the admissions may give evidence to rebut this presumption as there was no estoppel, but, unless and until that is done, the fact admitted must be taken to be established.

It is well settled that the express admissions of a party to the suit or admissions implied from his conduct, are evidence-indeed strong evidenceagainst him unless he can prove that such admissions were mistaken or were untrue, and he is not estopped or concluded by them, unless another person has been induced by them to alter his condition. ie Moreover, an admission, if of a sufficiently grave character, may have the effect of shifting the onus of proof.17 There is consensus of opinion on the point that the onus to show that an admission is untrue is on the person who wishes to get rid of it. The fact, that the admission was gratuitous, does not affect this rule, and all that can

13. Soojan v. Achmut, (1874) 14 B.L.R. App. 3; 21 W.R. 414.

 Slatterie v. Pooley, (1840) 6 M. & W. 664: 10 L.J. Ex. 8.
 L.R. 34 I.A. 27: 29 All, 184 (P.C.).
 Pratap Kishore v. Gyanendranath, 1951 Orissa 313, 321; Depuru Veeral raghava Reddi v. Depuru Kamal-amma, 1951 Mad. 403: (1950) 2 M. L.J. 575: 1950 M.W.N. 710; Mst. Ulfat v. Zubaida Khatun, 1955 All. 361.

 Abid Ali Khan v. Secretary of State,
 1951 Nag. 327: I.L.R. 1950 Nag.
 633; Salah Bin Ahmed v. Abdullah Bin Ewaz Hamidan, I.L.R. Hyd. 69: 1956 Hyd. 45: Forbes v. Mir, (1870) 5 B.L.R. 529, 540; 14 W.R. (P.C.) 28; 13 Moo, I. A. 438.

^{11.} A.I.R. 1959 S.C. 504: 1959 S. C.

Soojan v. Achmut, (1874) 14 B. L.
 R. App. 3; 21 W. R. 414; Hunsa v. Sheo, (1875) 24 W.R. 431, 432;
 Mohamed v. Mazhur. (1871) 15 W.R. 280; the value of an admission depends upon the circumstances under which it was made; Roscoe, N. P. Ev., 62: R. v. Simmonsto, (1843) 1 C. & K. 164, 166; where it is a mere inference drawn from facts, the admission goes no further than the facts proved, Bulley v. Bulley, L. R. (1875) 9 Ch. 739: and generally as to the weight to be attached to admissions v, ante,

be said is that, if proved to be erroneous, it can be withdrawn by the person who makes it, and will not operate as estoppel.¹⁸ Where a defendant does not give any evidence in rebuttal, a previous statement which he had made in earlier proceedings can be put in evidence as an admission made by him and would be admissible against him.¹⁹ The legal position under the provisions of Sec. 145 of this Act, no doubt is that evidence in a previous suit does not prove anything, and it ought to be put to the witness, but it is not so in the case of admissions, where the party making the admission is required to explain and rebut the same and unless and until that is satisfactorily done, the fact admitted must be taken to be established. The proposition equally applies to an admission in a signed pleading, and under the provisions of this Act, an admission or affidavit made by a party in a prior litigation would be regarded as an admission in a subsequent action though it is capable of rebuttal.²⁰

No exception can be taken to the proposition that "what a party himself admits to be true may reasonably be presumed to be so"; but, before it can be invoked, it must be shown that there is a clear and unambiguous statement by the opponent, such as will be conclusive unless explained. The mere fact, that the tenor of certain statements made by a person is sufficient to suggest that certain proceedings were fraudulent and collusive in character, would not be sufficient, without more, to sustain a finding that the proceedings were collusive.²¹

Again, "as the weight of an admission depends on the circumstances under which it was made, these circumstances may always be proved to impeach or enhance its credibility. Thus, an admission (unless amounting to an estoppel) may be shown by the party against whom it is tendered to be untrue, or to have been made under a mistake of law or fact, or to have been uttered in ignorance, levity, or an abnormal condition of mind. On the other hand, the weight of the admission increases with the knowledge and deliberation of the speaker, or the solemnity of the occasion on which it was made."22

In other words, an admission can only be used against a party, if it amounts to an estoppel. In other cases, it is always open to a party to explain the admission made by him. Thus, he can show that either the admission was made under mistake or under different circumstances, and unless there has been a prejudice to the opposite party, on account of the admission having been acted upon, or on account of any representation made by the admitting party, it does not

Phipson. Ev., 11th Ed., 306; Best Ev., ss. 529, 530; Taylor, Ev., ss. 854-861; N.P. Ev. 62.

Per Teja Singh, C. J., in Lal Singh v. Guru Granth Sahib, 1951 Pepsu 101 at 105.

 ⁽Mst.) Bibi Kaniz Ayesha v. Mojibul Hassan Khan, 1942 Pat. 280, 231:
 I.L.R. 20 Pat. 855: 200 I.C. 546.

^{20.} Lal Singh v. Guru Granth Sahib, 1951 Pepsu 101 at 103, Mst. Ulfat v. Zubaida Khatoon, 195 All. 361: but see Firm Malik Des Raj Faqir Chand v. Firm Piarelal Aya Ram,

¹⁹⁴⁶ Lah, 65; 223 I.C. 579 (F.B.).
21. Nagubai Ammal v. Shama Rao, 1956 S.C.R. 451; 1956 S.C.A. 959; 1956 S.C.C. 321; 1956 S.C.J. 655; I.L.R. 1956 Mys. 152; 1956 Andh. L.T. 1029; A.I.R. 1956 S.C. 593, 600.

bind the party unless it amounts to and operates as an estoppel.²³ Where each party makes admissions detrimental to himself, the mutual admissions cancel each other with the result that the question for consideration may have to be decided on the material on record irrespective of such alleged admissions.²⁴

An admission cannot confer a title on a person but can only shift the burden on to the party making the admission to prove a want of title in persons in whose favour the admission is made.²⁵

Oral admissions as to the contents of a document, namely, stage carriage permit, are not relevant unless the party proposing to prove them show that he is entitled to give secondary evidence of the contents thereof under Section 92, post.¹

The court cannot ignore the provisions of this section and assume that whatever was written in the form of admissions by the respondent-wife was conclusive proof of the happenings mentioned therein between wife and husband.²

As to admissions made "without prejudice" and admissions obtained under compulsion, v. ante, Sec. 23.

4. Burden of proving the contrary rests on person making the admission. An admission of a fact in a deed amounts to an admission both of the fact and of the validity of the act, and shifts the burden of proving the contrary to the party which made that admission. It is true, that the value of an admission depends upon the circumstances in which it is made. But, as held in Narayan Bhagwant Rao v. Gopal,3 an admission is the best evidence that an opposite party can rely upon, and though not conclusive, is decisive of the matter, unless successfully withdrawn or proved erroneous. But the value of an admission depends upon the circumstances in which it is made. Where the admission is made in a registered deed, formally executed by the party with an endorsement showing that the executant was fully aware of the contents of the deed executed with due deliberation and fully understanding it, the value of the admission is considerable, unless it is explained satisfactorily.4

The basic rule of law is that the burden rests upon him who makes an admission to show that the admission was erroneous not merely by an assertion on oath but by such evidence as he could have led reasonably and properly.

C. J. 560: A.I.R. 1959 S.C. 504; See also 1973 P.L.J. 214. 24. Kedar Nath v. Prahlad Rai, (1960) 1 S.C.R. 861: A.I.R. 1960 S. C. 213: 1960 B.L.J.R. 260,

 Abid Ali Khan v. Secretary of State, 1951 Nag. 327, 336; I.L.R., 1950 Nag. 633.

 Shantilal Shiv Kumar v. T.A. Tribunal, Rajasthan, I.L.R. (1965) 16 Raj. 682: 1967 Raj.L.W. 468: A.I. R. 1967 Raj. 138, 141.

Dr. Narayan Ganesh v. Mrs. Sucheta,
 I.L.R. 1969 Bom 1024: 71 Bom, L.
 R. 569: 1969 Mah.L.J. 798: A.I.R.
 1970 Bom, 312, 319 a case under nections 13 (1) (iii) and 10 of the
 Hindu Marriage Act, 1955.

 (1960) 1 S.C.R. 773: (1960) 2 S.C. A. 153: 1960 S.C.J. 263: A.I.R. 1960 S.C. 100.

 Soorathasinga v. Kanakasinga, I. L. R. 43 M. 867: A.I.R. 1920 M.

 Union of India v. Maqsood Ahmed, I.L.R. 1963 B. 158: A.I.R. 1965 B. J¹0: 64 Bom.L.R. 683.

^{23.} See Dhiyan Singh v Jugal Kishore, I.L.R. (1953) 1 A, 225: A.I.R. 1952 S.C. 145: 1952 All.L.J. 324: 1952 M.W.N. 528: 90 Cal. L. J. 206; Nagubai v. Shama Rao, (1956) S. C.R. 451: A.I.R. 1956 S.C. 593: Kishori Lal v. Chalti Bai, 1959 S. C.J. 560: A.I.R. 1959 S.C. 504; See also 1973 P.I.J. 214

If an admission relied upon by the plaintiff is in a document alleged to be fraudulent and it could not be explained by the maker of the document in consequence of the great delay in filing the suit during which the maker of the admission died, the question of shifting the burden becomes immaterial in an appellate court where the whole evidence has been led before the trial court.6

It would be incorrect to say that value should not be attached to admission made against a person to his own interests because it was made with a view to avoid prosecution.7 For the effect of admission made collusively, parties being jointly interested, see the undernoted case.8

5. Admissions in pleadings. Under Order XII, Rule 6,9 any party may, at any stage of the suit, move the Court for judgment upon admissions of a fact made in the pleadings or otherwise. Admissions in pleadings are either actual or constructive. Any actual admission consists of facts expressly admitted either in pleadings or in answer to interrogatories.10 Constructive admissions are those which are inferred or implied from pleadings in consequence of the form of pleading adopted.11 They usually arise where a defendant has not specifically dealt with some allegation of fact made in the plaint of which he does not admit the truth12 or denies an allegation of fact evasively.18 Under Order VIII, Rule 5, C. P. C. "Every allegation of fact in the plaint, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the defendant, shall be taken to be admitted except as against a person under disability."

The Calcutta and Lahore High Courts have held that this Rule is limited in its application to cases where there is in fact a pleading of the defendant before the Court, and that where the desendant does not file a written statement, the Court cannot, except in suits on negotiable instruments governed by the provisions of Order XXXVII, Rule 2, dispense with evidence either on the principle of admission by non-traverse under Order VIII, Rule 5, or on the ground that a verified plaint is itself legal evidence.14 But the Bombay High Court has dissented from this view. According to it, every allegation of fact in the plaint must be taken as admitted unless denied or stated to be not admitted in the pleading of the defendant. Hence if there is no pleading of the defendant, there can be no denial or non-admission on his part, and he is bound by all the allegations in the plaint.15

C. 189.

^{6.} Govinda v. Chimabai. 13 Law Rep-681; A.T.R. 1968 Mys. 309 following Kishori Lal v. Chalti Bai, 1959 (Sup.) 1 S.C.R 693: 1959 S.C.J. 560: A.I.R. 1959 S.C. 504,

^{7.} Veerbasavaradhya v. Devotees Lungadagudi Mutt, A. I. R. 1973 Mysore 280.

^{8.} Ujali Padhani v. Rushi Patra, (1972) 38 Cut.L.T. 110.

Code of Civil Procedure, Act V of

^{10.} Order XI, Rule 22.

Order VIII, Rules 3, 4 and 5.

^{12.} Order VIII, Rule 3. 13. Order VIII, Rule 4.

^{14.} J. B. Ross & Co. v. C.R. Scriven.

¹⁹¹⁷ Cal. 269 (2); I.L.R. 43 Cal. 1001: 34 I.C. 235; Narindar Singh v. C.M. King, 1928 Lah, 769. Shriram v. Shriram, 1936 Bom. 285, 286 : I.L.R. 60 Bom. 788 : 164 I.

The admission in the plaint of a suit, permitted to be withdrawn with liberty to sue afresh, is binding in the subsequent suit unless rebutted.¹⁶

Admissions on which a judgment may be given may be made otherwise than in pleadings, as on a notice under Order XII, Rule 1 of the Code. Again under Order X, Rule 1, C. P. C., the Court has, at the first hearing of the suit, to ascertain from each party, or his pleader, whether he admits or denies such allegations of fact as are made in the plaint or written statement, if any, of the opposite-party, and record such admissions and denials under Rule 2 of the same Order, the Court may examine any party. The present section applies to admission made on a previous occasion and produced as admission in a case and not to admission of fact made in a suit which ought to be treated as conclusive for the purposes of the suit.¹⁷ Where it is shown that an admission was made by mistake, the party may be allowed to amend his pleadings under Order VI, Rule 17. The effect of admissions by pleadings is that facts admitted need not be proved unless the Court in its discretion requires them to be proved, otherwise than by such admissions.¹⁸

The rule with reference to a signed pleading is stated by Taylor in para. 727 in his book on Evidence. In para. 821, there is no doubt a passage to this effect:

"With respect to admissions by pleadings the law at present seems to be that statements which are contained in any pleading, though binding on the party making them for all the purposes of the cause, ought not to be regarded in any subsequent action as admissions."

This statement must be understood in the light of the context and the subject-matter with which Taylor was dealing in his book. Taylor was there dealing with admissions which are conclusive and it was with reference to them that the said proposition was enunciated. Therefore, admissions in that passage mean conclusive admissions. The reference to the cases on which the proposition is based makes this clear.

So far as the Indian law is concerned, there can be no doubt that under the provisions of this Act an admission contained in a plaint or written statement, or in an affidavit or in a sworn deposition given by a party in a prior litigation would be regarded as an admission in a subsequent action, though it is capable of rebuttal.¹⁹ Admissions in applications for amendment of pleadings are relevant under section 11 and would constitute good evidence against the party making them, even though they may not operate as estoppels.²⁰ The admission would not be conclusive in the subsequent suit.

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Mohammed Seraj v, Adibar Rahman,
 C.W.N. 867: A.I.R. 1968 Cal.
 550, 553.

Abdul Aziz v. Mst. Mariyam Bibi.
 1926 All. 710: 97 I.C. 176: 25 A.
 L.J. 48.

S. 58, post.
 Sarvabhotla Thotappalle Chendikamba v Kanala Indrakant Viswanatha-

mayya, 1939 Mad, 446, 449: (1939) 1
M.L.J. 227: 49 L.W. 273: Deb
Prosanna v. Hari Kison, 1937 Cal.
515: 173 I. C. 427: 41 C.W.N. 1089;
see also Lal Singh v. Guru Granth
Saheb. 1951 Pepsu 101; (Mst.) Ulfat
v. Zubaida Khatoon, 1955 All, 361.
20. Jwala Singh v. Prem Singh, A.I.R.

A party is not bound by an admission in his pleading except for the purposes of the suit in which the pleading is delivered. It frequently happens that a party is prepared in a particular suit to deal with the case on a particular ground, and to make an admission, but that admission is not binding in any other suit, and certainly not for all time.²¹ The same rule applies to admissions made in summary proceedings.²² It is permissible to a tribunal to accept part and reject the rest of any witness's testimony but an admission in pleading cannot be so dissected and if it is made subject to a condition, it must either be accepted subject to the condition or not accepted at all.²⁸

Ramabai Shriniwas v. Government of Bombay, 1941 Bom. 144, 145: 194 1.
 C. 431: 43 Bom. L.R. 232: see also Mst. Diali v. Lachhman Singh, 1946
 Lah. 256: 225 I. C. 324.

Lah. 256: 225 I. C. 329. 22. Ramrup Rai v. Firm Mahadeo Lal, 1940 Pat. 653: I.L.R. 19 Pat. 494:

¹⁹¹ I.C. 542: but see Gordhan Dus v. Husaina, 1927 All. 659; 103 I.C. 34.

Motabhoy Mulla Essabhoy v. Mulji Husaina, I.L.R. 59 Bom. 399; 29 I.C. 223.

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